

Phil 116, March 3, 2010
Christiano, The Constitution of Equality, Ch. 7

Limits to democratic authority:

The democratic assembly has no authority:

1. to take away democratic rights (e.g., right to vote);
2. to take away individual liberties;
3. to fail to meet a basic economic minimum.
4. Its authority is weakened to the extent that there are persistent minorities.

These limits are not simply *countervailing considerations* that weigh against the assembly's authority, but *undercutting considerations* that show that the assembly lacks authority (at least in the case at hand) in the first place. (Compare your property rights in this 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 *internal* to democracy: roughly, you can't coherently care about democracy, but deny these limits.

Ely and Dworkin also suggest "internal" limits to democracy. Against Ely:

- i. Protects only *political* liberties (e.g., voting, political speech), not *personal* liberties (e.g., religion). (Is this entirely fair to Ely?)
- 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? (Recall Waldron's complaints.)

Christiano's view: The limits to democratic authority are justified by the *very same values* that justify democratic authority in the first place, chiefly public equality. Simply put, when the democratic assembly violates one of the limits, it publicly violates equality, so it no longer publicly realizes equality, so it lacks authority. "They are in effect rejecting public equality as a norm over their behavior. The institutions have become, for them, mere tools in the service of treating some as inferiors."

Denying not only democratic rights (the right to an equal say), but also individual liberties and an economic minimum violates public equality. Why?

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 being recognized and affirmed is advanced by freedom of association.

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. Respecting the court is not respecting the equal say of each of us.
- 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*.
- This implies that a constitutional court can be justified only if the good decisions *significantly* outnumber or outweigh in importance the bad decisions.
- *Exercise:* Compare and contrast Dworkin.

Reply to Waldron: 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?

Reply to Waldron: 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?
- *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. (Compare Estlund’s appeal to the truth about “qualifications.”)

Persistent minorities:

The majority doesn’t act out of contempt for the minority, but the minority rarely gets its way.

- If we object to this, then aren’t we saying that what matters is not equality in democratic processes, but equality in the outcomes? But then why bother with democracy? Why not just select the correct, equal outcome directly?
- Christiano’s “moderate proceduralist” response: In the cases of persistent minorities, it is *clear* that the interests that ground the democratic rights are receiving less attention. So we can apply a “minimum outcome standard.”