

Phil 290, March 8, 2011
Estlund, *Democratic Authority*, Ch. 4–6

Critique of Fair Proceduralism:

Fair Proceduralism: Voting is a fair procedure for making decisions when people disagree.

Appeal:

- Doesn't invoke independent standards for evaluating outcomes. These seem controversial, or question begging. There is disagreement about the standards.
- Doesn't require voters to be informed, rational, etc. Not all voters are!

Basic objection: Why isn't flipping a coin at least as fair as voting?

The relevant sense of "fairness":

- Fairness an *occasional* value: That something is fair does not entail that it is morally required, or that there is anything to be said for it. One might not be morally required to be fair, fairness might not matter. (E.g., giving to this panhandler rather than that one.)
- *Substantive fairness*: When each person has exactly what he or she ought to have. (E.g., the A students have A's, the F students have F's.)
- *Retrospectively fair*: When it results from a fair procedure. (E.g., a lottery result.)
- *Prospectively fair*: When it leads to substantive fairness. (E.g., reading student's exams carefully)
- *Noncheatingly fair procedure*: Conducted according to the rules that constitute it. (E.g., the lottery isn't rigged.)
- *Intrinsically fair procedure*: When the rules themselves are nonretrospectively, nonprospectively fair. This is the sense in which majority rule is supposed to be fair.

Fairness as Retreat: The purpose of intrinsic procedural fairness.

"It is an important fact... that the idea of a fair procedure would not even arise if it were common knowledge that everyone agreed about what the correct decisions is. In that case no one would have a decent objection to simply doing it rather than substituting a procedure whose outcome might be uncertain. This reflects an intuitive priority of substance over procedure."

- Isn't there another explanation, which doesn't assume that substance takes priority over procedure? If everyone *agrees* about what the correct decision is, then no further question of procedural fairness arises, *because it has already been satisfied*.

Needed when there is:

1. Disagreement about what we ought to do, or
 2. agreement that there is no procedure-independent standard of what we ought to do.
- We turn to experts. But there is not consensus about experts.
 - We turn to procedures that lead to good decisions. But there is not consensus about this...
 - Intrinsic procedural fairness is the last stage of the retreat. (This is why it is an occasional value.)

- Even so, there needs to be consensus about *something*: everyone should be taken equally into account.

A procedure is intrinsically fair just insofar as it is (fully) *anonymous*: insensitive to (any) *personal features*.

A procedure is not anonymous, and so not intrinsically fair, at least one way, when it is *aggregative*: the procedure is sensitive to what people want or choose.

- Examples
 - A benevolent dictator's decree: aggregative.
 - Coin flip: not aggregative.
 - Majority rule: aggregative.
- Aggregativity is a procedure-independent standard: it reflects the judgment that the *result* is *good* when people get what they want or choose.
- Sensitivity to what people choose is no more fair than sensitivity to their race.
- It may be morally *better*, but not because it is more fair (because it is not more fair).
 - Note that sometimes it seems *wrong* to appeal to preferences: e.g., conscription.
 - And sometimes *not* wrong to appeal to race: e.g., giving more of a say to Native Americans about reservation policy.
- Majority rule may be morally better than a coin flip, but not because it is more fair (because it is *less* fair).
- The point isn't that we should seek fairness at all costs, and so opt for a lottery.
- On the contrary, the point is that a lottery is absurd, so we shouldn't seek fairness at all costs.
- What our opposition to a lottery reveals is that we need to appeal to *some* procedure-independent, "substantive," "epistemic" element. There's no getting away from it.
- The question is *how* to bring this epistemic element in.

"If fairness is not even such an important thing (as I argue), who cares whether true fairness means full anonymity? I think that the answer is that appeals to fairness strike us as so attractive precisely because they purport to be fully neutral, not carrying any conception of good ends other than the procedure itself. But only full anonymity, which often had little moral value, actually lives up to that. Anything less than full anonymity imports nonprocedural and potentially controversial values. I am all for that. My approach, epistemic proceduralism, is distinctive partly for insisting on something more than procedural fairness: an appeal to democracy's epistemic value. The point here is that it is just false advertising to say of any procedure that is not fully anonymous that it involves nothing but procedural fairness."

Critique of intrinsic democratic proceduralism:

Intrinsic democratic proceduralism: Only democratic political arrangements are legitimate, and the value of their being democratic does not depend on any qualities of democratic decisions other than whether they are democratic in two senses: (a) decisions must be made by democratic procedures, and (b) they must not unduly undermine or threaten the possibility of democratic procedure in the future.

- How is this related to fair proceduralism?

- Need not say that there are no substantive standards, only no substantive standards for evaluating *political outcomes*.
- DE's basic criticism: Ultimately, forms of intrinsic democratic proceduralism *do* appeal to substantive standards for evaluating political outcomes.

Social choice theory:

- Not concerned with *votes*, but instead with *preferences*.
- Not concerned with *actual causal/temporal procedures* for deciding outcomes, but instead with *rules of aggregation*, which say when the outcome appropriately reflects preferences.
- Therefore, not concerned with fair procedures, but instead with substantive standards.
- *Examples:* A dictator might unilaterally impose the outcome that best satisfies the aggregation rule, given people's preferences. Or we might use accurate polls, rather than voting. Three objections to this:
 1. This would not be *fair*, since (intrinsic, procedural) fairness requires that the outcome be causally produced by the procedure. (Example: a coin flip that happens to agree with what the person was going to do anyway.)
 2. It would *violate the Acceptability Requirement*: "doing what the people *say* to do is the best generally acceptable epistemic route to doing what they really *think* should be done."
 3. It would also *not satisfy an interest in influence* (of choices), even if it satisfied an interest in conformity (to preference). Note: "For what it is worth, it seems clear that rule by the people is something different from rule in accordance with the people's views. Even if some mechanism forces or guarantees that people's views are tracked, putting their views 'in control' in a certain way, that is not the same as *people* being in control."

Habermas:

- "outcomes are legitimate when they could have been produced by ideal deliberative procedures."
- But this is a *substantive standard*, independent from how the outcome was determined.

Cohen:

"principle of deliberative inclusion."

- Roughly equivalent to Rawls's liberal principle and DE's Acceptability Requirement...
- ...except that JC suggests that it is *intrinsic* to democracy.
- DE finds this latter suggestion unhelpful. "A principle of democracy must surely assert something like inalienable popular sovereignty, the right of citizens actually to authorize their government, not merely to have a government that is justifiable from their point of view."
- DE also claims that JC in effect appeals to substantive standards for evaluating political decisions. Is this right? Does the mere appeal to the principle of deliberative inclusion appeal to substantive standards for evaluating political decisions, if it is appealed to, as DE appeals to it, *only* as a constraint on legitimate/authoritative procedures?

Critique of Fair Deliberative Proceduralism:

A lottery is objectionable, because it does not give everyone a hearing (?). Is the problem that this is:

- *Unfair*, as DE seems to suggest?
- Or that it does not *respect* people as competent judges, as seems to be Waldron's point?

DE: This procedure is defensible or attractive only because it smuggles in an epistemic element.

1. "The question is whether this strikes us as any valuable form of respect even if we purge the scene of all traces of epistemic value... let participants have views of no better than random quality... and let the process of deliberation produce results just as good or bad, wise or foolish, as if they have been pulled randomly from a hat... what kind of respect is present here that would be missing, and missed, if a policy had been chosen simply at random?"
 - Perhaps Waldron could reply: Granted, if the outcomes have no epistemic value, *then* majority decisions are not authoritative or legitimate. But this does not mean that the decision is authoritative or legitimate *because* it leads to good outcomes. It could be authoritative or legitimate instead because that is what respect for competent, equal judges requires. It might be merely be an additional fact, not necessary for the argument, that competent judges tend to produce good outcomes.
2. No more or less fair than dart-throwing, since it gives "every participant an equal chance to use certain skills that are unequally possessed to influence the procedure in the direction of what they prefer." So if we favor deliberation over darts, we must be implicitly appealing to epistemic considerations.
 - Perhaps Waldron could reply: "This assumes that the *only* two values are fairness or substantive goodness. But I am appealing to a third value, respecting people as competent judges, and this would not be satisfied just as well as dart-throwing."

Critique of rational deliberative proceduralism:

Rational deliberative proceduralism: legitimate/authoritative procedures are those that are sufficiently procedurally, but not necessarily substantively, rational.

- Objection: How can a procedure be rational—involving the recognition of reasons—but not lead to better outcomes?
- Reply: Procedures might help people to recognize reasons, but not lead to better outcomes. (But the objection seems off-base from the start: RD doesn't have to say that rational procedures *don't* lead to better outcomes. All it needs to say is that *what recommends the procedures isn't* that they lead to better outcomes.)
- Objection: Not clear why reason-recognition requires democratic participation.
- Objection: Reason-recognition just one intrinsic value among others.

Critique of Correctness theories:

Legitimate/authoritative decisions

= substantively correct decisions?

= decisions reached by procedures most likely to be substantively correct?

= decisions reached by procedures, from among a set restricted in a certain way, most likely to be substantively correct? But unless more is said about the restriction, epistemic proceduralism is a correctness theory.

1. *Invidious comparisons:*

- Rousseau's theory might seem to avoid them: the majority is most likely to be substantively correct.

2. *Deference:*

1. In order for the minority voter to *believe* that the procedure is legitimate according to the correctness theory, the minority voter must believe that the decision reached by the procedure on this occasion is likely to be true, even though it conflicts with her individual judgment.
 2. The following principle is questionable:
Probability supports moral judgment: One who accepts that the correctness of a moral judgment is extremely probable all things considered has good reason to accept the moral judgment.
 3. Therefore, it is questionable that minority voters have good reason to believe that the procedure is legitimate according to the correctness theory.
 - In what way is this an objection to a theory legitimacy? (Is it a desideratum of a theory of legitimacy that it imply that people generally have good reason to believe that it is legitimate?)
 - Why must the minority voter believe that the decision reached by the procedure *on this occasion* is likely to be true? Isn't it enough to believe that the procedure is *reliable over time*, which is compatible with being certain that it is mistaken on this occasion?
3. *Demandingness:* Requires implausibly strong claims about the epistemic virtues of democracy.
- How should we understand the epistemic virtues of democratic procedures?

Requirement sensitivity:

if something is required by justice, then the legislature legislates it and...

Permission discrimination:

if the legislature legislates it, then it is permitted by justice...

that is better than random.

Limits on democratic decisions:

There may be some, but they don't stem from democracy.