



Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. by
Juergen Habermas

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much a part of the American political scene as it is presently constituted. For example, the authors maintain that a participant in a debate fails to respect the norm of reciprocity if her arguments “appeal to any authority whose conclusions are impervious, in principle as well as practice, to the standards of logical consistency or to reliable methods of inquiry that themselves should be mutually acceptable” (p. 56). Now, this principle will appropriately exclude from the realm of debate those reciprocally minded people who talk gibberish, or who contradict themselves from one sentence to the next; but it will also leave out those who, for example, view religious texts as reliable moral sources. Lest I be misunderstood, I hasten to add that there are very good reasons to exclude religious considerations from the formation, say, of school curricula. But Gutmann and Thompson would have us believe that this exclusion can occur in advance of deliberation, through the stipulation of an uncontroversial formal constraint on deliberation. It seems clear, however, that achieving this result requires the kind of controversial philosophical argument which their theory is officially designed to rule out of court. Gutmann and Thompson’s position, therefore, yields the following paradox: Though it is officially committed to resolving controversial issues deliberatively, the theory leaves certain well-represented political positions out of the ambit of deliberation by definitional fiat, a result that is surely worse, from the point of view of the theoretical and practical ends which deliberative democracy was meant to serve, than engaging with them through the standard methods of philosophical argument.

Readers of *Democracy and Disagreement* will find much to admire within its pages, whether they are interested in it as a contribution to the growing field of deliberative democracy, or whether they look to it for its incisive discussions of some of the most controversial public policy issues of the day. But I think they will find that its central argument fails: Rather than convincing us that we ought to leave the resolution of these issues to deliberation among citizens and their representatives, the authors inadvertently make plain that there is still a place in societies marked by the “fact of pluralism” for the traditional, nondeliberative tools of the political philosopher.

Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. By Juergen Habermas. Cambridge, MA: MIT Press, 1996. 631p. \$40.00.

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Juergen Habermas, postwar Europe’s leading social and political philosopher, started his career more than three decades ago with a series of essays that critically examined the ideals of the bourgeois democratic revolutions of 1776 and 1789 from the perspective of Marxist class theory. Translated into English as *Theory and Practice* (trans. John Viertel, 1973), these essays were followed in 1962 by a landmark study, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (English trans. T. Burger and F. Lawrence, 1989), which has since appeared in 17 German editions alone. The kernel of Habermas’s argument in *Structural Transformation* was that a free public of private citizens, exchanging views and opinions with one another about the common good and reaching some common understanding about the public interest, was the guiding principle of the democratic form of government under the rule of law. The sociological developments of postwar capitalist democracies increasingly rendered this idea irrelevant: The reasoning public of the early bourgeois

republics became the consuming public of mass consumer societies; an unprecedented fusion of politics and economics created corporatistic interest groups that sought to become immune to legislative regulation; as more and more regulative acts were issued by administrative agencies and put into effect without legislative debate and deliberation, the legislative institutions fell into danger of losing their deliberative character and becoming empty chambers of power. The democratic public became a phantom public.

Thirty years later Habermas has returned to these concerns. Throughout his impressive peripetations in the areas of language philosophy, social action theory, cognitive moral psychology, and modernization and rationalization theories, this original concern with the fate of democracy in the contemporary world has not abandoned Habermas. Compared to *Structural Transformation*, the tone of *Between Facts and Norms* is less pessimistic. Whereas the earlier work exhibited a certain skepticism toward representative institutions and advocated the radical democratization of interest groups like trade unions from within, the later work rejects the Marxian critique of representative democratic institutions as utopian and philosophically ill-founded—wrong, then, not only in practice but also in theory. A two-track theory of democracy in which representative institutions exist alongside and contend with a vibrant and free public sphere and civil society of associations, social movements, and citizens’ initiatives is sketched.

Habermas argues that this two-track view should replace the simplistic political sociology of much leftist critique of existing democracies, since it presupposes that a single principle of organization—radical democracy—can be appropriately applied to all institutions and all spheres of social life (pp. 306ff). Not only must we adopt the two-track view of democratic institutions but also we must accept the logic behind money and administrative power as mechanisms for coordinating and solving collective action problems. The free market in goods, labor, and services is here to stay as a distribution mechanism, as is the complex, and often for the citizen impenetrable, organization of administrative and bureaucratic power (p. 303). Are democracy and social complexity compatible? Is not the price of this enriched sociological understanding of contemporary societies the abandonment of the radical democratic ideal?

The nerve of Habermas’s philosophical argument, as distinguished from his political sociology of democracy, is that the ideal of democracy—government for the people, by the people, and through the people—has to be reconceptualized without recourse to the faulty illusions of a united people, as if this were a single physical body in possession of one will, always clearly known to itself, assumptions which he has elsewhere characterized as representing a “philosophy of consciousness” (*The Philosophical Discourse of Modernity*, English trans. F. Lawrence, 1987). “This is not to denounce the intuition connected with the idea of popular sovereignty but to interpret it intersubjectively,” writes Habermas. “Popular sovereignty, even if it becomes anonymous, retreats into democratic procedures and the legal implementation of their demanding communicative presuppositions only in order to make itself felt as communicatively generated power” (pp. 301, 136).

Reversing Max Weber’s query about how political legitimacy can result from legality, Habermas asks how we can justify the legitimacy of legality. A well-known answer to this question in the history of Western political thought has been provided by the natural rights and social contract tradition, which in some version extends from Hobbes to Locke, Rousseau, and Kant. Habermas disagrees with the moral

philosophy as well as theory of society of these early liberal predecessors. Instead of beginning with a system of rights which supposedly precedes human association, he begins from the perspective of consociates of a form of life who are embedded in structures of communicative action, that is, of linguistically mediated forms of interaction based on the ability of hearer and speaker to accept or reject the validity claims of mutual speech acts.

Applying to this model of communicative freedom the discourse principle, namely, the metanorm that "just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses" (p. 127), Habermas derives a system of rights as well as shows how conditions for the exercise of political sovereignty can be institutionalized. The system of rights is not viewed, as it usually is, as analogous to property claims, which in some sense belong to the individual and which protect against the incursions of others. Rather, rights are understood as those very general norms that regulate the interaction of consociates in the practice of their communicative freedoms. These are the basic rights to the greatest possible measure of equal individual liberty, rights of participation and deliberation that accrue to one in voluntary associations, rights of legal protection, rights of equal opportunity to participate in processes of opinion- and will-formation through which citizens exercise political autonomy, and rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded (pp. 122-3).

Habermas's answer to Weber's query is that legality, or the system of law, is legitimate because the law is the most abstract medium through which consociates sharing a form of life can regulate one another's communicative freedom. That freedom can only be exercised through the practices of participation, legislation, deliberation, and contestation, through which consociates can see themselves as authors as well as addressees of the law. The facticity (*Faktizität*) of the law—its capacity to coerce, or the fact that "sovereigns without swords are but words" (Thomas Hobbes)—is based on its "validity" (*Geltung*), that is, on the democratic institutions, procedures, practices, and ultimately civic culture which precede the law, although these can only be exercised in the medium of the law. Habermas names this the "paradoxical emergence of legitimacy from legality" (pp. 130-1).

Much future debate about Habermas's work undoubtedly will center around this ambitious and complex argument, which ties together metaethics and democratic theory, rights discourse, and a reinterpretation of popular sovereignty in a novel and provocative way. The central argument that the system of rights and democratic sovereignty are not incompatible moves too fast and too smoothly. Even if one did not subscribe to a possessive individualist conception of right, conceptual as well as institutional conflicts and dilemmas exist between the protection of basic rights and the exercise of popular sovereignty. Think of the *Bowers v. Hardwick* decision of the U.S. Supreme Court, in which a particular interpretation of majoritarian sentiment left homosexual citizens of the United States without the protection of their basic civil and privacy rights. In the European context, one need only recall the bitter fight in Germany about the constitutionally guaranteed right of asylum of foreigners and its curtailment by a parliamentary majority. The language of "consociates of a form of life," which Habermas chooses carefully, may still not be complex enough to reflect the moral, sexual, ethnic, and linguistic cleavages of the democratic polity and the resulting dilemmas of majority rule versus the protection of the rights of unpopular minorities.

What has changed in the nearly thirty-five years since the

publication of *The Structural Transformation*? Has the world altered, or have our concepts become more attuned to detecting "existing reason" in the practices of democracies? A statesman-like optimism pervades the pages of *Between Facts and Norms*, which undoubtedly has to do with the euphoria of the democratic moment worldwide after 1989. What is missing in this work is a recognition of "democracy's discontent" (Michael Sandel). The rise of right-wing charismatic leaders such as Perot or Berlusconi, who exploit the circus of the electronic media; the surge of neofascist movements in Western Europe, which mobilize strong we-identities against foreigners, immigrants, and asylum seekers; the dismantling of the welfare state by neoliberal governments on both sides of the Atlantic; the tremendous sense of apathy, cynicism, and disillusionment with the political process visible in so many democracies and as manifested in lower rates of voter turnout and civic membership; the eclipse of popular sovereignty through the rise of new financial, capital, and communications networks—all are missing from Habermas's account of democracy. Like the mature Hegel of the *Philosophy of Right* (1821), the Habermas of *Between Facts and Norms* dispenses retroactive wisdom in searching for the "particles and fragments of an 'existing reason' already incorporated in political practices" (p. 287) of existing democracies. The question is whether these particles and fragments are sufficient to reignite the flames of democracy, which either are burning tepid in the contemporary world or appear to be ignited by the wrong forces.

Liberalism and Community. By Steven Kautz. Ithaca, NY: Cornell University Press, 1995. 232p. \$29.95.

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Despite its title, this volume is not an extended discussion of the relationship between liberalism and the notion of political community. Rather, it purports to be a defense of what the author calls "classical liberalism," which he identifies with Locke and Montesquieu, from the criticisms of those contemporary political theorists he labels "communitarians." Kautz is well aware of the diversity of meaning attached to these words and devotes substantial effort to clarifying and justifying his particular use of them. Classical liberalism is characterized in the familiar terms of austere individualism and sober appreciation of the dangers of individual passion and social aspiration. Humans are natural enemies; to achieve peace they must cultivate the virtues of moderation and toleration. The primary end of political association is security rather than justice, and security is attained by limiting the scope of politics and thereby facilitating accommodation. The primary benefit is liberty, whereby each individual may pursue his or her own definition of happiness as well as his or her circumstances permit. This is how many of us define classical liberalism, and if Kautz chooses to defend this version of the creed, so be it.

When it comes to communitarianism, however, his use of the term is less clear and more problematic. Although initially (p. 2) he stipulates that communitarianism is distinguished primarily by the mere fact of antiliberalism, he also acknowledges that his three chief targets, Richard Rorty, Benjamin Barber, and Michael Walzer, are not unequivocal enemies of liberal society. Their illiberalism stems primarily from two beliefs. The first is that human liberation can be extended beyond that achieved in liberal society by means of political engagement. The second is that the instrumental good of individual security must be supplemented with some notion of a genuine public good. Kautz argues that in each