

Phil 116, March 1, 2010
Waldron, The Constitutional Conception of Democracy

Two kinds of democracy rights:

- (a) Rights *constitutively* required for democracy: e.g., procedural matters like rights to vote
- (b) Rights required for the *legitimacy* or *moral value* of democracy.
 - i. Rights that establish a deliberative context for decision-making: freedom of speech and association
 - ii. Dworkin: Rights that establish for moral membership in a community. Someone is bound by majority decisions only if he is a member, and he is a member only if he has “part,” “stake,” and “independence.”

Against Ely:

1. There is a democratic *objection* to constraints on majority rule that protect (a)-rights. The right to be treated as a competent judge extends to judgments about democratic procedures.
2. There is a democratic *defense* of constraints on majority rule protect (b)-rights.

Dworkin’s claim: “Judicial review makes society no less democratic, because it is more favorable to democracy, whether or not people have chosen it.”

Argument: It improves public debate.

Reply: “My experience is that national debates about abortion are as robust and well-informed in countries like the United Kingdom and New Zealand, where they are not constitutionalized, as they are in the United States—the more so perhaps because they are uncontaminated by quibbling about how to interpret the text of an eighteenth century document.”

Argument: If the court is in fact protecting rights required for a democracy—the democratic conditions of part, stake, and independence—then democracy is improved. If not, then not. It all depends on the results. The question is simply whether the court is a more likely to get the relevant questions right than the legislature. A “results-driven test of legitimacy”: if the decision protects the rights that are in fact necessary for democracy, then it is legitimate

Reply: This confuses a decision *about* democracy with a decision that is *made democratically*. E.g. suppose the Queen unilaterally imposed the correct decision about how elections should be conducted. There would be *some loss* to democracy, even if there was also some gain.

Circularity: Isn’t it circular to allow the majority to make decisions about majority decision-making?

Case 1:

- People don’t have right X (e.g., female suffrage).
- The pro-X-ers think that X is required for democracy.
- The majority votes that people don’t have X.

Comments:

- If the pro-X-ers are right, then the decision is not legitimate.
 - Dworkin will agree with this.
- The decision still wouldn't have been legitimate even if the pro-X-ers had *won*.
 - Dworkin will *not* agree with this.
- *Even if the pro-X-ers are mistaken*, they still may “reasonably refuse to accept the legitimacy of this result...given the disagreement about this between them and their opponents, any claim that the issue about the right to X was settled legitimately by the vote would indeed be question-begging.”
 - Dworkin will not agree with this either.
 - But what does “reasonably refuse” mean exactly?
- “The existence of controversy about the rights associated with democracy means that a results-driven approach is unavailable too, or unavailable to us as a political community.”
 - In what sense is it unavailable to us? It certainly gives us *an answer* even in these conditions: if X is necessary for democracy, then the decision is illegitimate, and if not, then it is legitimate. Of course, some people will disagree, but so...?

Case 2:

- People *do* have right X (e.g., female suffrage).
- The pro-X-ers think that X is required for democracy.
- The majority votes that people don't have X.

The pro-X-ers *cannot* deny that *this* decision is legitimate, although they will deny that *future* decisions are legitimate.

- Maybe, if they think that X is necessary *and sufficient* for legitimacy. But must they think this?

Is everything up for grabs?

1. Denying that something is up for grabs begs the question:

“To say that... the right to X should not be up for grabs in this community, is to say that the community has already taken a side in this disagreement. And one is entitled to wonder how exactly *that* came about (given the disagreement) without at some earlier stage the right to X having indeed been up for grabs in a decision procedure addressing the question of whether this right was something to which the community ought to commit itself.”

- Why do we need to say that the *community ever decided* that it was not up for grabs?
- Can't we say that it is not up for grabs *for some other reason*?

2. Denying that something is up for grabs fails to respect others as competent judges:

“If... we resolve to treat each other's views with respect,... then we have no choice but to adopt procedures for settling political disagreements which do not themselves specify what the outcome is to be. In that sense, politics does leave things up for grabs in a way that is bound to be disconcerting from each individual's point of view. Respect for the opinions and consciences of others means that a single individual does not have the sort of control over political outcomes that his conscience or his own principles appear to dictate.”

- But if the decision *itself fails* to respect others as competent judges, then why should my duty to respect competent judges require me to accept this decision?