

David Estlund (2008)¹ proposes a hybrid of procedural and substantive democratic theory that he calls “epistemic proceduralism”. He attempts to show that democracy yields moral reasons to obey the law even when we conclude that it is factually mistaken. Estlund returns again and again to the model of a jury, highlighting the procedure’s epistemic fairness and arguing that our propensity to accept the result of legal proceedings stems not from their high chance of finding the truth but from the epistemically sound procedure for determining guilt. Similarly, he argues that the epistemic value of democracy stems not from its tendency to produce good results (though this is marginally better than chance), but from the procedure’s general acceptability.

He begins with the argument that there are no moral standards by which we can judge political decisions, an argument he dubs “political nihilism”. Citing Arendt’s concerns about the despotic character of truth in democratic proceedings, Estlund points out that mere possession of the truth fails to confer authority, and that some deeper reason for acceptance is needed. He points out Rawls’ equivocation on this point, and discusses a potential reasonable objection standard similar to the one Beitz (1989) proposes. He concludes, however, that reasonableness is unduly charged, replacing it with the neutral “qualified” in a standard he calls the “General Acceptability Criterion”. Crucially, Estlund does not define the parameters of what is to count as a qualified objection. This allows him to embrace epistocratic premises without ceding government to experts, because although Estlund accepts that some citizens have greater political expertise than others, he holds that it is legitimate to (“qualifiedly”) object to this view. He bases this on a principle he calls “No Invidious Comparisons,” whereby expertise can never be beyond

¹ Estlund, David (2008) *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press).

qualified rejection because any putative expert who might be advanced would be subject to public controversy.

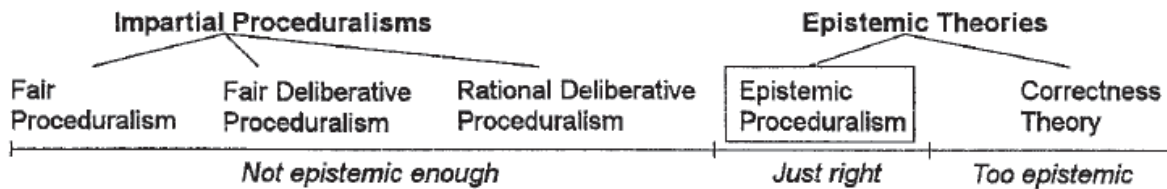
While Estlund thus banishes truth from political justification, he retains it in political procedure. This move blocks epistocracy without blocking epistemic arguments for democracy. Within the narrow ambit of “generally acceptable” procedures, Estlund advances a conception of legitimacy based on the absence of any potential qualified objections. On this basis, he argues that only democratically-produced laws can meet the general acceptability requirement, provided that the group is “insular”, which he defines as the mutual recognition of one another’s qualified rejection rights. He rejects wholly procedural and wholly substantive conceptions in favor of an “undogmatic substantive” position in which no doctrine can be relied on for justification unless it is “acceptable to reasonable citizens”.²

Estlund goes on to show that purely procedural arguments provide an insufficient basis for fairness, which he defines as a combination of “anonymity” and “aggregativity”. He argues that pure procedure cannot satisfy aggregativity (the promotion of the parties’ collective interests) because retrospective procedural fairness requires that the aggregation actually occur in a temporal process. The preferences, in other words, have nothing to do with the procedure but are being smuggled in from the substantive exterior. On these grounds, he criticizes social choice theories for purporting to be purely procedural, arguing that social choice rules are *not* procedures in the sense required for retrospective fairness. He makes the further observation that preference anonymity itself is suspect, since “it is not absolutely clear that a person’s identity can survive a dramatic change in their preference ranking” (78).

Similarly, he criticizes deliberative democratic theory for purporting to be purely procedural but actually importing substantive values. Specifically, he criticizes Habermas’s

² I am almost certain that Estlund meant to write “qualified” here.

foundation of legitimacy on hypothetical acceptability emerging from ideal deliberative procedures. Divorcing the justification from the actual procedure in this way, Estlund argues, introduces a substantive standard and thus undermining claims to pure procedure, thus dismissing Rawls and Cohen. He has more difficulty with Waldron’s grounding of deliberation on the requirement for a fair hearing in large assemblies, but he manages to argue that the epistemic improvement resulting from this public deliberation is itself substantive.



Ultimately, Estlund argues that fairness is insufficient to justify majority rule. Comparing majority rule to flipping a coin, he locates our reasons for preferring the former in its better-than-random chance of being right. He thinks this is the strongest epistemic claim that can pass the general acceptability criterion. Estlund embraces the epistemic value of properly-arranged democratic institutions while rejecting epistemic claims about just outcomes or superior wisdom. He rejects what he calls “correctness theories” of legitimacy that assert an external standard for judging the justice of a proposed law, arguing that correctness theories cannot meet the qualified acceptability requirement because particular applications are bound to invite qualified disagreement.

By contrast, epistemic proceduralism will pass the criterion because it can call an outcome legitimate even when it is incorrect, because the epistemic value of the (imperfect) democratic procedure imbues it with legitimacy. The reasons given are “moral reasons to

comply, not epistemic reasons to obey” (106). This obedience is subject to limits, however, and while Estlund declines to explain exactly what these limits are, one limit he adverts to recalls Rawls’s requirement that the democratic system itself remain free from threat, which would preclude majorities from disenfranchising minorities. He also refers to unjust punishments such as boiling in oil as the sort of thing that would go beyond the limits and strip government directives of their moral legitimacy.

Gerry Mackie (2011)³ questions Estlund’s rout of fair proceduralism, arguing that a fair proceduralist need not retreat quite so far as Estlund proposes. While Estlund argues that intrinsic fairness is vitiated if a proposal appeals to voters’ aims, Mackie responds that reference to aims *is* intrinsically procedural in the sense that each procedure must have inputs that embed such references. Mackie points out that the great virtue of democratic procedures (as opposed to, say, coin flips) is their *positive* responsiveness – they tend to do what the people want (rather than the opposite, for example). For Mackie (and *contra* Estlund) this responsiveness is intrinsic to voting procedure.

After rehearsing the May theorem, Mackie points out that the anonymity criterion is really intended to promote equality of voters rather than strict anonymity. Estlund’s interpretation of this criterion insists on anonymity among alternatives rather than merely among voters. This, argues Mackie, would be to collapse the anonymity condition into the neutrality condition. He argues that epistemic proceduralism goes astray by failing to consider agenda formation. Citing Dahl’s concept of procedural democracy, Mackie argues that agenda-setting is as vital to the decision process as outcome-decision, and he cites Tideman’s observation that each collective decision inevitably encodes earlier collective decisions. The mathematical

³ Mackie, Gerald. “The Values of Democratic Proceduralism”. *Irish Political Studies*, Vol. 26, No. 4, 439–453, December 2011

intractability of this chain of collective decision would be challenging to model, but Mackie's argument explains our intuitions about coin flips and locates them at a particular point in the democratic process. We believe decisions made by chance to be fair only when the alternatives among which the random selection is being made are those resulting from an earlier (fair) collective choice procedure. This is of course aggregative, giving us reasons to doubt Estlund's account of the fair proceduralist's flight from substance.

Rather than refer to an intrinsic standard of justice that is epistemically approximated by democratic procedure, Mackie argues for an interpretation of voting as the selection of what is thought best by the most people. This approach relieves the burden of the noumenal by obviating the need for a (problematic because disputed) independent standard of justice. This Kelsenian move relies on subjective value judgments "grounded in wishes and fears" rather than an objective common good.⁴ Mackie observes that democratic voting counters particularistic biases, and adverts to the possibility of justifying this substantive claim on the basis of democracy's propensity to produce outcomes that are "correct" by independent standards.

Questions for Discussion

1. Does failing to define the parameters of the qualified acceptability requirement strain Estlund's argument? He rejects reasonableness as too specific and too laden, but rather than propose an alternative he settles for a neutral term whose content is to be filled in later (... "filled in by "reasonable" or some such thing" p. 41). Wouldn't the process of filling in the content of "qualified" look a lot like the process of proposing an expert ruler? In other words, wouldn't the proposal automatically fall victim to "qualified" objections? And if the general acceptability criterion can't actually be filled out in practice, what are the consequences for epistemic proceduralism? Estlund considers this objection on pp.60-61, but his argument seems circular.

⁴ Mackie cites Arrow on this point - Arrow explicitly dismisses the notion that 'there exists an objective social good defined independently of individual desires' (Arrow, 1963: 22) as Platonic realism." (442)

2. Estlund, like Beitz, distinguishes sharply between process and substance. While this is more defensible than the means-ends distinction, I wonder if it shares some of its defects. Specifically, it seems that there is substantive value to process (as deliberative democrats have pointed out), and more generally determinations of substance or process seem to be in the eye of the beholder. If my grandfather drives me to school in another state, the trip might be process for me (to get to school), but could be substance for him (a chance to spend time with his grandson). Does this cast any doubt on Estlund's exclusion of truth from substance but embrace of truth in process?
3. Is it problematic that Estlund takes the same negative approach as Beitz, considering each form of democratic theory in turn and finding it wanting, proposing his own theory to fill in the newly established breach? Might there be more value to a positive approach along the lines of Hobbes, beginning at first principles?
4. Estlund uses the term "moral obligation" but never actually defines what he means by a moral obligation to obey the law. Many people (and many legal systems) seem to understand obedience on the basis of anticipatory punishment rather than the imposition of moral obligation. Does this matter?
5. Estlund seems to tacitly assume that we share a great deal of morality in common. He writes that we all agree that the subordination of particular groups is impermissible and that particularly heinous punishments such as boiling in oil should be forbidden. I wonder whether he might not be importing North American morality into his theory without realizing it. After all, in democratic India (for instance) both formal subordination and vigilante justice are common, and are not widely recognized as defects. Is there some sense in which Estlund (like Rawls) is assuming the sovereignty of his own morality?
6. If all procedures encode other procedures (*pace* Mackie), is there some sense in which our sovereignty is limited by the political tradition we're a part of? In other words, since each collective decision encodes the results of at least one past collective decision (whence the agenda), then our ostensibly free choices are taken within terms set by others' free choices, which were themselves directed by yet prior collective choices.⁵ I like this idea, and I see how it could provide an analytic basis for studying the concept of political culture, but is it problematic in terms of freeing ourselves from the shackles of the past? I keep hearing (particularly in California) that the past was rather retrogressive.

⁵ This observation recalls McCubbins, Noll and Weingast (1987) "Administrative Procedures as Instruments of Political Control". In both cases, actions by past majorities cabin the freedom of present majorities.