

Debate:

Defending the Purely Instrumental Account of Democratic

Legitimacy

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Governments compel their subjects to obey laws and duly empowered commands of public officials. Under what circumstances is this coercion by governments morally legitimate? In the contemporary world, many say a legitimate government must be democratic, and, with qualifications, I agree. (Let us say that in a democracy all nontransient adult residents are eligible to be citizens and each citizen is free to vote and run for office in free elections that determine who shall be lawmakers and top public officials.) More controversially, I hold that what renders the democratic form of government for a nation morally legitimate (when it is) is that its operation over time produces better consequences for people than any feasible alternative mode of governance.

Christopher Griffin criticizes this purely instrumental account of the justification of democracy.¹ His target is a 1993 essay by me that outlines a version of this approach.² He also offers a brief sketch of an alternative line of argument to the conclusion that democratic government is uniquely morally legitimate. I welcome the stimulus to revisit this large and significant topic provided by Griffin's interesting arguments. Griffin develops two arguments against my line on democracy. I shall argue that one of his arguments misfires and the other one, though it correctly challenges a genuinely confused train of thought, is not well aimed at any argument I ever advanced or have any interest in

advancing. The end result is that the purely instrumental approach I favor emerges unscathed by Griffin's arguments. This approach is still very much in the running and worthy of further development. The project of developing and defending the purely instrumental approach gets a further impetus from Griffin's brief sketch of an alternative, because this sketch immediately reveals large defects that should send us running back to instrumentalism, which looks promising by comparison.

I. PRELIMINARIES

The instrumental approach to the justification of democracy might take a variety of forms. For my purposes it will be useful to distinguish two.³ Consider political procedures that issue in laws or public policies. Suppose one holds that typically when various alternative policies are proposed and a political decision procedure selects one to be enacted, the alternatives can be assessed as morally better and worse independently of the actual choice that the decision procedure reaches. A correctness account of political legitimacy asserts that a political decision procedure is morally legitimate just in case it reaches the morally best decisions as to which policies to enact. An alternative correctness standard holds that a procedure for reaching political decisions is morally legitimate just in case it more reliably reaches the morally best among the alternative policies over the long haul than would any alternative feasible procedure that might be instituted instead.

The correctness account is on the right track, but there is a better way. Consider a best results account of political legitimacy.⁴ It holds that a political decision procedure is morally legitimate just in case over the long haul it gives rise to results that are morally superior to the results that any feasible alternative procedure would produce.

To see the difference between the correctness standard and the best results standard, imagine that the feasible alternatives in some setting are autocracy and democracy. Suppose that autocracy in these circumstances would tend to produce morally superior political decisions and hence a more just legal order than democracy. The correctness account then would favor autocracy over democracy. But let us stipulate further that besides the political decisions reached, the two political systems would differ in one other significant respect: the operation of democracy would tend to render citizens more virtuous on the average than they would be under the operation of autocracy. Suppose further that the superior virtue of democratic citizens leads to morally better outcomes all in all under democracy than under autocracy, even though the laws of the autocratic regime would be more just. The tendency to just acts induced by democratic virtue outweighs the tendency to just laws induced by autocratic wisdom. In this scenario a best results standard favors democracy whereas the correctness standard favors autocracy. But the wider view of the impact of a political decision procedure that the best results standard requires us to consider is more appropriate than the narrow fixation on the quality of political decisions themselves that the correctness standard imposes.

These two varieties of purely instrumental accounts of the justifiability of political decision procedures are opposed by views that maintain that the intrinsic moral quality of political decision procedures determines or at least affects their justifiability. The mixed view holds that both the intrinsic quality of a political decision procedure and the consequences of its implementation affect its justifiability. The purely intrinsic account holds that the justifiability of a political decision process depends only on its intrinsic qualities and not at all on the consequences of its implementation.⁵

II. NO RIGHT TO POWER OVER OTHERS

In my 1993 essay I asserted a particular version of a best results standard. In this version best results are identified with maximal fulfillment of significant individual moral rights. The political decision procedure that should be established is the one that in existing circumstances would maximize the fulfillment of significant individual rights over the long haul. The choice among democracy, monarchy, aristocracy, communist party autocracy, and other possible governance regimes is to be made by selecting the regime whose implementation would maximize the attainment of this moral goal. In this formulation I deliberately said very little about the content of individual moral rights. My idea was that believers in different views about the content of individual rights could agree that the choice of a political process should be made with a view to maximizing rights fulfillment.

As so far stated, this characterization fails to qualify as a version of pure instrumentalism, because for all that has been said so far, a moral right to democracy might be included among people's fundamental moral rights.

To rule out this possibility in the course of offering support to the "maximize rights fulfillment" version of a best results approach, I stipulated that the rights that enter into the determination of best results do not include rights to power over others. Rights to power over others are in all cases derivative, nonfundamental rights. One has such a derivative right to power over others just in case assignment of the right maximizes fulfillment of the fundamental individual moral rights. Examples of rights to power over others would be the rights to exercise control as guardians that parents are thought to have over their own children, the rights that court-appointed guardians hold over

individuals deemed incompetent to manage their own affairs, the rights that a judge has to control the conduct of a criminal justice proceeding, the rights that public bureaucrats have over the management of the agencies in which they hold office, and the rights that each voter has in a democracy.

This stipulation is supposed to accomplish two things. First, I rule out the right to a democratic say (an equal vote in a democratic political procedure) as a candidate for the status of fundamental moral right. Second, I intend that the exclusion of the right to a democratic say is not arbitrary but part of a principled and reasonable minimal constraint on the content of fundamental moral rights. Whatever rights we deem fundamental, important to satisfy just for their own sake, "rights" or purported rights to exercise power over other people's lives should not be included within the set of fundamental rights.

It might seem odd to count the right to a democratic say as a right to exercise power over how other people are to live their lives. But my claim is that the oddity disappears after reflection. The franchise in national elections in a populous society grants the bearer of the franchise only a tiny bit of political power. There is the chance that one's vote might be decisive in an election. Also, one's vote may contribute slightly to the margin of victory of a candidate or a ballot measure, and the margin of victory may itself have some causal influence (deterring efforts to unseat the elected candidate or reverse the outcome of the ballot measure, for example). But the vote in a serious political election is one among many that together determine rules that constrain citizens' conduct and life options in obvious and palpable ways. The vote gives each citizen of a democracy a tiny bit of the political power a dictator or powerful monarch possesses.

Griffin objects that this argument fails because all rights confer on the right-holder power over the lives of others, so no ground has been supplied for demoting the right to a democratic say to a derivative or instrumental status.

I suppose everything is like everything else in some way or another. But this does not obliterate all differences and distinctions. Some rights give one power or dominion over others, authority to direct their lives in certain ways. Some rights do not. To use the example of an institutional right, consider the contractually specified right of a manager to issue commands to subordinates (who do not have the reciprocal right to issue commands to the manager). Contrast this with the right of the subordinate to quit the firm at will. I say the right of the manager involves power or dominion over the lives of others, whereas the right of the subordinate to quit does not.

I acknowledge this is a blunt distinction and there may be a gray area of rights that do not clearly fit on one side or the other of the line it draws. But since the right to a democratic say is not a borderline case but a clear case of a right that allows one to exercise power over others, the existence of a gray area does not threaten my use of the distinction.

Suppose one insists that any right whatsoever gives some sphere of control to the right-holder and hence some power over others. The right to free speech gives one control over others to this extent—they may not interfere coercively if one is a willing participant as hearer or speaker in a free speech scenario. The right to freedom of thought gives one control over the rights of others to a limited extent—they may not coercively interfere in certain ways in the process whereby one's opinions and

convictions and attitudes are formed. This insistence might be sound reasoning or an instance of bad logic-chopping. For my purposes I do not need to decide this matter.

Suppose in line with the insistence of the previous paragraph that there is no sharp distinction between rights that confer power over the lives of others and rights that do not. There is simply a continuum of possible cases ranging from a tiny bit of power or dominion to an enormous amount. (There may be several dimensions that enter into having power but for simplicity just suppose that power varies along a single scale. This simplification does not affect my argument.) It is important to realize that this supposition in no way undermines my claim that rights that involve power over others are among the nonfundamental rights and their existence, strength, and shape should be fixed according to what is maximally productive for fulfillment of fundamental rights. I can simply go along with the supposition and stipulate that the rights that are to count as involving (significant) power over others are those that lie above a certain point on this scale measuring extent of power. Where exactly one chooses to place this line does not matter so long as the right to a democratic say will be comfortably on the “involves significant power over others” side of the line. I need not claim this line is sharp, just that there is a morally significant distinction between a right that marginally involves power over others and a right that involves a significant amount of such power.

Griffin concludes his discussion of this objection against my argument by claiming that my argument “*presupposes* that democratic rights are not fundamental; it does *not* demonstrate it” (section II). This is false. My argument provides a reason to classify the right to a democratic say as nonfundamental and moreover to assign this right to a class of purported rights that involve power over the lives of other people.

Regarding this class of rights, I suggest that they should be assigned in order to maximize fulfillment of the fundamental rights. This argument just presumes that fulfillment of the fundamental rights is what matters morally and avoids controversial specification of what these rights in detail are. But I propose that whatever the fundamental rights are, they do not include rights to power over others, and whatever exactly the right to a democratic say amounts to, it falls squarely inside this group of rights that we have reason to characterize as nonfundamental.

Why fuss about power or dominion over others? The conviction that drives my account is that one has legitimate authority to direct the course of other people's lives by issuing commands they are compelled to obey or deliberately arranging their environment so that many otherwise eligible options for their life course are unavailable or unfeasible *only if* one's exercise of these rights works out well for all concerned parties. Rights to power over others are rights to serve as steward for the interests of the affected parties. The moral test for the correct assignment of such stewardship rights is that they should be passed out so as to maximize fulfillment of the rights of those people affected by this rights assignment and exercise.

III.WHY MUST RIGHTS TO POWER OVER OTHERS MAXIMIZE GOOD CONSEQUENCES?

This last claim has attracted criticism by Griffin and others.⁶ I claim that rights that involve power or dominion over other people, to be morally sound, must be such that they maximize fulfillment of people's fundamental rights. Griffin and others view this requirement as too strong. Instead they propose a weaker requirement: these rights must be such as to generate adequate fulfillment of fundamental rights.

To see what is at stake here, consider the right that parents are usually thought to have to raise their own children as they prefer. Before a child reaches the age of adulthood, parents are thought to have extensive rights to control and direct the child's life that other adults do not share. You as parent have the right to order your child to be at home an hour after school lets out but I as nonparent neighbor have no such right and no right to contravene your command in normal (non-life-threatening) circumstances. This is all part of the morality of common sense.

Since these rights of parental control over children certainly fall into the class of rights that confer on the right-holder power or dominion over others, my claim regarding them is that they are justified just in case assigning these rights maximizes fulfillment of people's fundamental moral rights. The parents' rights are to be viewed as instruments to a greater good.

This claim has provoked horrified responses. In an astute commentary on my 1993 essay published along with it, Robert Sugden writes that "at times, we find the authentic voice of Benthamite utilitarianism in Arneson's essay—most notably in the chilling passage on the upbringing of children, where we are told that it is uncontroversial that natural parents' having custody of their own children is of merely instrumental value."⁷

Since moral assertions that chill and horrify are probably controversial, I withdraw my confident assertion that my claim about rights to power in its application to parents and children is uncontroversial. But it still strikes me as true.

This issue may be unavoidably murky to the extent that I nowhere commit myself as to the content of fundamental rights. It may be that the critics are supposing that

according to my proposal parents' heart-felt desires to care for their own children count for nothing in the determination of who has rights to act as guardians of children and that all that matters is what policy would work out for the best interest of the child. That is to say, the fundamental rights that we should be striving to fulfill here are being identified with the rights of children to morally decent education, socialization, care, and nurture. Griffin seems to be characterizing my thought in just this way when he comments, "It seems wrong headed to say that the *only* justification parents have for raising their own children is that those parents are *the best available*" (section II).

But this is a misconstrual or at any rate an extremely uncharitable reading of what my position comes to. Surely the fundamental rights at stake in the assignment of parenting rights extend beyond the fundamental rights of the children who will be affected by policy choice. They include the parents, other family members, the adults who would be guardians if the parents are bumped from this social role, ordinary members of society who suffer gains and losses later as a consequence of how well or badly the children in question are raised, and so on. I am not in fact a Benthamite but I am close enough to a fellow traveler of utilitarianism to suppose that people's fundamental rights include rights to well-being and that the deep and strong desires of parents to parent their own children and of children to be connected to their own parents become important elements in their well-being.

With this clarification on the table, I remain unmoved on the point of principle. The dialectic of the argument requires that the critic and I agree that fundamental moral rights are specified to be what really and overwhelmingly matters morally. If you think natural parents' natural inclination to be connected as primary guardians of their own

children is an important aspect of the aims and aspirations, satisfaction of which enters into their right to well-being, then that goes in the hopper of the fundamental moral rights, maximizing the fulfillment of which should be the basis for assigning rights to act as parent. But it is the all things considered judgment as to what maximizes everyone's rights fulfillment on the whole that should guide policy. It should turn out that the social science of the next century surprisingly informs us that some new form of childrearing regime that denies parents their traditional right of first try at exercising the role of guardian would lead to more fundamental rights fulfillment on the whole, then so be it. And less speculatively, in a host of state policy determinations that involve fixing precise boundaries as to where the rights of natural parents give out and the interests of other persons involved in the child's life or the interests of society at large become decisive, the maximizing test I propose is what should be regarded as the reasonable moral criterion for policy choice. If stripping parents of their traditional rights and putting children in state-run collective nurseries or assigning them at birth to nonrelated foster parents would really maximize rights fulfillment (I readily grant this is an improbable speculation), then it would be morally wrong to refrain from maximizing.

IV.A CONFUSION ABOUT RIGHTS

Griffin makes another point against insisting that nonfundamental rights should be selected so as to maximize fulfillment of fundamental rights that requires a brief comment. Recall that he favors dropping the maximization requirement and instead stipulating that rights to exercise power over others should not be interpreted to include the right to exercise power when this leads to a violation of the rights of the affected parties. In favor of this approach he says that its adoption would "minimize conflicts

generated by the institutional establishment of rights, powers, and authority” (section II). Something of what he has in mind here is indicated by his further comment that “the stringency of [Arneson's] requirement makes incredible demands upon our cognitive abilities.”

Either Griffin is confused here or he and I are speaking past each other. My position is in effect a consequentialism of fundamental rights.⁸ Institutions, policies, acts, and so on should be set so as to maximize fulfillment of fundamental rights, the rights being formulated to capture what fundamentally matters morally. This is a claim about what basic moral principles are correct. It is not an objection to such a proposal to say that figuring out what it would demand in practice is beyond our cognitive ability. The proposal is in the realm of moral metaphysics, not moral epistemology. Right acts including morally right assignments of institutional rights are those that maximize fundamental rights fulfillment. That at any rate is the claim. If we cannot know in some situation what does this, or cannot do more than rule out some alternatives as inadmissible without being able to single out a particular policy that satisfies the proposed test, then in those circumstances we don't know what we should do (or we know only that the right answer lies in some range). From my standpoint it would be utter confusion to try to choose our basic moral principles by trying to figure out which ones would be simplest or easiest to apply or would generate fewer administrative problems as we attempt to implement them. These considerations should enter moral thinking at a lower level of abstraction.

V. THE MORALITY OF PROCEDURES

Griffin's second argument is the suggestion that I make the mistake of supposing that the moral status of a procedure must either be fixed entirely by its intrinsic fairness or unfairness or be fixed entirely by the moral character of the results of applying it. This is obviously a mistake, because it might well be that the moral status of some or all procedures is fixed jointly by its intrinsic properties and its consequences (or other extrinsic properties). Here I simply submit my 1993 essay does not make this mistake, nor am I committed to any position that presupposes this mistake. I concede my prose was unperspicuous, and I welcome the opportunity for clarification.

The idea that democracy as a political decision procedure is morally justified partly because this procedure is inherently fair and partly because its operation leads to desirable consequences is surely the pretheoretical common sense position for many advocates of democracy. In arguing against this common-sense approach I am swimming upstream. In my 1993 essay I made what I thought was the bold claim that the appearance that we must balance intrinsic fairness and consequential fairness when assessing the democratic political procedure is an illusion because it turns out that in every case of procedure assessment, it turns out that our convictions that this or that procedure is intrinsically fair or unfair turn out to be driven by assessments of the likely or certain consequences of following the procedure. I claim this is true even of fair gambles, the quintessentially intrinsically fair procedure. I still espouse this deflationary view of the supposed intrinsic fairness of procedures, but what I accomplished in this regard in the 1993 essay was just to sketch the view.

It is important to note that I also claim that even if one were to reject the idea that there is no such thing as intrinsic procedural fairness, one should still stop short of

affirming that the intrinsic fairness of the democratic procedure is a significant element in its justification. I claim that our considered attitude to democracy-restrictive features of contemporary democratic governments such as judicial review lends support to this position. Further support is gained by pondering the speculation that enacting and enforcing severe competency requirements for the franchise that would disenfranchise some or even many currently eligible to vote in modern democracies would generate morally better consequences over the long haul than would the alternative of sticking with one-person-one-vote. In this imaginary case, I favor the competency requirements. I simply don't see any intrinsic procedural fairness to one-person-one-vote that would have to be traded off against the goal of producing better consequences. In other words, if fairness of procedures is a factor in determining what political decision procedure is morally best all things considered, the intrinsic procedural fairness norms will not single out democracy as preferred over any credible proposed substitute political decision procedures.

VI. GRIFFIN'S REASONS FOR SUPPOSING DEMOCRACY TO BE INTRINSICALLY JUST

At the end of his discussion Griffin gives a brief indication of why we should think that democracy is intrinsically just. The weakness of the reasons he asserts provides further indirect support for the pure instrumentalist account.⁹

Griffin states that a political procedure “is intrinsically just when the rules and practices constituting it treat persons appropriately” (section IV). The appropriate treatment consists in expressing the equal basic moral status of each member of society. Justice requires that the public institutions give public expression to this equal basic

moral status of its members. A democratic political procedure distributes political power equally and this equal distribution constitutes the appropriate expression of equal basic moral status.

The obvious question to raise about this approach to the justification of democracy is why it is morally required that the equal basic moral status of each member of society be expressed in the one specific form of establishing democracy. Here I am not challenging the idea that all have equal basic moral status and for the sake of the argument I am conceding that public institutions should express this idea in some fashion. But why must the choice of political decision procedure do the expressing? And even if we concede *arguendo* that the choice of political decision procedure must do the expressing, I still do not see that this carries us all the way to an argument for democracy.

Here is an alternative expressive proposal. Following instrumentalism, society selects the political decision procedure that is likely to produce the greatest fulfillment of people's significant moral rights over the long haul. If we believe in the equal basic moral status of all people and this translates into equal basic moral rights for all, then we express our commitment to equality by resolving to do whatever is needed to maximize the fulfillment of these important equal rights. Were we to implement one-person-one-vote democracy when this choice predictably results in lesser fulfillment of rights than would result from choice of a nondemocratic political decision procedure, arguably we would be expressing a less than wholehearted commitment to the basic equal moral status of all persons. At this point Griffin cannot appeal to the great right to democracy that is fulfilled by establishing democracy to tip the balance, because the expressive argument is supposed to establish that there is such a fundamental right to democracy.

To get the beginning of an argument for democracy from the considerations he cites, Griffin would have to claim that we are morally obligated to express the fundamental equal moral status of persons by choice of institutions and that we can do this only if we select democracy. Choice of any other mode of governance would inevitably express the idea that persons lack equal basic moral status. However, I do not see any reason at all to accept the claim that only choice of democracy can express the idea that persons have equal basic moral status. Only if Griffin had supplied an independent argument that the equal basic moral status of persons requires choice of democracy would it be plausible to suppose that we cannot express our conviction that persons have equal basic moral status except by establishing democracy. But Griffin offers no hint of how this independent argument would go, and without it the appeal to expression seems to me futile.

I have my doubts about the argumentative force about appealing to the message that is expressed by a choice of policy or action as a way of determining whether the choice is morally correct. Choice of slavery no doubt expresses a bad message, but this is because slavery is radically immoral and can be shown to be so without appeal to its expressive content. If there were good moral reasons for instituting slavery, then its expressive content would be different, and not objectionable. Why not say in every case that when one chooses an act or a policy conscientiously one expresses the idea that the act or choice is morally right, done for good and sufficient reasons so far as one can tell? Seen in this light, the expressive content of a choice depends on its independently determined moral status, so it would be misguided to defend a choice of action or policy by appeal to its expressive content. This would be putting the cart before the horse.

In some special settings I can imagine that a special need to send a message to people can play a role in justifying a choice of practice. For example, it is just possible that it was morally right for the Chinese government to impose exemplary harsh sentences on perpetrators of child prostitution and certain other evils just after taking power in 1945 to express its resolve that these evils, rampant under the old regime, would no longer be tolerated. But in this sort of case the message a practice conveys looks to me to be part of its consequences and to be assessed as part of its consequences. This sort of consideration will not figure in a demonstration that a practice is intrinsically just and moral quite independently of its consequences. That this is so becomes evident when we notice that the message expressed by a practice depends on what it is reasonable to suppose that those to whom the message is communicated will take its meaning to be. If people cannot make a certain desired inference necessary to understand the message the government wishes to convey, then the practice in question will not express the desired message to those people. Expressive consequences in this light are consequences to be reckoned along with others.

¹ . Christopher P. Griffin, "Democracy as a non-instrumentally just procedure," *The Journal of Political Philosophy*, this issue. Further references to sections of this essay are placed in parentheses in my text.

² Richard Arneson, "Democratic rights at national and workplace levels," *the Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer (Cambridge: Cambridge University Press, 1993, pp. 118-148.

³ . The account of the correctness account borrows from David Estlund, "Beyond fairness and deliberation: the epistemic dimension of democratic authority," *Deliberative democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge: MIT Press, 1997), pp. 173-204.

⁴ . The term is from Charles Beitz, *Political Equality: An Essay in Democratic theory* (Princeton, N.J.: Princeton University Press, 1989), p. 20.

⁵ . A procedure may have extrinsic properties other than consequences, but I set these aside for purposes of this discussion.

⁶ . Griffin cites Allen Buchanan and Thomas Christiano as sources of this objection, which he also endorses. In a commentary on Griffin presented at the 1999 Pacific APA meeting, Bruce Landesman raises a similar objection.

⁷ . Robert Sugden, "Justified to whom?", in *the Idea of Democracy*, 149.

⁸ . To clarify: One might take my 1993 position to assert: On the assumption that individual rights are what fundamentally matters morally, then one should regard democracy not as protected by fundamental rights but as justified as instrumental to their fulfillment. My later essay "Against rights," forthcoming in *Philosophical Issues*, 11 (2001), queries this assumption. None of Griffin's objections against my 1993 essay turn on whether or not consequentialism is best formulated as a consequentialism of rights.

⁹ . Of course there are other reasons than those Griffin mentions to regard democracy as an intrinsically just procedure and justified in part on this ground. My discussion targets Griffin.

