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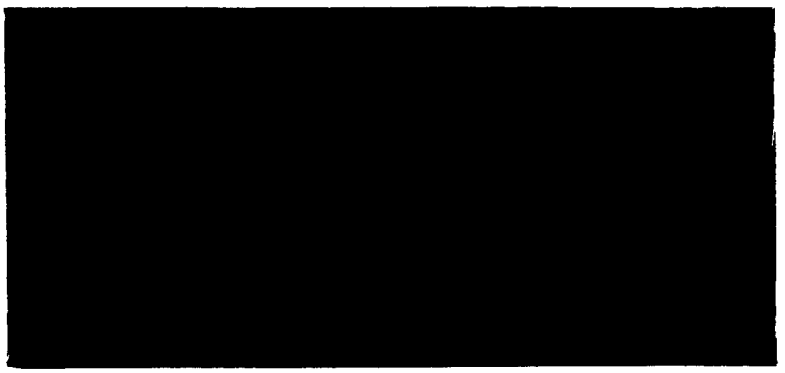

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"Procedural Democracy and the Limits of Liberalism"

Kenneth Baynes

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Procedural Democracy and the Limits of Liberalism

(Kenneth Baynes, Department of Philosophy,
SUNY, Stony Brook, NY, 11794-3750)

Habermas's recent book, Between Facts and Norms, engages current discussions in Anglo-American political theory--especially concerning the nature and limits of liberal democracy--more extensively than any of his earlier work.[1] It should thus be possible to form an initial judgment about how his "discourse theory of law" and conception of "procedural democracy" might fare when confronted by some of the more pressing issues in liberal political theory. In these discussions three issues particularly stand out: First, there is a longstanding debate about the relation between democracy and other political ideals (such as political equality, the rule of law, and the guarantee of basic rights and liberties). Are these political values in deep conflict with the ideal of democracy, or can they be reconciled with one another in a more general interpretation of democracy?[2] Second, there has been a lengthy discussion about the ideal of liberal neutrality.[3] Is the claim that the liberal state should not act in ways intended to promote a particular conception of the good defensible when, on the one hand, the diversity of distinct cultures and life-forms are increasingly threatened by global markets and, on the other, the ethical foundations of liberal society are being called into question by non-liberal regimes? Third, as an extension of the critique of neutrality, the "dilemma of difference" (Minow) poses a distinct challenge to liberal ideology: Must any attempt to address "difference" under the

liberal ideals of equality, impartiality, and toleration necessarily perpetuate injustices and do violence to those categories and classes not traditionally recognized as within the norm? This issue has been raised particularly (though not exclusively) in recent feminist jurisprudence.[4] After briefly reviewing some of the main features of Habermas's procedural democracy, I will return to these three issues to consider how they might be addressed from within the perspective of his discourse theory.

Within the context of North American discussions, Habermas's use of the phrase "procedural democracy" could be misleading since it differs from the contrast between procedural and substantive democracy found, for example, in John Ely's account in Democracy and Distrust or in in Brian Barry's influential essay, "Is Democracy Special?". Barry writes: "I follow . . . those who insist that 'democracy' is to be understood in procedural terms. That is to say, I reject the notion that one should build into 'democracy' any constraints on the content of outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty and the rule of law."[5] Habermas's model is clearly not procedural in this sense since it draws upon the ideals of liberty and equality implicit in the idea of communicative reason (see 323, 123, and 537). It presupposes as an element of practical reason an ideal of citizen's autonomy that should be reflected in an institutional design incorporating various practical discourses. Procedural democracy is thus closer

to what Charles Beitz refers to as "complex proceduralism" which holds that ". . . the terms of democratic participation are fair whn they are reasonably acceptable from each citizen's point of view, or more precisely, when no citizen has good reason to refuse to accept them."[6] Habermas's proceduralism may also be compared to what has been called a "public reasons" approach. According to this approach, found in the work of John Rawls, Thomas Scanlon, Samuel Freeman and others, democratic norms and procedures are said to be based on reasons that citizens can publicly affirm in view of a conception of themselves as free and equal persons.[7]

Habermas introduces his conception of procedural democracy by way of a contrast between two highly-stylized alternatives: liberal and republican (or communitarian). These have become familiar reference points in recent discussions. Cass Sunstein, for example, has recently summarized the liberal model well: "Self-interest, not virtue, is understood to be the usual motivating force of political behavior. Politics is typically, if not always, an effort to aggregate private interests. It is surrounded by checks, in the form of rights, protecting private liberty and private property from public intrusion".[8] By contrast, republicanism characteristically places more emphasis on the value of citizens' public virtues and active political participation. Politics is viewed as a deliberative process in which citizens seek to reach agreement about the common good, and law is not seen solely as a means for protecting individual rights but as an expression of the common praxis of the political community.

Habermas's procedural democracy attempts to incorporate the best features of both models while avoiding the shortcomings of each. In particular, with the republican model, it rejects the vision of the political process as primarily a process of competition and aggregation of private preferences. However, more in keeping with the liberal model, it regards the republican vision of a citizenry united and actively motivated by a shared conception of the good life as inappropriate in modern, pluralist societies.[9] Since political discourses involve bargaining and negotiation as well as moral argumentation, the republican or communitarian notion of a shared ethical-political dialogue also seems too limited (347). "Discourse theory has the success of deliberative politics depend not on a collectively acting citizenry but on the institutionalization of the corresponding procedures and conditions of communication, as well as on the interplay of institutionalized deliberative processes with informally constituted public opinions." (361-2) Thus, what is central is not a shared ethos, but institutionalized discourses for the formation of rational political opinion.

The idea of a suitably interpreted "deliberative politics" thus lies at the core of Habermas's procedural democracy. In a deliberative politics attention shifts away from the final act of voting and the problems of social choice that accompany it.[10] The model attempts to take seriously the fact that often enough preferences are not exogenous to the political system, but "are instead adaptive to a wide range of factors--including the context

in which the preference is expressed, the existing legal rules, past consumption choices, and culture in general".[11] The aim of a deliberative politics is to provide a context for the possible transformation of preferences in response to the considered views of others and the "laundering" or filtering of irrational and/or morally repugnant preferences in a manner that is not excessively paternalistic.[12] For example, by designing institutions of political will-formation so that they reflect the more complex preference structure of individuals rather than simply register the actual preferences individuals have at any given time, the conditions for a more rational politics (that is, a political process in which the outcomes are more informed, future-oriented, and other-regarding) can be improved.[13] One could even speak of an extension of democracy to preferences themselves since the question is whether the reasons offered in support of them are ones that could meet the requirements of public justification.[14] What is important for this notion of deliberation, however, is less that everyone participate--or even that voting be made public--than that there be a warranted presumption that public opinion be formed on the basis of adequate information and relevant reasons and that those whose interests are involved have an equal and effective opportunity to make their own interests (and the reasons for them) known.

Two further features serve to distinguish Habermas's model of procedural democracy and deliberative politics from other recent versions. First, this version of deliberative politics extends

beyond the formally-organized political system to the vast and complex communication network that Habermas calls "the public sphere".

> [Deliberative politics] is bound to the demanding communicative presuppositions of political arenas that do not coincide with the institutionalized will-formation in parliamentary bodies but extend equally to the political public sphere and to its cultural context and social basis. A deliberative practice of self-determination can develop only in the interplay between, on the one hand, the parliamentary will-formation institutionalized in legal procedures and programmed to reach decisions and, on the other, political opinion-building in informal circles of political communication. (334)

The model suggests a "two-track" process in which there is a division of labor between "weak publics"--the informally organized public sphere ranging from private associations to the mass media located in "civil society"--and "strong publics"--parliamentary bodies and other formally-organized institutions of the political system.[15] In this division of labor, "weak publics" assume a central responsibility for identifying and interpreting social problems: "For a good part of the normative expectations connected with deliberative politics now falls on the peripheral structures of opinion-formation. The expectations are directed at the capacity to perceive, interpret, and present encompassing social problems in a way both attention-catching and innovative." (434) However, decision-making responsibility, as well as the further "filtering" of reasons via more formal parliamentary procedures, remains the task of a strong public (e.g., the formally-organized political system).

Second, along with this division of labor between strong and weak publics and as a consequence of his increased acknowledgment of the "decentered" character of modern societies, Habermas argues that radical-democratic practice must assume a "self-limiting" form. Democratization is now focussed not on society as a whole, but on the legal system broadly conceived (370). In particular, he maintains, it must respect the boundaries of the political-administrative and economic subsystems that have become relatively freed from the integrative force of communicative action and are in this sense "autonomous". Failure to do so, he believes, at least partially explains the failure of state socialism.[16] The goal of radical democracy thus becomes not the democratic organization of these subsystems, but rather a type of indirect steering of them through the medium of law. In this connection, he also describes the task of an opinion-forming public sphere as that of laying siege to the formally-organized political system by encircling it with reasons without, however, attempting to overthrow or replace it.[17]

This raises a number of difficult questions about the scope and limits of democratization. Given the frequent metaphorical character of his discussion (see, e.g., the references to "colonization", "sieges", and "sluices"), it is not clear what specific proposals for mediating between weak and strong publics would follow from his model. Some have questioned, for example, whether he has not conceded too much to systems theory and Nancy Fraser, in an instructive discussion of Habermas's conception of

the public sphere, raises the question whether there might not be other possible "divisions of labor" between strong and weak publics.[18] Habermas's response, I think, would be that an answer to these questions will not be found at the level of normative theory, but depends upon the empirical findings of complex comparative studies. However, a more general question that arises in connection with this model of democracy is whether Habermas's confidence in the rationalizing effect of procedures alone is well-founded. In view of his own description of "weak publics" as "wild", "anarchic", and "unrestricted" (374), the suspicion can at least be raised whether discursive procedures will suffice to bring about a rational public opinion. To be sure, he states that a deliberative politics depends on a "rationalized lifeworld" (including a "liberal political culture") "that meets it halfway".[19] But without more attention to the particular "liberal virtues" that make up that political culture and give rise to some notion of shared purposes, it is difficult not to empathize with Sheldon Wolin's observation concerning the recent politics of difference. Describing the situation of someone who wants to have his claim to cultural exclusiveness recognized while at the same time resisting anything more than minimal inclusion in the political community, Wolin exposes a disturbing paradox within it:

> I want to be bound only by a weak and attenuated bond of inclusion, yet my demands presuppose a strong State, one capable of protecting me in an increasingly racist and violent society and assisting me amidst increasingly uncertain economic prospects. A society with a multitude of organized, vigorous, and self-conscious differences produces not a strong State but an erratic one that is capable of reckless military adventures

> abroad and partisan, arbitrary actions at home. . . yet is reduced to impotence when attempting to remedy structural injustices or to engage in long-range planning in matters such as education, environmental protection, racial relations, and economic strategies.[20]

Habermas no doubt shares some of these same concerns about the conditions necessary for maintaining a liberal political culture, and his own focus on the more abstract form of mutual recognition at the basis of a legal community may make the requirements for inclusion less demanding than Wolin suggests. The question nevertheless remains whether Habermas's almost exclusive attention to questions of institutional design and discursive procedures offers an adequate basis for dealing with this paradox or whether he must not supplement his model with a more specific account of the "liberal virtues" or "ethical foundations" that must "meet these halfway".[21]

I would now like to consider how Habermas's theory fares with respect to the three issues noted in the introduction: the project of reconciliation, the question of liberal neutrality, and the dilemma of difference.

(1) In Chapter Three of Between Facts and Norms Habermas introduces a novel attempt to reconcile the principle of democracy (or popular sovereignty) with a system of basic rights. His claim is that neither should be seen as subordinate to the other (as is generally the case in both republicanism and classical liberalism), but that they are "equiprimordial" or "co-original" (gleichursprünglich) (155) and "reciprocally explain each other. (123) The system of rights is the "reverse side" (123) of the

principle of democracy, and "the principle of democracy can only appear a the heart of a system of rights." (155)

More specifically, Habermas's claim is that the system of rights (along with the principle of democracy) can be developed from the "interpenetration" (Verschränkung) of the discourse principle and the legal form (154). As I understand it, this "derivation"--Habermas speaks of a "logical genesis" (logische Genese)-- of a system of rights occurs in two stages: First, the notion of law cannot be limited to the semantic features of general and abstract norms. Rather, bourgeois formal law has always been identified with the guarantee of an equal right to subjective liberty.[22] This is reflected in Kant's Universal Principle of Right (Recht) as well as Rawls's First Principle both of which guarantee the greatest amount of liberty compatible with a like liberty for all. For Habermas this link between positive law and individual liberty means that insofar as individuals undertake to regulate their common life through the legal form they must do so in a way that grants to each member an equal right to liberty.

However--and this is the second step--although the legal form is conceptually linked to the idea of subjective rights, it alone cannot ground any specific right (162). A system of rights can be developed only if and when the legal form is made use of by the political sovereign in an exercise of the citizens' public autonomy. This public autonomy in the last analysis refers back to the discourse principle which implies the "right" to submit only to those norms one could agree to in a discourse. Of course, in

connection with the principle of discourse this "right" has only the "quasi-transcendental" status of a communicative act and does not carry with it any coercive authorization. It can acquire a coercive authorization only when, as the principle of democracy, it is realized in the legal medium together with a system of rights.

> The principle of discourse can assume through the medium of law the shape of a principle of democracy only insofar as the discourse principle and the legal medium interpenetrate and develop into a system of rights bringing private and public autonomy into a relation of mutual presupposition. Conversely, every exercise of political autonomy signifies both an interpretation and concrete shaping of these fundamentally 'unsaturated' rights by a historical law-giver. (162)

Habermas hopes in this way to have reconciled democracy and individual rights in a manner that does not subordinate either one to the other. "The system of rights can be reduced neither to a moral reading of human rights [as in Kant and the tradition of natural rights] nor to an ethical reading of popular sovereignty [as in Rousseau and some communitarians] because the private autonomy of citizens must neither be set above nor made subordinate to their political autonomy." (134) Rather, the co-originality or "equiprimordiality" of the system of rights and the principle of democracy, which also reflects the mutual presupposition of citizens' public and private autonomy, is derived from this "interpenetration" of the legal form and the "quasi-transcendental" discourse principle that "must" occur if citizens are to regulate their living together by means of positive law.

Since Habermas claims that no one else has yet succeeded in this project of reconciliation (111), it may be useful to contrast

his own position with two other recent attempts. In Democracy and Its Critics Robert Dahl recognizes the potential conflict between a "procedural" democracy and a "substantive" set of basic rights and attempts to resolve it by arguing that the right to self-government through the democratic process is basic and that other political rights can be derived from this fundamental right.[23]

> These specific rights--let me call them primary political rights--are integral to the democratic process. They aren't ontologically separate from--or prior to, or superior to--the democratic process. To the extent that the democratic process exists in a political system, all the primary political rights must also exist. To the extent that primary political rights are absent from a system, the democratic process does not exist.[24]

This strategy faces two serious objections. First, it is not clear whether other "non-political" rights can be accounted for in a similar manner and, even if so, whether this would not amount to an instrumentalization of private autonomy for the sake of public autonomy. Second, although it is a "substantive" not "procedural" account, Dahl's strategy suffers from a reliance on an "aggregative" conception of democracy that is in the end similar to Ely's procedural conception referred to above. This is suggested, for example, in his endorsement of a fairly utilitarian reading of the "principle of equal consideration of interests" in contrast to the autonomy-based conception implicit in Habermas's account.[25]

In a recent essay, Ronald Dworkin has also attempted to reconcile democracy and basic rights.[26] He begins with Ely's observation that many of the "disabling provisions" of the U. S. Constitution (roughly the Bill of Rights) may be seen as "functionally structural" to the democratic process and thus not in

communal conception, democracy and constitutional constraint are not antagonists but partners in principle".[30]

Dworkin's model is clearly preferable to aggregative conceptions. The three principles appeal directly to the ideals of autonomy and mutual recognition, and the analysis of democracy (as well as law) in connection with the integrity of a community's practices and attitudes points away from a metaphysical or substantialist conception of community. On the other hand, as he recognizes, his "principle of stake" threatens to become a "black hole into which all other political virtues collapse."[31] His response, however, which is to claim that the principle requires not that each citizen be shown equal concern but only that there exist a "good faith effort," threatens to undermine the public autonomy of citizens.

Habermas's proposal, by contrast, reconciles popular sovereignty and human rights in the sense that public and private autonomy are said mutually to presuppose one another. A virtue of the model is that it relates these ideals at an abstract level: Public and private autonomy are two dimensions of the fundamental "right" to communicative liberty as this is expressed in the legal form. If one begins with this notion of communicative liberty, it is possible to regard the constitution as a sort of "public charter" and the system of rights as a form of "precommitment" that citizens make in undertaking to regulate their common lives by public law.[32] As such the proposed reconciliation of democracy and rights neither undervalues public autonomy, nor overtaxes private

conflict with it. The right to freedom of expression is an example: "Since democratic elections demonstrate the will of the people only when the public is fully informed, preventing officials from censoring speech protects rather than subverts democracy . . . . So a constitutional right of free speech counts as functionally structural as well as disabling in our catalogue."[27] However, as Ely concedes, this strategy will not work for all the "disabling provisions"--for example, the Establishment Clause of the First Amendment or rights that regulate the criminal process--and so, Dworkin concludes, "Ely's rescue of democracy from the Constitution is only a partial success".[28]

Dworkin's own response to the "supposed conflict between democracy and a constitution" (330) begins by distinguishing between a "statistical reading of democracy" (i.e., the aggregative conception referred to above) and a "communal reading of democracy" (e.g., Rousseau's general will).[29] He then argues for a specific version of the latter which he calls "democracy as integration". This model is specified in connection with three principles: the principle of participation (requiring that each citizen have an equal and effective opportunity to make a difference in the political process), the principle of stake (requiring that each person be recognized or shown equal concern), and the principle of independence (specifying that individuals be responsible for their own judgments). Dworkin then concludes that on this model many of the disabling provisions Ely rejected may be regarded as functionally structural and, hence, not anti-democratic: "On the

autonomy. It is not based on a shared conception of the good, but on a more abstract form of recognition contained in the idea of free and equal consociates under law.

At the same time, the principal strength of this approach may also prove to be its greatest weakness. Given the abstract character of the reconciliation of public and private autonomy, it is difficult to determine how it might contribute to more specific constitutional debates, for example, regarding the interpretation of the Establishment Clause of the First Amendment, or the more specific scope and content of the right to privacy. Habermas would probably claim that the system of rights is "unsaturated" and needs to be filled in both with reference to a political community's particular tradition and history and in response to ongoing deliberations within the public sphere. This may be so, but it also seems reasonable to expect that the general proposal for a reconciliation of democracy and basic rights should provide some guidance to more specific debates about rights (e.g., would it support a constitutional right to abortion as a condition for securing the public autonomy of women?). I suspect, in fact, that the theory will be able to provide such guidance, but much more work needs to be done in this "middle range" between general conceptions and the enumeration of specific rights and liberties.

(2) Despite his emphasis on "weak publics" and pluralist civil society Habermas's model of procedural democracy and deliberative politics endorses a "nonrestrictive" or "tolerant" version of the principle of liberal neutrality (374ff.). This

principle has been criticized by communitarians and others who argue that it is excessively individualistic or atomistic in its conception of the citizen and/or that it presupposes its own conception of the good and thus is inherently self-defeating (since it cannot allow for the promotion of values required for a liberal society).[33] In particular, it has been argued that the principle of liberal neutrality is not compatible with the state's pursuit of measures intended to promote or maintain a diverse civil society and robust public sphere.[34] Is Habermas's endorsement of a principle of neutrality consistent with his affirmation of the value of a robust public sphere?

It is important that the meaning of liberal neutrality, at least on its best interpretation, not be misunderstood. First, the principle of neutrality is not itself a neutral or non-moral principle. It does not imply a merely procedural neutrality with respect to whatever conceptions of the good life citizens may happen to have. Rather, it is an ideal introduced in conjunction with a principle of right (for example, Kant's Universal Principle of Right or Rawls's Principle of Equal Liberty) and thus one that is biased against conceptions of the good that are incompatible with the basic rights and liberties specified by that principle.[35] Second, the principle of neutrality does not even require that the state treat equally any permissible conception of the good citizens may have or that the policies pursued by the state must have the same effect upon any and all (permissible) conceptions of the good life. This form of neutrality, which has been called neutrality of

effect or consequential neutrality, is both impractical and undesirable. Rather, what liberal neutrality entails is "neutrality of aim" or "neutrality of grounds" in the sense that arguments and considerations introduced in support of specific principles or policies should not appeal to particular conceptions of the good life but should regard all citizens and their (permissible) conceptions with equal concern and respect.[36]

Even on this interpretation the principle can be contested. Can policies be neutral in their justification in this way, or must not such claims to neutrality inevitably appeal to some (permissible) conceptions of the good over others? One version of neutrality, suggested by Ackerman's notion of "constrained conversation" and Rawls's "method of avoidance", is susceptible to this challenge since by unduly restricting the issues that can be placed on the political agenda or raised in public discussion there is the danger of reinforcing the status quo and inhibiting mutual understanding.[37] This strategy also suggests that there is a relatively fixed and clear distinction between those matters appropriate for public discussion and those that are not.

An alternative interpretation of liberal neutrality is able to avoid this objection. On this interpretation, the principle of neutrality is not understood as part of a general strategy of avoidance, but as part of what is required in showing equal concern and respect in a stronger sense: The state should not act in ways intended to promote a particular conception of the good life since that would constitute a failure to show each citizen equal concern

and respect. Unlike the method of avoidance, this interpretation of neutrality does not require keeping controversial issues off the political agenda in order to avoid moral conflict. Rather, it is quite consistent with the view that the state act in ways intended to promote rational discussion in order to help resolve potentially divisive social and moral conflicts.[38] On this interpretation neutrality is compatible with the attempt to secure a form of mutual respect or "militant toleration" in which difference is not only tolerated, but in which individuals seek to understand one another in their differences and arrive at a solution to the matter at hand in view of their common recognition of one another as free and equal citizens.

It will perhaps be objected that this view leads beyond liberal neutrality to a liberal or "modest" perfectionism. In fact, a similar argument for a more robust and pluralist public sphere has recently been made by Michael Walzer.[39] As paradoxical as it may seem, in view of the tremendous "normalizing" effects of the market economy and bureaucratic state there is little reason to assume that either a robust and pluralist public sphere or the other general social conditions for a more deliberative politics can be secured without the (self-reflective) intervention and assistance of the state. However, while I have argued that the state may be justified in acting in ways to secure such forums, I do not see that this requires embracing a perfectionist account of liberalism rather than the alternative principle of neutrality outlined above. For, on this interpretation, the actions of the

state are justified not because of their contribution to a particular way of life or conception of the good, but because robust and pluralist deliberative forums are necessary conditions for the effective exercise of basic rights of public and private autonomy. The state may at times be justified in acting in ways aimed at promoting or securing the conditions for a pluralist civil society not because it regards a pluralist society as a good for its citizens, but because it regards such conditions as requirements of practical reason in the sense that informed and reasonable deliberation could not be achieved without them.

(3) Finally, issues raised in the critique of liberal neutrality reemerge in a heightened form in the "dilemma of difference". For the claim is now that the pursuit of "justice" through the bourgeois legal form (e.g. general law aimed at the guarantee of equal rights) necessarily devalues difference and does violence to individuals, groups and practices which deviate from the established norm.[40] The dilemma of difference, which has been most extensively discussed in recent feminist jurisprudence, is inextricably entwined with the fundamental principle of legal equality. "Treat equals equally" requires a judgment about the respects in which two things are equal and what it means to treat them equally. But this gives rise to the following dilemma:

> By taking another person's difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person's difference into account--in a world that has made that difference matter--you may also recreate and reestablish both the difference and its negative implications. If you draft

> or enforce laws you may worry that the effects of the laws will not be neutral whether you take difference into account or you ignore it.[41]

Attempts to secure legal equality have generally pursued either an "assimilationist model" (which emphasizes the extent to which we are all alike) or an "accommodation model" (which seeks to create "special rights" on the basis of "real" differences). As some feminists point out, however, both models founder upon the same problem. In attempting to determine which differences deserve legal remedies and which should be ignored the background norms which establish terms of relevance and in light of which judgments of similarity and difference are made frequently go unchallenged.[42]

One response has been to resist the language of sameness and difference altogether and pursue a critique of law from the point of view of domination instead.[43] However, once the problem is framed in the above manner, that is, not as a problem of judgments of sameness and difference per se, but as a critique of the underlying norms and criteria guiding them, attention shifts to the process through which those norms have been defined. And here, I think, the strength of Habermas's approach emerges: The effort to secure equal rights and the protection of law for each citizen must go hand in hand with efforts to secure the exercise of the public autonomy of all citizens. Public and private autonomy mutually suppose one another and must be jointly realized to secure processes of legitimate lawmaking. With this model in view, one could then take up the suggestion of some feminists that the point is not for the law to be "blind" to difference, nor to fix

particular differences through the introduction of "special rights," but "to make difference costless".[44]

With respect to these three challenges to liberal democracy, I conclude that the abstract and highly procedural character of Habermas's version of the project of radical democracy is its principal strength and weakness. Its strength is that, in connection with his theory of communicative reason and action, Habermas generates a unique and powerful argument for a model of democracy in which the public and private autonomy of citizens are given equal consideration. It generates an intersubjective account of basic rights and a procedural democracy more attractive than any of the liberal or republican accounts currently available. It also offers a strong argument for the design of institutions that will facilitate discussion based on mutual respect. On the other hand, the highly abstract character of the proposal suggests that more work still needs to be done if it is to contribute directly to more specific debates about basic rights, the "dilemmas of difference", or what counts as the appropriate correspondence (or "meeting halfway") of liberal virtue and institutional design that, as Habermas concedes, is required if his notion of a procedural democracy and deliberative politics is to be effectively realized in the contemporary world.

Notes

1. Faktizität und Geltung (Frankfurt: Suhrkamp, 1992); English translation from MIT Press, 1996. All page references in the text are to the German edition.

2. Two recent attempts at a reconciliation can be found in John Ely, Democracy and Distrust (Harvard, 1980) and Robert Dahl, Democracy and Its Critics (New Haven: Yale University Press, 1989).

3. See for example the criticisms of communitarians (such as Charles Taylor) or "critical legal studies," e.g., Mark Tushnet, Red, White, and Blue (Harvard, 1988).

4. See, for example, the essays collected in Feminist Jurisprudence, ed. by Patricia Smith (Oxford, 1993); more generally, see Iris Young, Justice and the Politics of Difference (Princeton: Princeton University Press, 1990) and William Connolly, Identity/Difference (Ithaca: Cornell University Press, 1991).

5. see John Ely, Democracy and Distrust (Cambridge: Harvard University Press, 1980) and Brian Barry, "Is Democracy Special?" in Philosophy, Politics, and Society, ed. by P. Laslett (Oxford: Blackwell, 1979), p. 155-56.

6. Charles Beitz, Political Equality (Princeton University Press, 1989), p. 23.

7. For examples of this "public reasons" approach, which is influenced by the work of Rawls and Scanlon, see especially, Joshua Cohen, "Deliberation and Democratic Legitimacy," in The Good Polity, ed. by Alan Hamlin and Philip Pettit (Blackwell, 1989), pp. 17-34 and several essays by Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" Law and Philosophy 9 (1990-91): 327-70; "Original Meaning, Democratic Interpretation, and the Constitution," Philosophy and Public Affairs 21 (1992): 3-42; and "Reason and Agreement in Social Contract Views," Philosophy and Public Affairs 19 (1990): 122-57.

8. "Preferences and Politics," Philosophy and Public Affairs 20 (1991), p. 4.

9. Habermas cites Frank Michelman's "Law's Republic" as an example of this sort of republicanism; he might also have referred to some of the writings of Charles Taylor. Habermas's own position seems closest, however, to the "Madisonian" republicanism of Cass Sunstein; see "Beyond the Republican Revival," Yale Law Journal 97 (1988): 1539-90.

19. Faktizität und Geltung, p. 366; compare also Habermas's corresponding remark that a postconventional morality "is dependent upon a form of life that meets it halfway. . . . There must be a modicum of fit between morality and socio-political institutions" [Moral Consciousness and Communicative Action (Cambridge: MIT Press, p. 207-08)] and the interesting essay on this topic by Klaus Offe, "Binding, Shackles, Brakes: On Self-Limitation Strategies" in Cultural-Political Interventions in the Unfinished Project of Enlightenment, ed. by A. Honneth, et al. (Cambridge: MIT Press, 1992).

20. Sheldon Wolin, "Democracy, Difference and Re-cognition," Political Theory 21 (1993), p. 480.

21. I have in mind something like Dworkin's recent remarks on the "ethical foundations" of liberalism in "The Foundations of Liberal Equality," The Tanner Lectures (University of Utah Press, 1990), v. 11 and Stephen Macedo's discussion in Liberal Virtues (Oxford: Clarendon, 1990); see also the related criticism of Habermas's "constitutional patriotism" from an Hegelian perspective in Andrew Buchwalter, "Hegel's Concept of Virtue," Political Theory 20 (1992), p. 576.

22. Some support for this claim can already be found in the fact that the German 'Recht', like the French 'droit', means "subjective right" as well as "objective law".

23. Democracy and Its Critics, p. 169-170.

24. Ibid., p. 170.

25. For the principle of equal consideration of interests, see Dahl, p. 85; for a similar criticism (to which I am indebted) see Joshua Cohen's Review of Democracy and Its Critics in Journal of Politics 53 (1991): 221-25.

26. "Equality, Democracy and Constitution: We the People in Court," Alberta Law Review 28 (1990): 324-346.

27. Ibid., p. 328.

28. Ibid.

29. Ibid., p. 330.

30. Ibid., p. 346.

31. Ibid., p. 339.

32. For this use of the notion of "precommitment" and the Constitution as a "public charter", see Samuel Freeman, "Original

10. See also B. Manin, "On Legitimacy and Political Deliberation," Political Theory 15 (1987): 338-68 and David Miller, "Deliberative Democracy and Social Choice," Political Studies 40 (1992), Special Issue, pp. 54-67.

11. Cass Sunstein, "Preferences and Politics," p. 5; see also Jon Elster, Sour Grapes (New York: Cambridge University Press, 1983).

12. see Robert Goodin, "Laundering Preferences," in Jon Elster, ed., Foundations of Rational Choice Theory (New York: Cambridge University Press, 1985), pp. 75-101.

13. Specific proposals for realizing the ideals of a deliberative politics could range from something like James Fishkin's idea of a "deliberative opinion poll" to alternative procedures of voting and modes of representation; see Fishkin, Democracy and Deliberation (New Haven: Yale, 1990), Ian McLean, "Forms of Representation and Systems of Voting" in David Held, ed., Political Theory Today (Stanford, 1991), pp. 172-96; and Iris Young, "Polity and Group Difference," Ethics 99 (1989): 250-74 (which discusses the question of special or group representation).

14. Although I think Donald Moon overestimates the dangers of "unconstrained conversation," especially for individual privacy rights, he points to the difficult question concerning the kinds of institutional design that are appropriate to help ensure that the deliberations conducted in an "unconstrained conversation" influence the process of decision-making. Should there, for example, be a system of public voting? See "Constrained Discourse and Public Life," Political Theory 19 (1991): 202-29.

15. Habermas takes these terms from Nancy Fraser who used them to describe Habermas's two-track conception of the public, see "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in Habermas and the Public Sphere, ed. by Craig Calhoun (Cambridge: MIT Press, 1992).

16. See "What Does Socialism Mean Today?" New Left Review 183 (1990): 3-21.

17. see Die Nachholende Revolution (Frankfurt: Suhrkamp, 1990), p. 199.

18. Specific proposals for a shared "division of labor" can be found in recent discussions concerning "neocorporatist" and "associative" democracies, see especially, Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," Politics and Society 20 (1992), pp. 393-422, and the discussions that follow.

Meaning, Democratic Interpretation, and the Constitution," Philosophy and Public Affairs 21 (1992): 3-42.

33. see, for example, Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in Liberalism and the Moral Life, ed. by Nancy Rosenblum (Harvard, 1989); Joseph Raz, "Facing Diversity," Philosophy and Public Affairs 19 (1990): 3-46; and Michael Walzer, "The Communitarian Critique of Liberalism," Political Theory 18 (1990): 6-23. In the following section I draw at points on my "Liberal Neutrality, Pluralism, and Deliberative Politics," Praxis International 12 (1992): 50-69.

34. Walzer, "The Communitarian Critique of Liberalism"

35. See "The Idea of An Overlapping Consensus," Oxford Journal of Legal Studies 7 (1987), p. 9.

36. Rawls, "The Priority of the Right and the Ideas of the Good," Philosophy and Public Affairs 17 (1988): 260-68; Peter de Marneffe, "Liberalism, Liberty, and Neutrality," Philosophy and Public Affairs 19 (1990): 253-74; and Kymlicka, "Liberal Individualism and Liberal Neutrality," Ethics 99 (1989), p. 883-84.

37. Bruce Ackerman, "Why Dialogue?," Journal of Philosophy 86 (1989): 5-32.

38. "Moral Conflict and Political Consensus" in Liberalism and the Good, ed. by G. Mara, R. Douglas, and H. Richardson (New York: Routledge, 1991), pp. 125-147.

39. "The Communitarian Critique of Liberalism," p. 19.

40. See Iris Young, Justice and the Politics of Difference and Martha Minow, Making all the Difference (Cornell University Press, 1990).

41. Martha Minow, "Justice Engendered" in Feminist Jurisprudence, ed. by Patricia Smith, (Oxford, 1992), p. 232.

42. See Christine Littleton, "Reconstructing Sexual Equality" in Feminist Jurisprudence, ed. by P. Smith (Oxford, 1992); Deborah Rhode, Justice and Gender (Harvard University Press, 1989); and Habermas's discussion in Faktizität und Geltung, p. 509ff..

43. See Catharine MacKinnon, "Difference and Dominance" in Feminism Unmodified (Cambridge: Harvard University Press, 1987).

44. This position, which she calls the "acceptance model", is proposed by Christine Littleton in "Reconstructing Sexual Equality". I do not mean to suggest (nor does Littleton) that this is an easy task for, as Charles Taylor points out in a related discussion, there can arise conflicts between the "politics of

equal dignity" and "the politics of difference"--conflicts, for example, between equal opportunity and cultural membership--that cannot easily be resolved (see Multiculturalism and 'The Politics of Recognition', Princeton, 1992, p. 37.).