

UNCOVERING A TENSION: DEMOCRACY, IMMIGRATION, AND THE NATION-STATE

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ABSTRACT: It is common to assume (a) that democracy is intrinsically valuable, and (b) that nation-states have the authority to exclude would-be immigrants from their territory. Are (a) and (b) in tension? This paper argues that they are. Every account of democracy's intrinsic value suggests that nation-states lack the authority to exclude would-be immigrants. In fact, reflection on democratic values suggests an even more heterodox conclusion: nation-states should not be the privileged sites of decision-making that we often take them to be.

KEYWORDS: democracy, democratic values, immigration, right to exclude, territorial exclusion

SHOULD nation-states have the authority to exclude would-be immigrants who intend no harm?¹ Section I sets up our inquiry by explaining the idea of a jurisdictional challenge. In the context of immigration, a jurisdictional challenge contests not the particular content of an immigration law, but the authority of the state to stop would-be immigrants at the border in the first place.

Section II examines the most important jurisdictional challenge to emerge from democratic theory: the argument from popular rule. The argument, most influentially formulated by Abizadeh (2008), contends that by restricting immigration, nation-states govern would-be immigrants without giving them a democratic say. My aim is not to add another chapter to the growing back-and-forth about this argument; it is to highlight an under-appreciated point. The argument from popular rule rests upon a roughly Rousseauvian account of democracy's value. Committed democrats who do not share Rousseau's vision need not be moved.

The main goal of this paper is to develop a more ecumenical jurisdictional challenge. Section III shows that *every* account of democracy's intrinsic value (Rousseauvian or otherwise) suggests that nation-states should not have the authority to exclude would-be immigrants.² The values that lead many of us to believe that democracy is intrinsically better than monarchy also suggest that nation-states should not claim the authority to stop would-be immigrants at the border.

In fact, reflection on democracy's intrinsic value suggests an even more heterodox conclusion: nation-states lack the authority to pass a great deal of legislation. By democratic lights, nation-states should not be the privileged sites of decision-making we often take them to be. We should not dismiss this radical implication too quickly. Many nation-states established their borders through happenstance, war, conquest, and shady political bargaining. It would be surprising if these processes happened to put borders in democratically defensible places.

I. CONTENT AND JURISDICTION: TWO WAYS TO CHALLENGE A LAW

There are two ways to morally criticize a law. An objection to banning late-term abortion illustrates the first: late-term abortions are rare, and the women who get them typically have urgent medical reasons—reasons that make it dangerous to wait around while an ethics committee decides whether to grant a legal exception. Call this a *content* challenge. It does not deny the state's rightful authority to restrict abortion access; it argues that the state should not restrict access in *this* particular way.

Margaret Little (1999), by contrast, argues that pregnancy is a physical intimacy, and thus that any restriction is effectively a requirement that pregnant women be physically intimate, sometimes without their consent. Little does not grant the state's legitimate authority to restrict abortion and then criticize some particular restriction. She argues that no one, especially the state, should have the authority to require physical intimacy in the first place. Call this a *jurisdictional* challenge.

Another example: A content challenge to current federal drug laws in the United States might argue that marijuana should be legal. Without denying the state's rightful authority to regulate pharmacological substances, this challenge contends that banning marijuana in particular is a bad idea. A jurisdictional challenge would of course be more radical. Consider the well-known Libertarian argument that we have the right to dose our bodies with whatever we choose—our bodies belong to us, so, provided that we do not harm others, the state has no right to interfere.³

In the context of immigration, a content challenge might say that certain immigration quotas are too low, or that the process for screening immigrants is labyrinthine. But my concern is jurisdictional: Do nation-states have the legitimate authority to stop would-be immigrants at the border in the first place?

II. THE ARGUMENT FROM POPULAR RULE

The most influential, democracy-based jurisdictional challenge is what we might call the *argument from popular rule*. It begins with the premise that people should not be governed by political processes that exclude them. Who counts as being governed? There are two main answers. First, a law governs those whose *interests* it directly affects (Young 2000; Held 2004; Goodin 2007). Second, a law governs those it *coerces* (Abizadeh 2008). Either way, would-be immigrants seem to count, at least for immigration control. Would-be immigrants clearly have an interest in migrating; immigration control seems to target would-be immigrants, not citizens, for coercion. So by writing and enforcing immigration law—the argument

concludes—we govern would-be immigrants without giving them any legislative voice whatsoever.

Some critics accept the argument's central premise, but deny that would-be immigrants number among the governed. For example, David Miller (2010) contends that one must be coerced to number among the governed, but that immigration control is not, despite appearances, coercive.⁴ I want to focus on a second sort of criticism: denying that it is wrong to govern people without giving them a say.

The argument from popular rule builds upon a roughly Rousseauian account of democracy's value—people should not be subject to an alien will; the value of democracy is that we are authors of the laws that bind us.⁵ But, there are other accounts of democracy's value. Someone who endorses democracy for resolutely non-Rousseauian reasons might not be overly bothered that would-be immigrants have no voice in the laws that restrict their movements.

Consider, for example, someone who values democracy for purely epistemic reasons. When the argument from popular rule asserts that would-be immigrants are subjected to an alien will, the epistemic theorist may be wholly unmoved—what matters to her is not necessarily that the governed get a say, but that democratic processes are structured to promote wise decision-making. To be clear, epistemic theorists might think that would-be immigrants should have a say in our immigration laws. (As I argue below, that should be their view.) But if epistemic theorists reach that conclusion, they will do so for their own epistemic reasons, not because they think there is an intrinsic moral problem with political processes that don't give the governed a legislative voice.

So, the argument from popular rule is built to appeal to a fairly narrow set of committed democrats. This paper's aim is to develop a more ecumenical, democracy-based, jurisdictional challenge. Every account of democracy's intrinsic value suggests that nation-states lack the authority to exclude would-be immigrants.

III. A NEW JURISDICTIONAL CHALLENGE

There are two accounts of democracy's intrinsic value: *moral proceduralism* and *epistemic proceduralism*.⁶ Both suggest that a nation-level process—a process that includes citizen voices and ignores outsiders—oversteps its bounds by stopping would-be immigrants at the border.

III.A. MORAL PROCEDURALISM: NATION-STATES AND SOCIAL WORLDS DO NOT LINE UP

When we live with and among others, we form social worlds—interlocking networks of social and institutional structures that partially determine what we can do and who we can become. The two central commitments of moral proceduralism are: (a) people have a right to structure their shared world, and (b) members should shape their world together through a fair democratic process (Singer 1973; Waldron 1999; Christiano 2004).

The best way to understand moral proceduralism—and its connection to social worlds, autonomy, and equality—is to examine its account of why it is wrong to disobey the law in a genuine democracy. According to what we might call the

arrogation argument, such disobedience constitutes an “unreasonable arrogation of power” (Shapiro 2002: 12). Tom Christiano elaborates:

If they refuse to go along and disrupt the democratically chosen arrangements, they are assuming for themselves a right to determine how things should go that overrides the equal rights of others. They are, in Peter Singer’s words, assuming the position of dictators in relation to the others. (Christiano 2013)

To explicate, if a group decides to structure their shared lives in a particular way, but neglects to give one of their compatriots any say in the matter, they treat her as an inferior—a subordinate with no right to structure her social world. According to the arrogation argument, someone who disobeys a genuinely democratic law subjects her political peers to the same treatment—she treats them as inferiors who lack the right to structure the shared world. The consequences of treating someone as an inferior might not be so bad. But the arrogation argument emphasizes *respect*: when the *demos* gets together, has the right sort of debate, and makes a reasoned decision to structure a portion of the shared world it rightfully regulates, we disrespect our political peers by disobeying.

How does any of this connect to immigration? If would-be immigrants share a social world with citizens, moral proceduralists should conclude that nation-states are acting as dictators. Immigration laws clearly structure shared worlds, and would-be immigrants get no legislative voice. So we must ask: can a plausible account of world-sharing link citizens to one another without also linking citizens to non-citizens?

There are two main accounts of world-sharing. Jeremy Waldron offers one; Christiano, the other. Waldron’s account relies upon proximity: when we are “unavoidably side by side with others,” Waldron holds that we must establish civil society with them (Waldron 1993: 14). The idea is that our actions are likely to affect those around us, and that our capacity to causally impact one another locates us in the same shared world.

But the set of people causally impacted by one’s actions is almost never co-extensive with one’s co-nationals.⁷ Most of my actions impact those most proximate to me—family, neighbors, students, or colleagues I see every day—without making the slightest difference to people several states distant. And when my actions have a more far-reaching impact, their impact seldom stops at national boundaries. When I publish a paper or post something on the Internet, for example, it becomes available to people across the globe. The point is not that Waldron’s strategy for distinguishing shared worlds is necessarily mistaken; it’s that if Waldron is correct to focus on proximity, *nation-states* do not constitute a shared world.

Christiano’s strategy for distinguishing shared worlds is more complicated. According to Christiano, shared worlds are characterized by a deep “intertwining” of people’s interests: a shared world is one “in which the fulfillment of all or nearly all of the fundamental interests of *each* person is connected with the fulfillment of all or nearly all of the fundamental interests of *every* other person” (Christiano 2008: 80; emphasis mine).

I can think of two ways to interpret this view. First, the interests of people who share a world might be directly connected to each other. My interests are connected

in this way to my young daughter's interests—if she is badly off, my interests (*qua* involved parent) are also set back; if I am badly off, I am less able to care for her and so her interests suffer as well. But are citizens interests directly connected in modern nation-states? Clearly not. My fundamental interests are pretty well satisfied—I have adequate food, shelter, and healthcare. I have fulfilling work and I enjoy the social bases of self-respect. But I share a nation-state with hundreds of thousands of homeless people, hundreds of thousands of prisoners suffering inhumane conditions, and millions who live well below the poverty line. If some catastrophe befell me, so that my fundamental interests went mostly unsatisfied, their interests would be just as poorly served as before. And if their fundamental interests were better satisfied—suppose there was a sudden national interest in building homeless shelters, improving prison conditions, and providing more comprehensive welfare programs—very little would change for me. Modern nation-states do not display Christiano's deep intertwining of fundamental interests.

The second interpretation of Christiano's view is that the interests of those who share a world are connected in the sense that they are subject to the same authority—they are not linked directly, as my daughter's interests and mine are, but they are linked by a common authority. An analogy: If some catastrophe were to befall members of the Business Department, it is possible that little would change for me over in Philosophy. Still, I am connected to business professors in the sense that we are both subject to the same University President. Are co-nationals linked in this sense?

The answer is that they are, but that this indirect, 'common authority' sort of linkage creates a different problem by multiplying social worlds. The president of an home owner's association links neighbors; County officials link those who share a county; mayors link city residents to each other; and governors link those who share a state. To preserve the *nation-state's* authority to regulate immigration amid this crowd of social worlds, the moral proceduralist needs to (a) explain why the authority to regulate immigration is important for the nation-state, without (b) inadvertently crediting that authority to some other municipality as well. And that is difficult. The answer cannot be that nation-states need to preserve a distinctive national culture—if cultural differences are good reason to keep Canadians out of America, they are good reason to keep Texans out of New York. Nor can the moral proceduralist appeal to economic interests—if nation-states may exclude for the sake of economic wellbeing, it is hard to see why economic benefits wouldn't justify democratically run cities from doing the same. Nor, finally, can the moral proceduralist argue that nation-states are the only municipality capable of regulating immigration—cities and small towns have much less border to monitor, and might find it easier to regulate comings and goings.

So neither Waldron's nor Christiano's strategy for distinguishing shared worlds is friendly to the idea that modern nation-states should have the authority to turn away would-be immigrants. Can a different strategy do better? It is hard to see how.

The populations of modern nation-states are vast and vastly stratified. Many co-nationals do not share a region, a religion, a culture, a political ideology, a substantive moral code, a socio-economic class, a profession, a language, friends, family, colleagues, or acquaintances. So suppose, realistically, that *A* is a white,

atheist, progressive, English-speaking academic living in the Northwest United States. *B* is a Hispanic, Catholic, conservative, Spanish-speaking carpenter living in South Florida. If we set the bar for world-sharing low enough to link *A* and *B*, it will be implausible to insist that *A* is not also linked to her friends, family, and academic interlocutors overseas, and that *B* is not linked to his close relations in, say, South America. On the other hand, if we set the bar for world-sharing so high that *A* and *B* are not linked to anyone outside the United States, it will be implausible to insist that they *are* linked to one another. If their comparatively robust connections to certain non-citizens are not sufficient for world-sharing, neither should the comparatively tenuous connections between *A* and *B*.

What about a more moderate strategy for distinguishing shared worlds? Can we distinguish shared worlds by suggesting that, while citizens are often connected to people outside national borders, citizens are especially connected with one another? No. This more moderate strategy for privileging the nation-state fails for the same reason as Christiano's: in most modern nation-states, many citizens are barely connected to each other while, at the same time, bearing fairly robust connections to outsiders. Again, if the relatively tenuous connections between *A* and *B* are sufficient for world-sharing, the relatively robust connections between *B* and his close relations in South America should be sufficient as well. If the relatively robust connections between *B* and his South American relatives is insufficient for world-sharing, we should draw the same conclusion about the relatively tenuous connections between *A* and *B*.

To sum up: according to moral proceduralism, democracy is valuable because it recognizes the right of each person to shape the social world she inhabits. To avoid acting as dictators, we must give each person with whom we share a world a say in the legislation that structures that world. Moral proceduralism does not preclude the possibility that *some* group has the authority to get together and decide who may enter. But world-sharing does not seem to respect national borders, so nation-states are probably not that group.

In fact, these observations suggest a more radical conclusion. Moral proceduralists should conclude that nation-states lack the authority to pass *any* legislation that significantly shapes the social worlds of non-citizens (many economic and foreign policies, for example). This is a radical conclusion, but it is not obviously false. As I pointed out in the introduction, war, conquest, and shady political bargaining established many national boundaries. It would be almost miraculous if these processes happened to put borders in democratically defensible places. Moreover, most national boundaries were established long ago. Centuries of immigration, population growth, the globalization of business, and increasingly powerful technology have radically changed the way that people across the globe interact. There is no *a priori* reason to think that such changes couldn't render old boundaries obsolete.

III.B. EPISTEMIC PROCEDURALISM: PROCEDURAL OPENNESS

The epistemic proceduralist's objection stems not from the boundaries of shared worlds, but from a commitment to procedural openness. (More precisely, procedural

openness is the root of what the objection *should* be. Most epistemic proceduralists seem not to recognize the radical implications of their view.⁸)

There are two sorts of epistemic proceduralist, and each is committed to openness for a different reason. According to the first, there are procedure-independent—or ‘transcendental’ or ‘objective’—facts about which policies a polity should enact. Democratic deliberation is valuable because it arrives at the objectively correct policies more reliably than any other feasible political arrangement. Early versions of this view relied upon the Condorcet Jury Theorem—a large number of people presented with a binary choice, each of whom is only slightly more likely to be right than wrong, becomes almost infallible when they vote as a group governed by majority rule. The Condorcet Jury Theorem has fallen out of favor;⁹ but Estlund (2008a) has revived this kind of epistemic proceduralism by arguing that moral considerations rule out arrangements such as epistocracy—rule of the wise—and that democracy is the most epistemically reliable arrangement that remains. Call this first camp the *reliabilist* version of epistemic proceduralism.

The second camp has roots in Pragmatism and takes its cue from figures such as Dewey, Peirce, and Habermas. It eschews procedure-independent—or ‘transcendental’ or ‘objective’—facts about which policies a polity ought to implement. As Cheryl Misak puts it, “The right answers to our political questions are not . . . given by a sovereign, or by a deity, or by some canon of Reason” (Misak 2008: 95). Rather, we constitute political truths by having the right sort of political deliberation. In a similar vein, Fabienne Peter writes, “Epistemic values, in this account, are . . . irreducibly procedural—there is nothing beyond critically engaging with each other in transparent and non-authoritarian ways” (Peter 2009: 124). Call this the *pragmatist* version of epistemic proceduralism.¹⁰

Reliabilists and pragmatists share two convictions. First, democratic politics is a *truth-oriented* deliberative enterprise. Of course, reliabilists hold that democracy strives to discover objective truths while pragmatists regard political truths as constituted by deliberation. But the point is that both camps think of democratic politics as akin to moral philosophy, or even to science, in that it aims to get things right.¹¹ The second shared conviction is to *procedural openness*: democratic deliberation must be open to all, and all must get a vote. This might seem odd: “Why deliberate with the ignorant multitude? . . . Science . . . doesn’t work by asking the person in the street what he or she thinks about quantum mechanics” (Misak 2008: 102). Different epistemic proceduralists respond to this worry differently. Estlund, as we saw above, uses moral considerations to rule out epistocracy. Many pragmatists follow Dewey (1927) in holding that whereas we can recognize scientific experts by their training, moral and political expertise is difficult, if not impossible, to reliably identify. So while they disagree about why, both reliabilists and pragmatists agree that procedural openness is a core democratic commitment.

Now, as a general matter, participants in a procedurally open, truth-oriented debate do not have the authority to exclude people on account of their nationality. Scholars from the United States do not have the authority to exclude Mexicans from a debate about the nature of moral rights, for example, or about the likely consequences of global warming. Epistemic proceduralists see politics as an epistemic

practice alongside moral philosophy or science, so it should be odd for them to think that citizens from the United States have the authority to exclude Mexicans from a debate about immigration.

Can epistemic proceduralists avoid this conclusion? They cannot say that citizens' decisions about immigration will not much affect outsiders. Besides, it is strange to think that one's being particularly affected by the outcome of a truth-oriented deliberation should be a precondition for joining in. If you have no particular stake in the outcome of a debate, but happen to have an excellent point, you should be heard if you wish to speak.

Nor can epistemic proceduralists justify nation-level decision-making procedures on the grounds that citizens are the only ones epistemically qualified to formulate their nation-states immigration policy. First, as we saw above, both reliabilists and pragmatists condemn epistocracy. They have ruled out this move for themselves. Second, even if epistemic proceduralists were to embrace epistocracy, it is plainly false that non-citizens, as a category, are less knowledgeable than citizens. Embracing epistocracy, in any nation-state, would mean disenfranchising certain citizens and giving certain non-citizens a political voice.

To sum up: epistemic proceduralists see politics as a truth-oriented deliberation that should be procedurally open. But these commitments sit uneasily with a political practice in which the citizens of a nation-state decide for themselves which would-be immigrants to admit and which to turn away. Like its moral cousin, epistemic proceduralism also has a more radical implication: nation-states lack the authority to pass just about *any* law. The argument is straightforward: there is no plausible, consistent way to maintain both (a) that politics should be a procedurally open, truth-oriented enterprise on a par with moral philosophy or science, and (b) that non-citizens should have no voice in our nation-state's legislative proceedings. This is a radical implication, but, once again, it is not obviously mistaken.

IV. CONCLUSION

There is a deep tension in political philosophy: the values that lead many of us to endorse democracy in the first place raise doubt about whether nation-states should be privileged sites of decision-making. The problem for moral proceduralists is that modern nation-states are vast and vastly stratified, so that the boundaries of social worlds do not line up with national boundaries. Moral proceduralists should therefore object to any law—like immigration control—that shapes the social world of people who get no democratic say. The problem for epistemic proceduralists is more straightforward and even more pronounced. There is no good way to hold (a) that democracy is a truth-oriented, procedurally open practice alongside moral philosophy or science, and (b) that nation-states are entitled to exclude outsiders on account of their nationality.

This tension has gone largely unnoticed. My aim has been to uncover it.¹²

ENDNOTES

1. The qualifier ‘who intend no harm’ is important. Just as any third party has the moral right to keep armed white supremacists like Dylan Roof out of Black churches, the state has the moral right to keep out would-be immigrants who intend harm. But, of course, most would-be immigrants do not intend harm. The malevolent outsider is mostly a politically motivated fiction. From this point forward, I will drop the qualifier and refer simply to “would-be immigrants.”
2. It is possible that democracy is not intrinsically valuable. According to instrumentalism, democracy is merely a means to independently valuable ends. This paper mostly leaves instrumentalism to one side—it aims to explore what the intrinsic values of democracy (if there are any) suggest for immigration.
3. See Huemer 2004.
4. Miller distinguishes between *prevention* (which stops people from doing a specific thing while leaving other options open) and *coercion* (which forces people to do a fairly specific thing). He claims that immigration control is an example of prevention, not coercion. See Abizadeh 2010 and Fine 2011 for responses. As an anonymous reviewer rightly points out, a critic could take a subtly different tack: accept that people should not be governed by political processes that exclude them, and then argue that would-be immigrants get sufficient representation through their own leaders—Mexican officials represent would-be immigrants from Mexico, for example, and the United States works out its immigration policy in consultation with them. But, as the reviewer again rightly points out, this is not a promising line of argument. Mexican officials do not have much leverage, so would-be immigrants from Mexico are not really heard. The difference in power is even more pronounced if we substitute the Maldives, Bangladesh, or any number of other countries for Mexico.
5. For Rousseau, of course, we are authors because we help to form the general will (Rousseau 1987).
6. Instrumentalists deny that democracy is intrinsically valuable. For them, democracy is simply a tool for achieving important ends. My task is to determine what the intrinsic value of democracy, if there is one, implies for immigration control, so I will mostly pass over instrumentalism in silence. Still, one observation is worth making: instrumentalists who endorse border control need to justify a massive opportunity cost. In 2012, for example, the United States spent roughly eighteen billion dollars on the enforcement of immigration law—a higher sum than was spent on all other law enforcement agencies combined (http://www.huffingtonpost.com/huff-wires/20130107/us-immigration-spending/?utm_hp_ref=homepage&ir=homepage). Eighteen billion is a small portion of the national budget, but whatever percentage it constitutes, eighteen billion dollars can achieve quite a few good ends. If we could achieve a better overall result by putting those resources towards a different end, instrumentalists should eschew immigration control in favor of something else.
7. Simmons 2013 makes a similar argument for this conclusion.
8. Most refer generically to ‘the *demos*,’ to ‘political society,’ to ‘the body politic,’ or to ‘political community’ without pausing to ask whether these terms plausibly refer to the citizens of a nation-state. For a representative sample, see Cohen 1986, Estlund 2008a, Fuerstein 2008, Misak 2008, and Peter 2008.
9. The theorem requires that voters’ decisions be independent from one another, but the independence condition is often violated in practice. In addition, the theorem requires that choices be binary. Many political decisions are not.

10. Joshua Cohen 1986 is another notable epistemic proceduralist.
11. Estlund 2008a is particularly clear that democratic politics aim at truth. To take a pragmatist, Peter 2009 aligns democratic politics with science by building her account of democracy on Helen Longino's pragmatist epistemology.
12. I would like to thank Del Ratzsch, Jason Matteson, Russ Pryba, Jona Vance, and two anonymous reviewers for helpful comments.

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