

**Phil 290, February 22, 2011**  
**Christiano, *The Constitution of Equality*, Ch. 7**

**Limits to democratic authority:**

When the democratic assembly (positively) makes a decision that encroaches on:

1. democratic rights (e.g., right to vote), or
2. individual liberties;

this particular decision has no authority.

When the democratic assembly (negatively) fails to secure:

3. democratic rights,
4. individual liberties, or
5. a basic economic minimum, or
6. persistent minorities do not get their way in a minimum of outcomes,

then its authority, in general, weakens.

These limits are:

- Not *countervailing considerations* that weigh against the assembly's authority.
  - For example, the argument is not that when the democratic assembly's decision violates public equality, we have *conflicting* duties to ensure public equality, one of which tells us to obey the decision, the other of which tells us not to.
- Instead, they are *undercutting considerations* that show that the assembly lacks authority (in the decision at hand or more generally) in the first place.

(Compare your property rights in a bicycle. A countervailing consideration against respecting them is that I need it to rush someone to the hospital. An undercutting consideration is that you stole it from me.)

These limits are also *internal* to democracy:

- It is not simply (as Ely famously argued) that certain limits are *necessary for democratic processes*. TC finds this inadequate because it:
  - i. Protects only *political* liberties (e.g., voting, political speech), not *personal* liberties (e.g., religion).
  - ii. *Presupposes* that legislation that undermines the proper functioning of democracy (e.g., that denies some people voting rights) is beyond the limits of democratic authority. But why?
- Instead, the limits are justified by the *very same values* that justify democratic authority in the first place, namely public equality and the interests in judgment.

**Two accounts of limits of democratic authority**

A division-of-labor account of how this works:

- Certain outcomes are incompatible with public equality, or the equal advancement of the interests in judgment. So there is no violation of public equality/interests in judgment in preventing these from being implemented, regardless of whether this is done by democratic procedures. (One might call this: "substantive public equality.")

- But there is still a wide range of outcomes compatible with public equality/interests in judgment. So there is a violation of public equality/interests in judgment in implementing one of these without following democratic procedures.

Questions:

- Why doesn't TC pursue this argument?
- If all the outcomes are compatible with PE/IJ, then *why* is there a violation of PE/IJ in implementing one of them undemocratically?\*

TC's account:

- When the decisions of the democratic assembly "publicly violate equality"—in one of the ways 1–6—...
  - Note that TC seems to be distinguishing between a "public violation of equality" and "a violation of public equality" (p. 265). What is the difference?
  - But maybe he needs the distinction between a public violation of equality and a mere violation of public equality to resolve problem \* above.
- ...the DA expresses that it rejects public equality as a norm over its behavior. It becomes a mere collection of particular persons abusing their power
  - TC sometimes puts the point in expressive or intentional terms: "they *intend* to violate public equality by their legislative action."
  - How can we attribute such intentions to the DA?
  - How would this even work in a referendum?
  - Why are such intentions necessary?
- So it no longer publicly realizes equality.
  - Why is authority only lost over the decision at issue? If the DA is really rejecting PE as a norm, then shouldn't it lose its authority more generally? The division-of-labor explanation seems to give a clearer answer.
  - A very puzzling passage: Even though the DA no longer publicly realizes equality, still interference with the DA is in violation of PE. "So even though it may be inconsistent for the majority to complain that it is not being treated in accordance with public equality when it is stopped from making decisions that violate public equality, it does not follow that they are not being treated in violation of public equality."

*Individual liberties:* Freedom of thought, expression, association, and private pursuits. Justified on the same grounds as democratic rights.

- The interest in being at home in the world is advanced by freedom of association and private pursuits.
- The interest in avoiding cognitive bias in favor of others' interests is also served by individual liberties, which allow one to live one's life according to one's *own* conception of one's interests.
- The interest in learning about justice is advanced by freedom of expression and association.
- The interest in respect is advanced by freedom of association.

So fundamental to well-being that no society that set them back could be thought to advance the common good. Thus, any fundamental undermining of these basic liberal rights would be a publicly clear violation of equality.

- Is it essential to the argument that these are the *same* interests as the interests that ground democratic authority? Wouldn't it be enough to show that they are interests that everyone can see are being set back?

*Economic minimum:* Necessary for exercising liberal and democratic rights.

- "Less than an economic minimum would fail to take the interests that ground liberal rights seriously;
- "but to require more than an economic minimum as a condition of democratic authority would be to fail to take the interests behind democracy seriously." This is because there is reasonable disagreement about what justice requires in the distribution of income.

### **Judicial Review:**

- Constitutional court does not itself realize public equality, so it has no inherent authority. We do not owe it to the constitutional court to obey it in the way in which we (usually) owe it to the democratic assembly.
- But suppose the court acts when the democratic assembly also has no inherent authority. Then its lack of inherent authority is not a serious objection to it.
- And suppose it strikes down legislation that violates public equality. Then the court will have at least a kind of instrumental (Raz-ian) authority.
- However, the loss when the court makes a *bad* decision (say, striking down democratic legislation that accords with public equality) is a *double loss*.
  - In what sense a "double" loss? This seems to presuppose (i) that there is some standard of what counts as public equality *independent* of what the democratic assembly has decided (i.e., substantive public equality) and the court's decision (ii) violates that standard. But why is there a double loss when the court's decision does not violate that standard (even though the DA's decision didn't violate that standard either), i.e., when the court selects a different decision that still satisfies substantive public equality?
- This implies that a constitutional court can be justified only if the good decisions *significantly* outnumber or outweigh in importance the bad decisions.

### *Replies to Waldron:*

1. Why suppose that the failure of respect displayed in limiting a democratic legislature's decision is more serious than that involved in limiting (say) liberal rights?
  - a. Seems to me fairly decisive. But for some reason, TC suggests that this is not, since Waldron might claim that even decisions to withdraw democratic rights have authority: that everything is up for grabs. But I don't see how this claim would help JW. Again, why is the failure of respect displayed in limiting the DA's decision less serious than the failure of respect displayed in denying people democratic rights henceforth?
2. The claim that everything is up for grabs either leads to self-defeat, or requires consensus.
  - *The basic idea:* It is question begging simply to implement a policy about which people disagree. Instead, people should decide by majority vote.

- *Either* we just assume that people don't disagree about deciding by majority vote...
- ... *or* we accept that people do disagree about deciding by majority vote. But then what do we do? If we settle whether to decide by majority vote by majority vote, then aren't we question-beggingly implementing a policy about which people disagree? (Compare the argument against Singer in *Rule of the Many*.)
- *Lesson*: Our justification for democracy must be based on something that is not "up for grabs," that we take as true or valid, independently of people's opinions about it. Simply the principle of equal respect for judgments? But that seems ad hoc. Instead, a deeper grounding in the values that explain why we should respect judgments.

### **Persistent minorities:**

In *the pure case*, the majority doesn't act out of contempt for the minority, but the minority rarely gets its way.

As we noted above, TC's "moderate proceduralist" response applies a "minimum outcome standard."

Why are persistent minorities a problem?

1. Substantive interests of the minority probably being ignored.
  - This is what the *pure proceduralist/instrumentalist* response says.
2. Interests in conformity not being equally advanced.
  - "Individuals have conflicting interests in how their common lives are to be organized. Democracy provides a publicly fair means by which to resolve these conflicts by giving each equal resources in determining the outcomes of collective decision-making about their common life... In these circumstances the minority does not have its interests in the common features of their society realized at all."
    - But this is true only if the interests are interests in conformity.
  - "These circumstances are different from the usual circumstance where it is difficult to compare how well people are doing. Here one group is getting very little if anything of what it desires. This permits us to make crude comparisons between their well-being and that of others. Clearly, if a group never or almost never has its way in the process of collective decision-making then it will not be able to provide a corrective to the cognitive bias of the majority in making the laws."
    - But both these points seem to appeal to *substantive* interests.
  - "They will not be able to make the larger world it lives in a home for themselves." Also: "the minority rarely gets its way on any of the properties of the common world it shares with the majority. It suffers from a kind of global alienation from the political process. Its members live in a world they do not really understand or recognize and which is not suited to their conception of social life...[The majority's] conception of justice as well as its conception of how to organize social relations and the cultural goods holds sway."
    - Which interpretation of the interest in at homeness is being assumed here?
  - "And since other citizens will experience no need to listen to their ideas about justice and well-being, they will not learn much from the democratic process."

- “Finally, since they can see that these interests are being neglected by the democratic process, they will have reason to think that they are not being treated as equals by the society at large. So they will not have their equal status recognized and affirmed.”
  - Note that this is not an appeal to an interest in respect *for judgment*. Instead, it is an interest in respect which others give one when they treat one’s interests equally. But then this point depends on already having identified interests that are not treated equally insofar as there are persistent minorities.

*Outcome views:*

- *Equal preference satisfaction*: each person’s preference ought to be satisfied to an equal extent.
- *Proportional preference satisfaction*: a person’s preferences should be satisfied in proportion to the average size of the coalitions in which he belongs.

TC’s objections:

1. “instrumentalist... and possibly requires... nondemocratic institutions.”
  - a. It seems instrumentalist only insofar as it views preferences as indicators of substantive interests. Otherwise, it seems to appeal to interests in conformity.
  - b. In a sense, interests in conformity might be satisfied by nondemocratic institutions (so long as there were some nondemocratic mechanism of preference revelation). But, to the extent that TC himself seems to appeal to interests in conformity, this might be as much of a problem for him.
2. “we cannot assume equal or proportional preference satisfaction views because we cannot make publicly clear sense of the comparisons that must be made in order to sustain them” (295).
  - a. If this is supposed to be a problem for only for using preferences as proxies for substantive interests?
  - b. Or is it also supposed to be a problem for interests in conformity? One can see how it might be. Arguably, some outcomes are more important for some people’s at homeness than for others’.
  - c. TC’s idea would then be that the only way to *publicly* equally advance the interest in at homeness, given that we can’t make the necessary comparisons, would be democracy + limits, just as the only way to publicly advance substantive interests is democracy + limits. But this is a little confusing, since the interest in at homeness was supposed to be part of the explanation for the requirement of publicity in the first place.