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Democratically Binding*

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Abstract

The aspiration of the 'Democracy Unbound' project was to extend democracy in two dimensions: range and scope. The former would give a wider range of people the vote. The latter would give people a wider scope of things to vote on. In practice, no doubt there is room to do much more of both. But whereas it would be democratically justifiable in an ideal world for democracy to be completely unbounded as regards range, even in an ideal world democracy ought be subject to some limits internal to the logic of democracy itself as regards its scope.

Keywords

Bindingness of law; Democratic franchise; All affected interests; Limits to democracy; Democracy.

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Introduction

This set of papers brings closure to a project creatively entitled 'Democracy Unbound'. That formulation constituted something of a creative stretch, productively combining range and scope. In one direction, it invited critical examination of boundaries: limits on who is empowered to practice democracy together. In another direction, it invited critical examination of constraints on democratic rule: limits on what those deciding democratically are thereby empowered to do. Unbound in both directions, democracy would involve more people deciding more things together.

Perversely, I want to pause – however late in the day – to consider a prior question. What is it for decisions, made democratically (or otherwise), to be binding? Once we get clear on the nature of bindingness, we will be into a position to contemplate what it might really mean for democracy to be unbounded (or even just substantially less bounded) in either (or both) its range and scope.

I. The Bindingless of Law

We typically say that democratically enacted laws are 'binding' on people in the state that has democratically enacted them. But what does that amount to?

The first thing it means for a law to be 'binding' on you is that it applies to you. You are subject to the law's commands. You are an addressee of its orders. The law speaks to you, among others. Your conduct will be assessed by reference to the law's requirements, and when accounting for your conduct to the authorities you will be expected to do so inter alia by reference to that law.

To say a law is 'binding' on you is to say more than merely that it applies to you, however. 'Binding' implies constraint. To say a law is 'binding on you' means that you 'must obey' it – until the law is repealed, unless you are exempted from it, or whatever.

The constraint rarely amounts to complete restraint. Laws can be binding without literally preventing you from doing otherwise. But a law would be an empty formality if it did nothing materially to alter one's options. To be binding in any fuller sense, law needs to be backed by force of some sort.

Typically, that force is in part physical and in part moral. The bindingness of a law gives you a reason to obey, as well as an incentive to do so. One reason you 'must obey' a binding law is of course that there are penalties imposed, by force of law, on disobedience. Typically, however, there is a moral side to it as well. Laws made by legitimate authorities have moral force. People ought to obey such laws, on pain of legitimate penalty. Such laws are morally as well as legally binding.

Of course, in some formal legal sense any law made by a legitimate authority is binding: that follows simply from the definition of what it is for authority to be 'legitimate'; it is empowered make binding laws. And of course one thing that can make a political authority legitimate is its 'being democratically elected'. So there is one very easy, straightforward connection between 'democracy' and the 'bindingness' of laws, via the intermediary notion of 'legitimacy'. Here, however, I want to enquire what more is involved in laws being 'democratically binding', beyond the sheer fact that they are legitimate.

II. What Does It Add to Say the Laws are *Democratically* Binding?

The phrase 'democratically binding' can be read in either (or both) of two ways, both relevant to the concerns of the 'Democracy Unbound' project. On first reading, a law that is 'democratically binding' is binding (or perhaps just 'particularly binding') because, and just because, it has been made democratically. On the second reading, a law that is 'democratically binding' is binding (or perhaps 'particularly binding) on democracies and people and peoples committed to democratic principles more generally.

These two strands can be connected by expanding the adverbial qualifier in 'democratially binding'. Let us expand that phrase to read: 'binding by virtue of their democraticness'. That is to say two things. The first regards the source of the bindingness of those laws. Laws that are 'democratically binding' are binding because of (by virtue of) their democraticness. The second regards the agents who are thus bound. Laws that are 'democratically binding' are binding on democracies and people committed to democratic principles by virtue of their democraticness, once again.

The same general pattern holds for analogous locutions. Rules that are said to be 'religiously binding' are binding because of their consonance with religious principles, and they are binding on people of the faith. Rules that are said to be 'morally binding' are binding because of their consonance with moral principles, and they are binding on people committed to leading the moral life in that way. Such rules are binding, in both senses, 'by virtue of' their religiousness or ethicalness, respectively.

The 'by virtue of' formulation not only points to the reason – the rationale, the 'because' – for considering a law or rule binding. That rationale also enables us, at the same time, to identify on whom the law or rule is binding.

To say a law is 'democratically binding' is thus to say it is binding by virtue of the fact that it was enacted democratically. It was enacted not just by any old legitimate authority, but by a democratic authority. And it was enacted not just by any old authority following democratically-correct surface procedures, but by an authority that was conforming to deeper democratic principles as well as the more superficial trappings of procedural democratic forms.

Pause briefly to consider just how inadequate thin procedural definitions of democracy actually are. For anyone tempted to equate democracy simply with majority rule, there is much to give them pause. For a start, there are lots of things you must democratically worry about, before votes are aggregated in that way. Who gets to vote? In constituencies constituted how? On an agenda set by whom? And so on. Furthermore, there are lots of things you must democratically worry about, after votes are thus aggregated. I will come to some of those shortly.

But for the moment let us just focus on the aggregation rule itself. Tempting though it may be to associate democracy preeminently with majority rule, there are actually certain purposes for which both supermajority and submajority rules are democratically to be preferred. Supermajority rules seem democratically desirable for 'big decisions' like amending constitutions, for protecting entrenched minorities from majority tyranny, and so on.[1] Submajority rules are useful within legislatures as 'accountability-forcing mechanisms. One use, for example, is to force legislation to a formal, recorder vote, in order that representatives can be held accountable for their votes on that legislation in subsequent elections.[2] So even just as regards aggregation rules, there is no purely procedural answer to the question of what is truly 'democratic'. Recourse must be had, even there, to deeper democratic principles to determine which rule should be used when and for what.

[1] Goodin & List 2006.
[2] Vermeuele 2005; 2006.

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III. Democracy Beyond Pure Procedure

When invited go beyond the thinnest procedural definition of 'democracy as majority rule', the other things that people ordinarily first think about are other still fundamentally procedural issues. They would easily agree, for example, that the definition of democracy ought surely extend beyond aggregation rules as such to the conditions that would be required in order for the votes being aggregated to count as democratically worthy. 'Free and fair elections' have various further preconditions: freedom of political speech, multiple candidates for each office taking distinct positions, non-intimidation at the voting place, fair counting of votes, and so on.

Pressed to say 'what else democracy requires', people might go on to add something about the frequency of elections, about the apportionment of electors to constituencies, and so on. Pressed further, they might recall that settled though the franchise often seems these days, who gets to vote has historically and still in some places matters hugely from a democratic point of view. And campaigners for global democracy who dream for a second chamber of the United Nations, popularly apportioned and directly elected, would extend the franchise to everyone worldwide.[3]

If pressed still further, people might go on to admit that substantively there are some things that even (or perhaps especially) democracies – however democratic they may be in all those other respects – simply cannot do. Among them might be taking people's lives, liberty or property without due process of law.

Here, in keeping with the range-and-scope concerns of the 'Democracy Unbound' project overall, I want to focus on those latter two sorts of issues. What is the 'range' of democracy, properly construed? To whom may (or must) a democracy's laws apply, and who may (or must) get a say in making them? And what is the 'scope' of democracy, properly construed? What may or must or must not be included in content of democratic laws?

A. To Whom Ought the Laws Apply?

Consider first the 'range' of democracy – the question of to whom a democracy's laws apply and who gets a say in making them.

This is a topic at the centre of discussion within the 'Democracy Unbound' project. I will not pretend a consensus where there is none. But at least the polar positions are clear, even if there are those who prefer to occupy mixed positions somewhere between those poles.[4]

At one extreme lies the 'communitarian' way of constituting the demos. Democratic procedures are there seen as devices for adducing the 'general will' of a People who ex ante committed to making decisions together, 'as one'. The collectivity making the decision is fixed somehow: by a prior decision; by unspoken sentiments, ties of 'blood and soil', shared histories and shared futures, or whatever; maybe just by sheer accident of history. No matter. On this view, how a demos is constituted is exogenous – 'outside the model' – from a democratic point of view. Democracy, on this view, takes those pre-ordained groups as given. Democracy, on this view, is all about how such groups go about giving laws to themselves. There is, on this view, no issue of democracy that arises in demarcating those groups in the first place.

[3] Falk & Strauss 2001. Goodin 2010.
[4] Arhennius 2005. Bergstrom 2005; 2007. Goodin 2007 and sources cited therein.

The other polar view – let's call it 'consequentialistic', although there is no settled nomenclature for it in its most general form – marks a striking contrast to the communitarian view. This alternative view is much less relaxed about treating the question of to whom laws democratically ought apply and who ought get to participate in making them as sheer 'don't cares' from the point of view of democratic theory. On this alternative 'consequentialistic' view, democratic principles prescribe that laws ought apply to and be made by everyone whose actions and choices affect one another.

A more specific corollary of that more general rule – and the form in which it is most commonly discussed within democratic theory – is the 'all affected interests' principle. On what I regard as the most defensible version, that principle holds that 'all those who probably will be affected by any possible decision arising out of any possible agenda ought democratically be included among those making that decision'.[5]

There are of course counterexamples to that, in the practice of real-existing democracies. Some of our laws are taken to apply to those who had no part in making them. Visiting tourists have to comply with our country's road rules when driving in that country, for example; and resident aliens, even if long-term residents, are not entitled to a vote. Still, those look like exceptions that prove the rule. The rule in question is forward-looking, and takes account of the temporally extended effect of laws we now make: and the rule seems to be that the franchise ought be extended to anyone who is intending to be in our country for that long haul (in contrast to tourists, and perhaps even resident aliens who however long they have lived here so far have not committed to living here in the future by taking out citizenship).

If the 'communitarian' account is correct, then of course there is every reason for democracy to be bounded and no reason for it to be unbounded.[6] Communities are as they are, beyond the reach of democratic critique. On that account we must simply take the existing bounds as given, making decisions within those bounds democratically – but by the same token not making decisions beyond those bounds democratically. And on the 'communitarian' account, the way of demarcating those bounds is left open: it might be on the basis of geography, or of race or ethnicity, or of gender, or of class, or whatever. Any way of bounding a community is as good as any other way, on this account – or at least there is nothing within democratic theory as such that tells one way rather than any other on that issue.

On that account, therefore, it would have been a terrible mistake to campaign for extensions of the franchise to the working classes, to women, to African-Americans, to Australian Aborigines. Or anyway, it would have been a terrible mistake to do so in the name of democracy. Maybe there are other good reasons we should regard them as members of 'our community'; but, on this account, democracy has nothing to do with it. A community in which only one in a thousand people have the vote is, on this account, no worse on democratic grounds than one in which every adult has the vote.

I can well imagine some philosophers responding to those examples with a hearty, 'Just so!' But as the old slogan goes, 'One person's QED is another's reductio ad absurdum'. For my own part, I do indeed regard those implications as reductios of the communitarian approach to these issues, and I will discuss it no further.

Instead, I want now to explore further how we might actually implement the 'consequentialistic' range requirement, extending the franchise to 'all affected interests'. As I have argued elsewhere, that phrase has to be understood expansively if the requirement is to avoid incoherence: it has to extend to all

[5] Goodin 2007.
[6] Walzer 1983, ch. 2.

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interests that are (probably) affected by any possible outcome of any possible agenda. And as I there observe, that would be to extend the franchise very broadly indeed.

Some commentators worry that the 'all affected interests' principle, more narrowly understood, might require a different electorate for each different decision. On the broader understanding of that principle outlined that I favour, however, there is no need for that. Just about everyone worldwide is probably affected by some possible outcome of just about every decision. And even where they are not, it is only underinclusiveness that needs worry us: assuming that people vote purely on the basis of their interests, people whose interests are unaffected by some proposal will vote on it randomly, so their votes make no difference to the outcome. Judged in terms of consequences of the vote, it is thus costless to include such people among the electorate.[7]

The natural outcome of that argument is an absolutely universal franchise worldwide, in which everyone is entitled to vote on everything, worldwide, in one big global democracy. That is on the argument just sketched the most appropriate 'range' of democratic decision-making. It may be politically impossible to get from here to there, given the strength of the existing system of sovereign states with their own electorates. Linguistic and other barriers may constitute a further barrier to implementation of that ideal.[8] It may even be morally undesirable to strive that sort of democracy in the imperfect world as we know it, given the (morally unfortunate) limits to people's empathetic concerns. I do not want to discuss any of those constraints in detail, however, because there are others that seem to me of a logically different order; and dealing with them leads directly into the next set of issues I want to discuss.

Among the interests that are possibly (indeed, certainly) affected by each of our current actions and choices are the interests of future generations, of people who follow us. The 'all affected interests' principle would require us to enfranchise such interests.[9] But people who do not yet exist are ontologically disenfranchised. Until someone invents a device that enables voters to travel back in time to cast their ballots, future people simply cannot vote in present elections.

Of course, the injunction is to enfranchise 'all affected interests', not (necessarily) 'all affected people' as such. If we regard people as the best judge of their own interests, as we typically do, then the best way to enfranchise 'all affected interests' is to enfranchise 'all affected people'. But occasionally people are not the best judge of their own interests (as in the case of the insane); and occasionally people are not capable of acting on their own behalf (as in the case of underage heirs or the infirm elderly). In such cases, we appoint 'guardians' to represent their interests on their behalves. Non-ideal it may be, but only in the sense that the situation is non-ideal; it is the best response we can make, in those non-ideal circumstances.

The 'guardianship' model works tolerably well where we can identify people who can reasonably be entrusted to represent the interests in their care. Partly it is a matter of knowledge, the ability to surmise what is truly in the interests of the people they are supposed to represent; partly it is a matter of will, the capacity to bring themselves to act on those interests, particularly when their own interests diverge. In paradigm cases of guardianship we solve those problems by entrusting that responsibility to those who are 'close' to the people being represented: close

[7] Goodin & Lau (2011) make a similar argument in connection with enfranchising incompetent votes. Of course, there is cause for concern if there is reason to think the votes of the unaffected will be non-random – as Lopez-Garcia (2005) argues may be true of expatriates who are still entitled to vote in their 'home' countries, despite no longer (in extreme cases, perhaps never) resident there.

[8] Although the internet may indeed open up possibilities for 'worldwide deliberation and public use of reason online', in the words of Thorseth (2007).

[9] Cf. Tännsjö 2005; Bergstrom 2005.

family or friends, and such like. In non-paradigm cases – like allowing someone to file an amicus curie brief on behalf of environmental interests in a case before the courts – we do on similar grounds of particular 'closeness' to the interests being represented, particular sensitivity to and empathy with the environmental interests being represented.[10]

How well could similar strategies work with regard to the interests of future generations? Well, near-term futures can probably be protected perfectly well in these ways. Young children never have the vote; in all real-existing democracies, the implicit assumption is that their interests are encapsulated in the interests of their parents, who exercise their own vote at least in part with an eye to what is or will be in the interests of their children. There are proposals afoot to make this assumption more explicit by giving parents multiple votes, to be cast explicitly on behalf of their children.[11] That is fine, because parents know their children and have a good idea, better the older the children become, what will indeed be in their future interests. It is fine, because parents have a natural affinity (usually, if sadly not always) with their children and they will them success in life.

None of that works nearly so well as we look further into the future. There are all the obvious problems of information at a distance: it is harder to imagine what the future world will be like; and it is harder still to imagine how distant successors will conceive their own interests. But beyond that, there are problems of the will.

Consider this: A great many of the things we do today will affect lives 300 years down the track. Now just do some back-of-the-envelope arithmetic: assume for the sake of this stylized calculation that a new generation is born every 30 years, that is 10 generations; and assume that each person has exactly 2 children. That means you will have 2^{10} or 256 successors living in 300 years' time. And by the same token, whereas each child alive today has only 2 parents, each child alive in 300 years' time will have 256 great-great-great-great-great-great-great-great grandparents.

Now, I can realistically be expected to take a particular interest in and feel special responsibility for the future of my 2 children. But I cannot realistically be expected to take a particular interest in 256 successors 300 years down the track whom I will never meet. Nor can I realistically be expected to feel the same special responsibility for them, when each of them has 255 other people in exactly the same relation to them as me. Rawls was doubtless too conservative when thinking that concern with successor generations extends only to one's immediate offspring.[12] But he was probably right that both knowledge about and concern with future generations, at the personal level, is something like an exponentially decreasing function of temporal-cum-generational distance.

The notion of protecting the interests of future generations by person-to-person 'guardianship' relations thus seems unpromising, at least as regards the further future. Instead of protecting those further-future interests through personalized mechanisms like guardianship, we must instead protect them through political mechanisms of public policy.

How exactly we implement that is an open question; and we might end up doing so by appointing someone to serve as Commissioner of the Future with a particular

[10] Goodin 1986. Stone 1972. Under Rule 37(1) of the Rules of the Supreme Court of the US, 'An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.'

[11] Van Parijs 1998. Better yet (and directly contrary to Van Parijs' own proposal), perhaps we should give the votes to their grandparents to cast on the children's behalf; it is my hunch (and one Jim Fishkin tells me Peter Laslett shared) that they would be more disinterested guardians of the children's interests than the parents themselves.

[12] Rawls 1972, p. 292.

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brief for intervening to protect the interests of future generations.[13] That might look sort like a 'Guardian for the Future'. But despite those appearances, the mechanism is really quite different. It involves imposing duties to the future, as a matter of public policy rather than personal representations. If the Commissioner for the Future is to have any power, the legislation creating that office must specify certain sorts of things that the state must and must not do with respect to future generations, and empower the Commissioner to make political (and perhaps legal) complaints when the specified duties to the future are violated.

Realistically, the only way that can happen in a democracy is of course through legislation enacted in the standard democratic way. But let us not recognize the moral limits of that realism, here. It is not as if protecting the future is something that democratic majorities can decide to do, or not, just as they please. If the correct principle for constituting the demos in the first place is to extend the vote, or equivalent protections, to 'all affected interests' – and if those future interests might (indeed, will) be affected – then implementing some way of protecting future interests in not democratically merely optional. It is a democratic 'must'. Democracies are being undemocratic, insofar as they fail to do so.

Similarly, democracies are being undemocratic insofar as they fail to meet demands legitimately lodged on behalf of the future. Realistically, democratic majorities can always vote to overrule or ignore the Commissioner for the Future, or to withdraw his or her commission. But democratically they cannot. The interests of the future constitute constraints on the legitimate scope of decision-making power of today's democratic majorities.

In short, democratic principles require substantive limits to be imposed on current majorities in aid of inevitably disenfranchised interests such as those of future generations.

B. Democratic Bounds on What Democracies Can Do

There are of course other familiar substantive limits on what democratic majorities can legitimately do, within the scope of democratic principles.

One of them – to return to the 'proceduralist' theme with which I began – is that the currently sovereign people cannot bind future sovereign peoples. To some extent, that is a trivially analytical point, tied to the definition of what is for a people to be 'sovereign': the future people simply would not be 'sovereign' if it were capable of being bound.[14] But the depth of the point extends beyond that trivial analytical truth. It would be inconsistent with the democratic purposes for which we made one electorate sovereign to allow it to act in such a way as to bind a future electorate that the same democratic purposes impel us to regard as equally entitled to sovereignty. 'Giving laws to ourselves' – the master slogan of democracy[15] – requires that each generation be free, formally and insofar as practicable practically as well, to craft laws of its own choosing.

In passing, note here the connections to Mill's argument against allowing one to 'sell oneself into slavery': whatever reason we have to respect people's choices, that provides no reason to respect their choice to abnegate all future choice.[16] At the macro-political level, pause to consider what implications that might have for 'renouncing one's sovereignty' by agreeing for one's polity to be subsumed into some other. The fathers of international law discussed this in relation to conquered nations being subsumed by the conquering nation; the discussion there typically

[13] Either as an Ombudsman or with reserved seats in Parliament. See, e.g., Dobson 1996; Ekeli 2005.
[14] That, expressed in terms of the sovereignty of Parliament, is Dicey's (1908) version of the argument.
[15] Goodin 2005.
[16] Mill 1859.

mimicked at the national level the traditional discourse about how an individual warrior, defeated in battle, might reasonably agree to live as his conqueror's slave rather than be put to death (as his conqueror has every right to do).[17] But the issue resurfaces in modern times with, for example, states ceding sovereignty to supra-state organizations like the European Union.

Seen as an issue in democratic theory, the issue is relatively simple – far simpler than ordinarily seen in the non-too-theoretically-sophisticated discourse (public and otherwise) surrounding the EU. The issue is simply whether, in ceding sovereignty, the People in question cease 'giving law to themselves'. They do, insofar as the sovereign to which they cede sovereignty is not democratically responsive to their wishes. They do not, insofar as that sovereign is democratically responsive to their wishes (among others, of course). That is to say, the democraticness of the sovereign to which one cedes authority is the key to determining whether a ceding of authority is democratically legitimate or not. And that is why the EU's 'democratic deficit' matters so hugely, from a democratic-theory point of view.

But my primary focus here is on not procedural but substantive limits to the scope of legitimate democratic authority. One of those limits we have already seen, deriving from the democratic duty to be solicitous of the interests of those whose interests ought democratically be taken into account but who are inherently disenfranchised, like future generations.

Other examples of substantive limits to the writ of democratic rule are conventionally couched in terms of 'human rights'. There are certain things that public authorities ought not do, even if they are democratically elected, such as abnegate rights of life, liberty and property without due process of law.

Sometimes those are taken to be 'higher duties', standing outside of and exercising a supervisory role over the operation of democratic principles. But sometimes – and in my view, typically more correctly – they are seen as manifestations of those democratic principles themselves. That is to say, for the selfsame reasons we think that peoples ought govern their collective affairs according to democratic procedures, we also think that they ought govern their collective affairs in such a way as to respect those fundamental rights.

Democracies cannot, consistently with their fundamental legitimating principle, endorse torture or genocide. That is not to say that torture and genocide might not be enacted into policy by the procedurally-proper vote of a democratic majority, from time to time. It is merely to say that, whatever reason you have for deciding what to do by 'counting votes' in the first place, that selfsame consideration constitutes a compelling reason not to allow genocide among the things that you will count votes for.[18]

The classic formulation of such principles that are internal to the logic of democracy is Locke's 'life, liberty and property'. Supposing the purpose of democracy to be (in Macpherson's dismissive phrase[19]) 'protective', and supposing those are the interests it is to protect, it would be contrary to the purposes of democracy to make the protection of 'life, liberty and property' a purely contingent matter of how the votes come down. Of course, we have to protect the 'property interests' – the interests in having property – even of those presently without property. And where one person's property interests clash with another person's, we cannot satisfy both simultaneously. But while redistribution is thus licensed, a democracy's wanton neglect of everyone's interests in property, or life or liberty, would be profoundly contrary to the purposes of that democracy.

[17] Vattel 1758.
[18] Goodin 1986.
[19] Macpherson 1977.

I do not want to attempt to detail what all property rights there are that must be democratically respected in this way, as a matter of democratic principle. Suffice it to say that there clearly are some. The implication is that what democracy can do is necessarily subject to substantive constraints, and those constraints are themselves internal to democracy's own justificatory logic.

IV. Conclusion

So where does all this leave us, with respect to the question for a 'democracy unbound'? The bottom line is just this. Democracy is – or anyway, according to what I see as the best interpretation of its underlying principles, ought to be – unbounded as regards its range. Ideally everyone ought have a vote on everything, worldwide – and timelessly, to boot. But democracy ought not be unbounded as regards the scope of its decisional power. There are some things democracy must do and other things it must not do, if it is to be a democracy at all.

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