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Corey Brettschneider: Democratic Rights

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◆ Introduction ◆

In 2003 the Supreme Court of the United States overturned its decision in *Bowers v. Hardwick* and struck down a Texas law that prohibited homosexual sodomy.¹ Writing for the Court in *Lawrence v. Texas*, Justice Kennedy argued that the Court's guarantee of a right to privacy, which it had earlier extended to areas such as contraception, marriage, and abortion, also included a protection of sexual relationships for gay and straight couples.² The privacy doctrine invoked in *Lawrence* was based, he argued, in the Fourteenth Amendment's guarantee of "substantive due process."

One prominent critique of this privacy doctrine and of the decision in *Lawrence* is that an appeal by the Supreme Court to a set of substantive rights is antidemocratic: it was never endorsed by a legislature or a constitutional convention. The word "substantive" does not appear in the Fourteenth Amendment or anywhere else in the Constitution. At its base, "substantive" is defined as "not procedural," or "procedure-independent." Substantive matters pertain to issues of justice, such as protecting individual rights against abuses of power. In contrast to procedural rights, such as the right to vote, substantive rights are often thought to be at the heart of a just society but not integrally connected to citizens' ability to partake in the democratic process. In addition to the right to privacy, they include rights to property and against excessive punishment. Because of this clear distinction between substantive and procedural rights, many think that the phrase "substantive due process" is not only bad doctrine, but an oxymoron: the terms "substantive" and "process" are at loggerheads.

Although the *Lawrence* decision was hailed by many as a gain for the rights of gay citizens, as this critique makes clear, it poses a dilemma for democratic theory. The Texas law had been passed according to the procedures established by the Texas legislature. The representatives of that legislature had been elected by a majority of Texans, and thus their decision not to repeal the Texas law was arguably majoritarian.³ Although critics of the law might find it repugnant, it would seem to have been democratically authorized. Therefore, while critics of the Court's decision might agree that the legislation at issue in *Lawrence* was "uncommonly silly," some argue that the Court acted without democratic

¹478 U.S. 186 (1986).

²539 U.S. 558 (2003).

³Although *Lawrence* struck down a Texas law, the precedent it sets is binding for legislation in every state as well as on federal congressional decisions that would affect the entire polity of the United States. Justice Scalia's dissent expresses his concern with the countermajoritarian nature of

authority in striking down the law.⁴ Defenders of the Court's decision in *Lawrence*, as well as of the general concept of "substantive due process," face what Alexander Bickel calls the "counter-majoritarian difficulty."⁵ Such defenders must explain why, in a society guided by democratic principles, a majority of the Supreme Court can override a majority of voters in an entire polity.⁶

Although the question of whether the Court should ever act contrary to democratic will is a live issue in political and legal theory, the case of *Lawrence v. Texas* raises another distinct issue: What is required for a society to be an ideal democracy in the first place? Are substantive rights an essential aspect of ideal democracies? Those who point to the countermajoritarian difficulty often assume that democracy is to be defined exclusively by adherence to majoritarian procedures. They adhere to what I call a "pure procedural" definition of democracy.⁷ This means that a decision is democratically legitimate only if it is produced by citizens participating in a set of sanctioned processes. As such, there is nothing intrinsically democratic about outcomes of such decisions aside from the fact that they were produced by democratic procedures. On a pure procedural view, then, even when democratic processes produce results that are unjust or violate individual rights, such as the antisodomy law in Texas, they are democratic. According to pure proceduralists, concerns about the justice or injustice of policy outcomes, apart from procedural issues, are not matters of democratic concern. In other words, these thinkers suggest that procedure-independent evaluations of outcomes, what I call "substantive evaluations," are not rightly characterized as democratic.

In this project, however, I offer an alternative to the traditional divide between procedural theories of democracy and substantive theories of justice. I

the decision: "But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action . . ." (*Lawrence v. Texas*, 539 U.S. 558 [2003]).

⁴In *Lawrence*, Justice Thomas called the Texas law "uncommonly silly."

⁵See Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986), 16.

⁶In *Romer v. Evans*, 517 U.S. 620 (1996), for example, the Supreme Court upheld an inferior court decision striking down a Colorado plebiscite that prohibited local antidiscrimination ordinances protecting gays. In reaction to this decision, critics of the Court charged it with acting contrary to a clear democratic will expressed through a plebiscite. Moreover, the suggestion that the law was based on animus seemed to critics an illegitimate attack on the motives of a democratic majority.

⁷See David Estlund, "Democratic Theory," in *The Oxford Handbook of Contemporary Philosophy*, ed. Frank Jackson and Michael Smith (Oxford: Oxford University Press, 2005), 208–30.

argue that democracy is an ideal of self-government constituted by three core values—political autonomy, equality of interests, and reciprocity—with both procedural and substantive implications. I contend that what are often thought of as distinctly liberal substantive rights to privacy, property, and welfare can be newly understood within a theory of democracy. I do not aim merely to provide new democratic justifications for traditional rights; in many instances, I argue that democracy requires rights less often invoked in the liberal tradition. I argue, for example, that rights to welfare are central to democratic legitimacy, as are free speech rights for convicted criminals and the right not to be executed by the state. Moreover, once democracy has been reformulated in this manner, I suggest that we can reexamine *Lawrence*'s legitimacy with a new lens. Rather than being counterdemocratic, the Court's substantive due process doctrine and its decision in *Lawrence* help to guarantee a set of basic, democratic rights.

I begin by challenging the idea that the only proper criterion by which a decision can be judged democratic is whether it resulted from a majoritarian procedure. In contrast to pure procedural theories of democracy, I propose the *value theory of democracy* as a way of articulating the fundamental idea that self-government should respect each individual's status as a ruler. The three core values serve as the independent standards by which to judge whether citizens' democratic status is respected through procedural rights to participate in governance and substantive rights that protect against undemocratic outcomes of democratic procedures. Thus, democratic procedures and substantive rights are both distinct yet necessary aspects of ideal democracies.

In a broad sense, the value theory of democracy draws on the idea of “co-originality” present in the work of Jürgen Habermas and arguably implicit in the work of Jean-Jacques Rousseau and John Rawls. Co-originality suggests that participatory rights and the right to be free from government intervention are not conflicting ideals, but rather are complementary aspects of a good theory of political legitimacy. These theories thus aim to reject the conflict between what Berlin termed “positive” and “negative” liberty and what Constant called the “liberty of the ancients” and the “liberty of the moderns.”⁸ On my understand-

See also his *Democratic Authority* (forthcoming, Princeton University Press), in which Estlund defines “intrinsic democratic proceduralism” as the view that “only democratic political arrangements are legitimate, and the value of their being democratic does not depend on any qualities of democratic decisions other than whether they are democratic in two senses: (a) decisions must be made by democratic procedures, and (b) they must also not unduly undermine or threaten the possibility of democratic procedure in the future” (Estlund, “Democratic Theory,” 213). Estlund rejects such a view in favor of one that views democracy as instrumental to good outcomes, a view that I take up in chapter 6.

⁸See Isaiah Berlin, “Two Concepts of Liberty,” in *Liberty*, ed. Henry Hardy (Oxford: Oxford

ing, rights and procedures are co-original in that each is founded on the three core values that best define the democratic ideal of rule by the people.⁹

My argument for the value theory of democracy begins in chapter 1, where I consider and reject procedural accounts of democracy. I instead defend the value theory and elaborate why its three core values should be the standard for judging democratic legitimacy.

In chapter 2, I argue that the core values give rise to rights of citizens. These rights, I suggest, not only protect citizens in their capacity as makers, or “authors,” of the law, but also provide substantive entitlements to citizens as they are coerced, or “addressed,” by law. The rights of addressees, I argue, are best justified with reference to reciprocity’s requirement of reasonable treatment for all democratic citizens.¹⁰ In defending the idea that democratic rights should not merely protect citizens as political participants but should also guarantee substantive limits on state coercion, I avoid a top-down theory that merely proposes a standard and then applies it. Instead, I ground the idea of the rights of citizens as addressees in our intuitions about the requirements of paradigmatic democratic institutions such as the rule of law and free speech.

University Press, 1997), 166–217, and Benjamin Constant, “The Liberty of the Ancients Compared with That of the Moderns: Speech Given at the Athénée Royal in Paris,” in idem, *Political Writings*, trans. and ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 307–28. Isaiah Berlin helped popularize the notion that democracy and individual rights are drawn from two distinct traditions. He argued: “There is no necessary connection between individual liberty and democratic rule” (Berlin, “Two Concepts of Liberty, 177). For Berlin the linguistic and conceptual contrast between positive liberty, or self-rule, and negative liberty, or freedom from coercion, served to highlight what he regarded as a valid historical and philosophical distinction between democracy and individual rights. He believed that the tradition of positive liberty, from which the concept of democracy stems, draws on the fundamental question, “Who governs me?” Democratic conceptions argue that citizens are most free when they rule themselves. In contrast, the tradition of negative liberty attempts to respond to the separate question: “How far does government interfere with me?” (ibid.). Drawing on Benjamin Constant’s distinction between the democratic liberties of the ancients and the rights of the moderns, Berlin sought to show that a good political theory would demonstrate how individual rights could constrain democracy while at the same time avoiding a conflation between these two basic concepts.

⁹In the first chapter I distinguish my view from what I deem sophisticated proceduralists’ accounts of co-originality, such as that of Habermas. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), 104. For a reading of Habermas’s procedural notion of co-originality that contrasts it with Ronald Dworkin’s constitutional conception of democracy, see Frank I. Michelman, “Democracy and Positive Liberty,” *Boston Review* 21, no. 5 (November 1996). See also the introduction to Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), to which I respond in chapter 6.

¹⁰Although I draw in this chapter from Habermas, I argue against him that this concept suggests a capacity of citizens that is normatively independent of any appeal to democratic procedure.

In chapter 3, I draw on the insights gleaned from my analysis of paradigmatic democratic rights of addressees of law to develop a framework for democratic justification that can be extended to some of the most contentious contemporary debates about rights. I call this framework for interpreting the core values of democracy “democratic contractualism” to emphasize its debt to Rousseau and Rawls. The framework contains two standards for judging the democratic limits of coercion and those rights to which citizens are entitled. The first standard, “democracy’s public reason,” serves as an initial way of identifying coercion that is inconsistent with the core values of democracy by examining whether its justification respects citizens as autonomous and equal. A second standard, the “inclusion principle,” focuses on the impact of coercion on individuals in their particular contexts and with their distinct interests.

Chapter 4 begins the project of extending the ideas developed in chapter 3 to more controversial areas. I appeal to democratic contractualism to illustrate that the right to privacy is a necessary condition for an ideal democracy. Democratic contractualism articulates an understanding of the substantive right to be free from state intervention in matters of consensual sexual relations, such as that at issue in *Lawrence v. Texas*. Moreover, the democratic account of privacy can take into account feminist arguments about the need to develop and maintain theories of privacy that respect the core value of equality.

In chapter 5, I explore the implications of democratic contractualism for the rights of convicted criminals against certain forms of state punishment. I argue that the ideal of democratic citizenship should be extended to even the most violent offenders in our society. The democratic ideal requires certain restrictions on the forms of punishment that a legitimate democracy can rightly invoke.

In chapter 6, I discuss democratic contractualism’s account of the right of private property and the right of welfare. While the right to private property plays a fundamental role in ideal democracies, I argue that a necessary condition for justifying its enforcement is that all citizens should be entitled to a basic right of welfare. I suggest three forms that this right could reasonably take: a right to a job, in-kind resources for basic needs, and basic income. Unlike the right to privacy and the rights of the incarcerated, the right of welfare is a positive right that provides for citizens to be given certain goods by the state. This right distinguishes democratic contractualism from libertarian theories.

Central to this project is an articulation of the democratic meaning of privacy, criminal justice rights, and property in an ideal democracy. Once this meaning has been established, however, it is necessary to explore a potential conflict between aspects of the democratic ideal. Although both democratic procedures and democratic rights are necessary conditions for ideal democracies, these two aspects at times will conflict in real democracies. What is the

most democratic response when democratic procedures produce outcomes that violate democratic rights? Such an instance characterizes the *Lawrence* case discussed above. In chapter 7, I argue that in certain instances, such as cases related to privacy, judicial review in defense of democratic rights is justified. Although this form of judicial review results in a loss to the procedural integrity of democracy, it can be defended on the grounds that it represents an overall gain for the democratic ideal. One can, however, also embrace the value theory of democracy as articulated in chapters 1 through 6 without accepting the implication I suggest it has for judicial review; I examine such a position in this final chapter.

Now that I have explained the outline and ambition of my argument, I want to clarify its limits. My argument is limited in that I hope to articulate what a commitment to democracy means for an account of rights, not to provide a comprehensive account of all rights. Similarly, as I suggest in chapter 2, the core values are not intended to serve as an exhaustive list of *all* values relevant to democracy but rather as a collection of those that are most fundamental. These values may be consistent with a wide range of other values present in a democracy, such as fiscal responsibility and aesthetics. Finally, while I argue for rights as an implication of democracy, I do not seek to provide a justification of democracy itself; such a justification is outside the scope of this project. Indeed, another project might pursue the question of whether the rights I examine are ever trumped by nondemocratic reasons and values. I leave open this possibility in my discussion of supreme emergencies in chapter 2.

The ideals of the value theory of democracy and democratic contractualism suggest a new understanding of the meaning of democracy. Given how widely “democracy” is invoked in political discourse, the debate over the term’s meaning is essential for understanding what is required of the state and citizenry for moving society toward an ideal democracy. Defenders of the democratic ideal rightly seek the power of all to participate, but they should also demand the rights that are the substance of self-government.