



**JUDICIAL REVIEW AND DEMOCRATIC AUTHORITY:
ABSOLUTE V. BALANCING CONCEPTIONS**

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IT IS MY PLEASURE TO CONTINUE a dialogue with Tom Christiano about his book *The Constitution of Equality*. In a previous exchange, Christiano and I explored differences between his theory of democracy and rights and my own “value theory of democracy,” as articulated in *Democratic Rights: the Substance of Self-Government*.¹ In this exchange, I hope to focus on our more specific differences about the proper role of judicial review in a democracy.

To a large extent, our exchanges explore differences within the context of broad agreement. Both of our theories are defined by the thesis that democracy and liberal rights have a common grounding in substantive public values. We also share the view that democratic procedures must sometimes be overridden to achieve outcomes that respect substantive values. However, our theories differ in two important ways. First, we disagree about when judicial review is justified to overturn majoritarian legislation. Second, we disagree about how to address the concern that judicial review may restrict democracy. How should the commitment to majoritarian decision-making be “balanced” against the commitment to public equality? Although I will briefly describe the first difference in order to clarify the contrast between our general theories, my focus in this piece is on the second disagreement. While Christiano argues that judicial review is justified when the democratic assembly “undercuts” its own authority, my value theory of democracy argues that the results of democratic procedures retain some intrinsic democratic authority even when judicial review striking down legislation is, on balance, justified. This difference is important in understanding our differing views regarding both the intrinsic value of democratic procedures and the justice of judicial review.

According to Christiano, “public equality” grounds both the liberal rights and democratic entitlements necessary to a just regime. He argues that public equality refers to three basic interests. First, it stands as a corrective to “cognitive bias” and the risk that some citizens will subordinate each other’s beliefs and basic interests. Second, it ensures the possibility that citizens will “be at home” in a diverse and potentially unjust world. This means that the conditions should be guaranteed for citizens not to feel alienated from society. Third, it advances the interest of each person in having an “equal moral standing.” Once these components of public equality are understood, they can be used to describe the kind of democratic and liberal rights that justice demands.

¹ Brettschneider and Christiano, Book Review Exchange, *Journal of Politics* (2009), 71: 1593-1594.

On Christiano's view, public equality entitles citizens to participate in democratic procedures as a means of making their own decisions on matters of policy. However, when the outcomes of democratic procedures substantively fail to respect the ideal of public equality, the very source of the procedures' authority is undercut, since the value of the procedures is based on public equality. Thus, his theory is not "purely procedural." Purely procedural theories suggest that any outcome of a legitimate democratic process is itself legitimate simply because it emerged from that process. In contrast, Christiano suggests that the outcomes of democratic processes should be respected only if they reflect the ideal of public equality, which grounds those processes. Judicial review is justified, he suggests, if an outcome undercuts this ideal.

Importantly for Christiano, public equality is what Rawls would define as a comprehensive conception that is broader and more robust than political liberal values. It encompasses not just freedom of thought but moral equality and the sense of being "at home" in the world. Christiano's concept of equality is thus thicker than a strictly political notion of equal citizenship. A justification for judicial review that is tied to this thicker standard might call for a more activist court than a justification tied to the narrower standard of political equality. In Christiano's view, judicial intervention would seem to be called for not only to protect rights, but also to promote the comprehensive values of public equality, in the sense of equality and being at home in the world. By contrast, my theory of value democracy argues that there is a need for judicial review in instances where the outcomes of democratic procedures undermine the political values that justify those procedures in the first place. In *Democratic Rights* I suggest that judicial review is justifiable when core democratic values of free and equal citizenship are undermined by the results of democratic procedures. But there is an important difference between my view, which seeks to promote the political reasons of free and equal citizenship that underlie rights, and Christiano's theory, which upholds a comprehensive theory of equality. Courts do have a role in protecting rights against democratic legislatures that subvert public values—and in explaining why they do so. However, I believe that it is also important for a Supreme Court which exercises the power of judicial review to refrain from using this power to endorse a particular comprehensive conception of the good. Christiano is clear that he wishes to reject the Rawlsian distinction between comprehensive and political conceptions. But, without such a distinction, I worry that courts will stray into the promotion of controversial moral views beyond the protection of democratic values.

This difference in the structure of our theories aside, however, I want to focus my comments on our contrasting views of how to understand the relationship between judicial review and democratic authority. I agree with Christiano's contention that judicial review is sometimes justifiable when democratic assemblies pass legislation that harms public equality. However, I do not believe that such instances undercut democratic authority in an abso-

lute sense. On my view, even when democratic procedures produce laws that undermine the democratic values which justify these procedures in the first place, they retain some authority. The authority of these laws is not entirely “undercut” as Christiano sees it. Rather, they are overridden by the countervailing duty to uphold democratic values. To determine when judicial review is justifiable, on my view of value democracy, we must balance two duties: first, the duty to uphold the substantive values which underlie democratic procedures and, second, the duty that comes from the fact that a law was passed by a democratic procedure.

For Christiano, when a democratic assembly passes a law that undermines public equality, the democratic authority of that particular law is entirely undercut. While the assembly might retain democratic authority as a whole, the democratic authority of the particular law that violates public equality is lost. This is because the democratic assembly derives its entire authority from its support of public equality. If this fundamental value is harmed by the outcome of a legislative process in which a law violates the value of public equality, the very basis for the assembly’s democratic authority is undermined, according to Christiano. In his words, “the democratic assembly runs up against the limits of its authority by passing legislation that violates public equality.” (275) However, Christiano is clear that just because one law might have its authority undermined, this does not entail the loss of authority of the assembly as a whole, “The citizen will still have duties to obey other pieces of legislation that are legitimate.” (275) Moreover, the fact that the democratic authority of this one piece of legislation is undermined does not entail that citizens have no duty at all to follow it. He argues that they might have a duty to follow such a law for instrumental reasons, such as a concern for maintaining general stability in society or respect for the legislature as a whole. However, a law that violates public equality would lack any intrinsic democratic authority for Christiano and, if there is a duty to follow it, the duty would be solely instrumental.

I agree with Christiano that the authority of democratic procedures is based on substantive values. When democratic procedures result in outcomes that severely contradict those values, judicial review is justified. But, in contrast to Christiano, I think that the democratic authority of a law still retains some normative force even when it undermines these substantive values. Thus the appropriate way to understand justifiable judicial view is by appeal to a *balancing* model. Even though laws passed by democratic procedures retain normative force, the duty to uphold that law is overridden by another more fundamental duty to uphold and protect democratic values. On balance our duty to the values that constitute the core of democratic authority sometimes overrides our duty to laws passed by democratic procedures. But at times the duty to follow laws passed by democratic procedures trumps the duty to uphold the core values that ground democratic procedures.

In short, my thought is that citizens retain what might be called a *pro tanto* duty to laws passed by democratic procedures, even when they are rightly

struck down. Such a duty might be overridden by what is, on balance, a conclusory concern to protect public equality, but even when it is overridden, a degree of intrinsic democratic authority remains in the law. This stands in contrast to Christiano's claim that such a law would have a claim to be followed only for instrumental reasons.

An analogy with civil disobedience is helpful here. Laws enforcing segregation seem clear examples of legislative outcomes that undermine public equality. Yet, if we follow Rawls and King, the fact that there are duties for citizens to resist such laws does not mean that our duty to be law-abiding disappears entirely. We retain, for instance, a duty to civility and to show respect for the democratic system as a whole even when we are justified in disobeying a law. But our duty to justice in such cases is deemed more fundamental than the duty to civility in cases when civil disobedience is justifiable on balance. Both Rawls and King argue that we should accept our punishment for breaking these laws even though we are right to violate them. I agree with Rawls and King. Even when some duties trump others, this does not mean that the "losing" duty disappears. On my view, duties to civil disobedience also involve countervailing duties to uphold laws that are passed democratically. To uphold laws that are passed democratically, it is unclear whether Rawls and King hold that a duty exists to law in general or to the specific law that is being violated.² I want to argue that it is a duty to the specific law that has been violated that has *pro tanto* force even though it does not have conclusory force. Even though we should break a law that undermines public equality, when we accept punishment for breaking it, we recognize that it still maintains a degree of intrinsic authority. We should accept punishment in such cases not only to show fidelity to the system as a whole, but also to show some fidelity to the specific law that has been broken.

In general, duties that are overridden often retain some normative force. If I promise to meet you for coffee but on my way witness an accident, I clearly am obliged to stop and help the victim even if it makes me late. The countervailing duty to help here overrides the duty to keep my promise. But this does not mean that I have no duty to you at all. Indeed, to the degree to which I can honor my duty I ought to try. For instance, I might apologize to you or meet you after the accident victim has been helped. In this case, I believe that my remaining duty stems not just from the practice of promise-keeping in general, but also from the specific promise I have made, which retains *pro tanto* force. There is an important implication for judicial review in this notion that the duty which is overridden continues to have some normative force. When public equality is harmed—for instance by the violation of a liberal right—the authority of the democratic assembly or of the law that is

² See John Rawls, *Theory of Justice, revised edition* (Cambridge, MA: Harvard University Press, 1999) p. 322 and Martin Luther King Jr., "Letter from a Birmingham Jail," in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, James Melvin Washington, ed. (New York: Harper Collins, 1991) p. 294.

struck down does not entirely disappear. Even a law that is rightly struck down still retains some democratic authority in virtue of the fact that it was passed by a democratic procedure. Thus, even when judicial review overturning legislation is justified, we should balance between a concern to respect the outcomes of democratic procedures and a concern to protect the substantive values that underlie those procedures.

This concern about the continued existence of democratic authority of laws that are rightly overridden goes to the very meaning of the “intrinsic” value that Christiano and I both agree inheres in democratic procedures and explains our rejection of solely instrumental accounts of democratic authority. Both Christiano and I think the authority of the democratic assembly is grounded in a substantive notion of equality, but a question remains as to the sense in which this is true. One sense in which it might be true is instrumental. The democratic assembly might have authority because it tends to promote outcomes consistent with public equality. If this were the sole ground for the authority of the democratic assembly, we might see why one would hold the absolute rather than the balancing conception of authority. The authority was only instrumental to begin with, so when it fails to comply with its instrumental justification, it can be discarded. Of course, democratic assemblies can pass laws that are more or less consistent with public equality, and these laws might therefore have more or less authority. However, the point here is that a particular law could potentially undermine equality to such a degree that it would lack any instrumental justification and thus any democratic authority.

Christiano maintains that in addition to the instrumental reasons to respect the democratic assembly, the laws that it passes also have intrinsic value. I want to ask, however, whether his position on laws that are overridden is consistent with his claim that the democratic assembly has intrinsic and not just instrumental value generally. I will inquire into whether his position regarding laws that lack democratic authority ultimately risks collapsing his notion of the authority of the democratic legislature into an instrumental conception.

An alternative to the instrumental justification of democratic authority is an intrinsic justification, grounded in the assembly’s respect for the right to participate in democratic governance. On this view, even laws that violate public equality in the most severe sense might retain some residual democratic authority because they are produced by democratic assemblies, as opposed to a dictator or unelected group. Intrinsic democratic authority could be defended by the sort of argument that Jeremy Waldron makes about the equal capacity to decide. However, I agree with Christiano that Waldron is wrong to conclude that intrinsic democratic authority is incompatible with judicial review. Like Christiano, I agree that Waldron is wrong to ignore the fact that sometimes outcomes that result from democratic procedures undermine equality to such an extent that the laws must be overturned by a court. However, unlike Christiano, I believe Waldron is right in the sense that, even

when it is justified to override democratic majorities, there still is a loss to the intrinsic value of equal participation in self-government. This loss, however, can only be understood if we recognize that laws passed by a democratic assembly retain some intrinsic value even when they undermine substantive democratic values.

My difference with Christiano on this point parallels a critique I made in *Democratic Rights* of Ronald Dworkin's notion of judicial review.³ Consider Dworkin's analysis of how *Texas v. Johnson* (1989) can be justified on democratic grounds.⁴ In this case, the Court considered whether the First Amendment was inconsistent with a Texas law that prohibited citizens from burning the American flag. The Court reasoned that since the Texas law restricted politically symbolic speech, the First Amendment required the law to be struck down. In Dworkin's view, such a decision was not a loss to democracy, but a gain. In a passage that Waldron focuses on in his own critique, Dworkin explains his reasoning:

No one's power to participate in a self-governing community has been worsened, because everyone's power in that respect has been improved. No one's equality has been compromised, because equality, in the only pertinent sense, has been strengthened. No one has been cheated of the ethical advantages of a role in principled deliberation if he or she had a chance to participate in the public discussion about whether the decision was right.⁵

As I have indicated, I agree with Christiano that judicial review in defense of an outcome like the one Dworkin defends—the protection of free speech—is justified because it protects against a harm to public equality. But given that this same outcome can be protected by a variety of procedures, surely there would have been added value if a legislature rather than a court had changed the law or, indeed, if the Texas legislature had never passed the law restricting free speech in the first place.

Specifically, the added value that comes when good democratic outcomes are affirmed by majorities is that there is actual endorsement, or what some would call ratification, of public equality by the citizenry or their elected representatives. However, Dworkin overlooks this fact, contending that there is no loss to democracy when bad legislative outcomes are struck down. The added significance that comes with a majority or supra-majority's affirmation of the core values points to the fact that procedure has some intrinsic worth. On my view, the intrinsic value of certain democratic procedures explains why democratic procedures embody public equality in a way that is distinct from the question of whether the outcomes of these procedures

³ Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton, NJ: Princeton University Press, 2007) pp. 142-143.

⁴ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁵ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1997) p. 32.

harm public equality. This intrinsic value is based on the importance of citizens' collective self-government and their political autonomy.

I recognize both the intrinsic value of democratic procedures and the importance of legislative outcomes' impact on public equality; therefore, I believe decisions about when to resort to judicial review must be made by balancing the democratic harm that comes from striking down laws passed by democratic assemblies against the harm to public equality that would occur were those legislative outcomes allowed to stand. In cases in which majorities undermine the very values of democracy that give rise to their right to participate and decide, they are rightly regarded as having, on balance, acted undemocratically. Occasionally, the threat to core values is so extreme that it calls for a correction. When a democratic correction is made, it results in some loss to democracy. But even in these cases—in which judicial review in defense of public equality is justified—such laws retain democratic authority when they are produced by legitimately democratic legislatures.

Christiano and I both agree with Dworkin's contention that judicial review in defense of equality is justified on grounds of democracy (278, n. 3). However, I believe that Christiano is mistaken to conclude that democratic outcomes should lose all democratic authority when they violate rights. His view in this respect shares with Dworkin the failure to recognize why the intrinsic value of participation grants even these laws a degree of democratic authority. Neither Dworkin nor Christiano can account for the residual democratic authority that exists even for laws that have been rightly struck down on democratic grounds. Thus, neither can see the loss to democracy that occurs when courts, rather than democratic legislatures, are needed to protect public equality. At times in the book, as I read him, Christiano does seem to acknowledge, unlike Dworkin, that democratic procedures realize public equality in an intrinsic sense as well as an instrumental sense. However, this acknowledgment does not carry through to his discussion of the way in which the democratic authority of laws is undercut when they violate liberal-democratic rights. While I agree that such laws should sometimes be struck down through judicial review, they do not eliminate all of the intrinsic value of these procedures. Specifically, if these procedures have intrinsic value, it follows that even the specific laws that are struck down by judicial review retain some *pro tanto* normative force. Christiano, however, rejects this idea, suggesting that the normative force of such laws is entirely undercut. He thus rejects a balancing conception between conflicting *pro tanto* duties to laws based on their intrinsic procedural worth and their substantive worth in favor of an all-or-nothing conception.

Ultimately I wonder if Christiano's all-or-nothing conception risks collapsing into an instrumental idea of authority, despite our mutual attempt to demonstrate that democratic procedures have intrinsic authority. On my view, the assembly has authority because it is structured to involve the participation of the population at large. Simply by virtue of guaranteeing a right to participate, democratic procedures create *pro tanto* duties to obey, albeit duties

that can be overridden. But if the assembly's procedures go awry by producing outcomes at odds with public equality, it still retains some authority because its authority is not dependent on the results it produces. In other words, on my view, to say that democratic procedures have intrinsic authority is to claim that they have authority even in the absence of the kind of results that they would ideally produce in a democracy.

Christiano seems to have a different sense of intrinsic in mind. On his view, if a legislature fails to produce outcomes consistent with public equality, it loses its democratic credentials. This suggests that authority is ultimately linked to the kind of outcomes produced, not to the way a procedure manifests public equality. Such a view is held by my colleague, David Estlund, who suggests that democratic authority is based upon democratic procedures' tendency to produce true outcomes.⁶ If Christiano is to retain the claim that the democratic assembly has intrinsic authority, he might have to abandon his all-or-nothing view of democratic authority and adopt the kind of balancing view I suggest.

As significant as our different understandings of intrinsic democratic authority are, we might often agree regarding when judicial review is justifiable. If legislative outcomes significantly harm public equality, we both think judicial review is justified. The significant normative difference in our views, however, arises when an outcome of democratic procedures is illegitimate, but where there is reasonable disagreement about whether this is the case. I have in mind violations of positive rights, such as the right to an economic minimum.⁷ Christiano and I both agree that there is a requirement for legitimacy that all citizens are guaranteed a minimal set of material resources. State economic policies that fail to guarantee this minimal economic standard of material resources violate a core right of citizens. But there is often reasonable disagreement about what policies might generate an economic minimum or about how to discern empirically whether the positive right has been met. It seems that on Christiano's absolutist view, any instance of an economic policy failing to guarantee a right to an economic minimum could justify judicial review because the public equality of citizens and thus the democratic authority of the assembly has been undercut. But, on my balancing view, there might be a reason for courts not to intervene in democratic decision-making in such an instance even though a right to the economic minimum has been violated.

In short, I do not think there should be intervention when there is reasonable disagreement about whether the positive right has been undermined by a particular economic policy. In cases of reasonable disagreement, the need to balance between the intrinsic value of democratic procedures and the the need to prevent undemocratic outcomes, might be struck in favor of de-

⁶ David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2009).

⁷ See Brettschneider, *Democratic Rights*, chapter 6.

ferring to the legislature. Thus, unlike Christiano, my theory of value democracy acknowledges that there are times when courts should refrain from overruling legislation that might violate democratic rights. Sometimes balancing requires deference to democratic procedures even when the outcomes violate the substantive requirements of the core values of democracy. In such instances, the *pro tanto* reasons that obligate us to democratically produce laws outweigh concerns to protect against undemocratic outcomes.

In sum, I think Christiano and I are kindred spirits in our commitment to the central thesis that a common set of public values underlies both democratic procedures and substantive rights. But I have asked whether ultimately Christiano really does hold an intrinsic notion of the authority of democratic procedures and whether he is right to reject a balancing conception between justifiable judicial review and the authority of democratic procedures. Christiano's book is a rich and significant contribution to democratic theory. It stands as a major alternative to Rawlsian approaches to democracy and rights, and serves as a very important challenge to such approaches. It has been a pleasure to again engage with him in dialogue about our respective views.

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