

## POLITICAL THEORY

**Rejecting Rights.** By Sonu Bedi. New York: Cambridge University Press, 2009. 220p. \$81.00 cloth, \$29.99 paper.  
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—Lasse Thomassen, *Centro de Estudios Políticos y Constitucionales*

Rights are bad for democracy and for freedom and equality. Relying on rights leads to a democratic deficit, and to confusions and arbitrary decisions that run counter to freedom and equality. Instead, we should turn to legislative purpose and limit government to act only to prevent demonstrable nonconsensual harm. This is the central thesis of *Rejecting Rights*. The book is divided into three parts: a critique of contemporary defenses and critiques of rights, Sonu Bedi's own alternative, and the application of this alternative to issues as they have arisen in cases before the U.S. Supreme Court.

Rights are detrimental to democracy insofar as they act as prepolitical trumps against democratic majority decisions. There is no necessary link between (individual freedom) rights and democracy, Bedi argues, and so we can reject rights and improve democracy at the same time. Rights are also problematical for freedom and equality. Here, it is a question of the assumptions behind appeals to rights, which often rely on a distinction between public and private: A right to something creates a private sphere out of reach of government action. But this has perverse effects because privacy can also be a sphere of subordination and violence as, for instance, in the case of "domestic" violence. What is more, the tolerance of private acts such as homosexuality implies a hierarchy between a norm expressing the worldview of the majority and deviations from that norm. Thus, rights come at a price, reproducing stigma and moralizing distinctions between good and bad behavior. Finally, rights are problematical for freedom and equality because they rest on categorizations and classes, for example, "race" and "black," and the choice of categorizations and classes is potentially arbitrary.

Bedi's alternative is "a theory of justification." The focus should not be on individuals or groups but on the actions of the state and on whether these can be justified, according to a basic criterion: "The democratic state may only seek to minimize (mitigate, prevent, regulate, etc.) demonstrable, non-consensual harm" (p. 60). The point of the theory is to set out the limits to permissible state action, and "[i]t stipulates what the polity may do, not what it must do" (p. 85), thus leaving democracy less constrained by constitutional norms. It is in this sense that Bedi is for limited government, and he is very clear in his assessments of what the state may or may not do, and very consistent in not telling us what the state ought to do within the

spectrum of permissible policies. Thus, he suggests that both neoliberal and socialist policies may qualify as legitimate so long as they seek only to prevent demonstrable nonconsensual harm. And when it comes to the example of equal protection, he argues that we must reject morally irrelevant characterizations and classes (namely, those not aimed only at demonstrable nonconsensual harm), but he also leaves room for affirmative action programs, with the proviso that they seek only to minimize harm.

Bedi's theory of justification rests on the basic moral values of democracy (understood as majority rule), freedom and equality, and the avoidance of demonstrable nonconsensual harm. It looks to the reasons and intents of the state's policies; in this sense, too, it is a theory of justification, and the emphasis is always on democratic justification: The state must justify its actions with the right kind of reasons, and this must be done through democratic procedures. In the context of jurisprudence, this means that we should aim for rational review rather than strict scrutiny, again leaving more to democracy.

Bedi draws on John Stuart Mill for his conception of harm. The state can act on nonconsensual harm, and here the consent/nonconsent distinction cuts across the public/private distinction, which Bedi rejects. For instance, it does not matter whether rape occurs in the bedroom or in the street. The harm must be demonstrable, by which he means that it is subject to "publicly ascertainable evidence," and the means to minimize the harm must be chosen "in good faith" (p. 68). The latter implies that the state action must aim *only* at minimizing harm; the state cannot act with a moralizing intent hidden behind claims to minimize harm. For instance, if the state outlaws gay sex with reference to its nonprocreational nature, we may rightly ask why other forms of nonprocreational sex are not similarly outlawed.

In the third part of the book, Bedi shows that the Supreme Court has, to some extent, moved away from rights and toward purpose, which is also a (partial) move away from strict scrutiny toward rational review. What is more, this is a good thing, he argues, and the Court should continue moving in this direction. He argues that we should not worry about rejecting rights and strict scrutiny because rational review will do the job. It will give more room to democracy, and it will protect freedom and equality against irrational laws that do not seek only to minimize demonstrable nonconsensual harm.

The book is written in a clear and direct language, making it accessible to both students and researchers. It is also provocative, both in its thesis (reject rights!) and its use of examples and comparisons, but this only makes it better. And it illustrates its theoretical points with empirical political and legal cases and develops its central thesis through a well-argued discussion of Supreme Court jurisprudence.

Like most analytical political theory, the argument of the book substitutes one set of concepts and distinctions for another, claiming that (only) the new concepts and distinctions just manage to secure democracy, freedom and equality, and so on. One of those concepts is demonstrable nonconsensual harm. Yet Bedi's discussion of the terms of this concept shows that it can do the job only to the extent that citizens agree about what constitutes demonstrability, consent, and harm. Take, for instance, the following quotation: "[I]n many . . . cases there will be good faith disagreement over demonstrability, whether a particular activity leads to harm. . . . There are no right answers here, only good faith decisions by the majority" (p. 72). Here, the acknowledged fact of disagreement undermines the ability of the demonstrability requirement to protect minorities against the tyranny of the majority.

This seems to me to be a general point: When we probe the concepts and distinctions of *Rejecting Rights*, their force is undermined by potential disagreements. Those disagreements can be trumped by democratic majority decisions, but this reintroduces the threat of majority tyranny that the author otherwise wants to protect us against. I do not claim to have a way to solve this; nor is my point that Bedi fails to find the truly neutral theory of government. As he rightly argues, such a theory does not exist. But perhaps the very concerns he has with the failures of competing liberal attempts to square democracy and freedom and equality should lead us to be more wary about the work that concepts and distinctions can do. That said, it is the merit of the book that it forces us to rethink our common conceptions about rights, democracy, freedom, and equality, and it is highly recommended for political scientists and legal scholars with an interest in contemporary theories, and uses, of rights.

**Democracy as Problem Solving: Civic Capacity in Communities Across the Globe.** By Xavier de Souza Briggs. Cambridge, MA: MIT Press, 2008. 400p. \$70.00 cloth, \$28.00 paper. doi:10.1017/S1537592710003683

— Carmen Sirianni, *Brandeis University*

This book makes a significant contribution to an emergent international literature that looks at democracy through the pragmatic lens of problem solving. Xavier de Souza Briggs locates this in the tradition of John Dewey, though its contemporary variants are much more explicit about the role that citizens, as well as different kinds of civic associations and intermediaries, can play in working with other stakeholders to solve important public problems in ways that are innovative and accountable. He steers a quite interesting path within this literature and brings to bear his own six case studies designed for theory building, not rigorous comparison or hypothesis testing. The six are paired across continents, with the U.S. cases as the repeating ones. Thus, under the policy problem of managing

urban growth, the Salt Lake City region is paired with Mumbai, India. On restructuring the economy, Pittsburgh is paired with a region within Greater São Paulo, Brazil. For youth development, San Francisco is paired with post-apartheid Capetown, South Africa.

The core of Briggs's argument is that in many policy domains, public problems have become so complex and have so many interacting parts that new forms of civic capacity need to be built that are customized to address the specific nature of the challenges they pose (in addition, of course, to aligning with local and regional civic and political cultures). Aggregate measures of social capital do not tell us much about how this can be done, and historic civic legacies (see Robert Putnam, *Making Democracy Work*, 1993), while important, often disguise emergent possibilities for "resourceful" (p. 300) civic innovation represented by new intermediaries and coalitions. While he does not say so directly, Briggs also implies that the classic multitiered civic associations in U.S. history (see Theda Skocpol, *Diminished Democracy*, 2003) have also lost much of their relative capacity because of the increasingly complex nature of many problems and the multifarious forms of coalitions and partnerships that need to be generated to address them. I would argue further that the classic multitiered associations of the nineteenth and early twentieth centuries displayed almost no propensity to develop complex policy frames and capacities for the problems of the late twentieth century and beyond, and that in addition to the causes that Skocpol pinpoints, the diverse organizational ecologies generated to respond to such complexity tended over time to undermine the structural privileges of the multitiers as civic aggregators at the local level and, thus, in the democratic system as a whole.

Briggs's analytic approach draws fruitfully from the work of Clarence Stone, especially upon his social production model of "power with" in urban regimes (though Briggs goes beyond the regime model), as well as Stone's specific analysis of what it means to build civic capacity for reforming urban schools. The latter, according to Stone and his colleagues, are "high reverberation subsystems . . . characterized by frequent reshuffling of mobilized stakeholders, multiple and strongly felt competing value and belief systems, deeply held stakes by both educators (the professional providers of education) and parents (the consumers), and ambiguous boundaries" (Clarence Stone et al., *Building Civic Capacity*, 2001, p. 50). Only new forms of civic capacity and mobilization are likely to be adequate to such systems and, Briggs adds, to many other systems (ecosystems, public health and safety, housing, employment, urban and regional development).

Briggs stresses models of democratic coproduction and reciprocal accountability among various partners (civic, government, business, other institutions) because implementation is as critical as setting agendas or enacting legislation. Leadership for such partnerships can come from