

Putting Principles Before Process: Why Education Ballot Initiatives Should Really Bother Us

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Michele Moses's important essay addresses a pressing problem in education policy, given recent ballot initiatives that have undone civil rights measures in some states. This policy problem also invokes one of the most enduring debates in democratic theory, which centers on the foundational question: Why do we value democratic decision making, anyway? In response to this question, democratic theorists roughly divide into two camps — proceduralists and constitutionalists. By briefly sketching out each side's response to this question, I aim to draw out what I understand to be Moses's position in this debate when it comes to education policy making. I then suggest that her position leads to a stronger stance against ballot initiatives than she acknowledges, owing to a choice between democracy and justice that she implicitly (and I think rightly) makes. My aim in this response, then, is not to disagree with the spirit of Moses's conclusion, but rather to suggest firmer ground on which she might defend it.

On the one hand, procedural democrats view popular will as the core of democracy, and are centrally concerned with whether the democratic process enables expression of that will. At the extreme end of the procedural spectrum, aggregative theorists like Joseph Schumpeter reduce democracy to competitive elections, without much concern for the equality or justice of outcomes (or much hope in citizens' ability for intelligent political participation).¹ More moderate proceduralists are concerned about the problem of the tyranny of the majority, and emphasize certain background conditions (such as campaign finance reform) in order to ensure a fair decision-making process. But, at bottom, they still defend the legitimacy of majoritarian outcomes.

On the other hand, liberal constitutionalists are primarily concerned with the fairness of democratic outcomes. On their view, the democratic process should regulate which outcomes are just, not only the processes by which we make decisions. Liberal constitutionalists appeal to substantive values (like equality of opportunity) in order to constrain what democratic bodies can rightly decide. Popular will is not decisive here, then; popular will instead must cohere with respect for individual rights. Jon Elster captures well the motivation for this view of democracy, in comparison to its procedural alternative that simply aggregates individual preferences: "If people affected each other only by tripping over each other's feet, or by dumping garbage into one another's backyard, a social choice mechanism might cope. But the task of politics is not only to eliminate inefficiency, but also to create justice."²

Both theoretical camps are vulnerable to criticism of their extreme corners. Proceduralists are accused of having an anything-goes attitude to democratic

outcomes; constitutionalists are portrayed as undemocratic elitists. Amy Gutmann and Dennis Thompson step into this fray, as Moses emphasizes, and aim for a compromise within their view of deliberative democracy. As they put it: “Breaking the deadlock between proceduralists and constitutionalists about which rights have priority is part of the promise of deliberative democracy.”³ Moses draws upon Gutmann and Thompson’s dual concern for procedures and outcomes to frame her objection to certain education ballot initiatives. But a close inspection of her reasoning seems to suggest that the force of her opposition is rooted mainly, if not entirely, in constitutional concerns. I am doubtful that procedural objections are doing much work in Moses’s analysis, and that anything short of eliminating certain ballot initiatives will deliver the results that she really wants.

Moses offers three reasons for questioning the fairness of education-policy-making-by-ballot-initiative. The first two are squarely procedural: first, citizens do not have enough (or at least not good enough) information to make sound decisions; and, second, power and corruption taint the democratic process. Putting these two considerations together (and ignoring her third rationale for the moment), it would seem that, if people were adequately informed and power were evenly distributed, Moses could accept majoritarian decisions to end affirmative action or bilingual education. Yet this cannot be her position, given the third reason she offers for opposing ballot initiatives: a concern for minority rights.

This objection is different in kind from the former two, in that it appeals to substantive values that are concerned with just outcomes, beyond fair procedures. And it seems to me that a concern for minority rights is doing the bulk of the work in Moses’s analysis. She gestures toward its heightened importance when calling it “perhaps the most crucial reason” to doubt the fairness of ballot initiatives. But I wish to push her beyond this “perhaps” to suggest that this concern *is* her best reason to oppose ballot initiatives — and that the strength of this constitutional objection renders her other two procedural concerns largely beside the point.

To illustrate why concern for minority rights is a singularly compelling reason to oppose the ballot initiatives that trouble Moses, consider a counterfactual depiction of recent events. Suppose a wealthy affirmative action advocate bankrolled an initiative in Michigan to protect affirmative action in higher education admissions, *contra* a recent Supreme Court decision that substantially limited it. Further, assume that voters are not as informed as they might be about the issue, and that the liberal media bends public opinion to some degree. Would Moses protest a victory for affirmative action in this context? If not (or if not to the same degree as she might oppose a procedurally fair vote against affirmative action), then the (more) decisive criterion in her assessment of ballot initiatives seems to be their outcome.

If this is the case, then Moses joins good company among education theorists. Harry Brighouse, for one, expresses concern about the possibility of collective choices yielding bad education policy. When it comes to deciding how to make policy that treats children as prospective moral equals, he writes: “Democracy may be this method, but it may not.”⁴ Moses is not as explicitly agnostic about the value

of democracy when making educational policy, but I think her argument would be well served if she were. Admitting agnosticism about democracy would enable her to appeal more forcefully to individual rights, justice, and equality of opportunity — substantive values that do more for her case than the procedural objections she also enlists.

To be sure, firm appeals to substantive rights will force a tradeoff with respect for popular will. This is the point at which democracy and justice come apart. Moses does not discuss this crossroads explicitly. But it seems that she implicitly chooses justice over democracy, given her concern for the fairness of initiative results, and not just the process by which they came to be. I think she could state her substantive objection more forcefully, then: when it comes to certain matters in the education arena, the majority simply should not rule. Voters may get it wrong, and the damage done to justice when they do far outweighs democratic concerns about popular will in the context of policies like affirmative action and bilingual education.

If Moses agrees with this stronger statement of her substantive objection, then her conclusion is too timid. She endorses several moderate proposals to make ballot initiatives more procedurally fair (for example, requiring supermajority support, and campaign finance transparency). Yet the strength of her recommendations rests not with these procedural adjustments, but rather with her recognition of the need for a fundamental shift in authority over policy decision making. Drawing upon Amy Gutmann's view that political authority should be limited to respect the principle of nonrepression, Moses emphasizes how ballot initiatives that end affirmative action violate this principle. To this end, she points to the drop in minority enrollment in public universities in California after the passage of Proposition 209. This again demonstrates her constitutionalist stance, to the extent that her concern about declining minority enrollment as a rights violation would not be appeased by assurances that the ballot initiative process was conducted fairly. It is unclear to me, then, why Moses bothers to endorse reforms to the ballot initiative process in this instance instead of strongly advocating its abolishment altogether.

In sum, I think Moses is a stronger advocate for minority rights than she conveys, and her argument would be strengthened if she was more forthright about her constitutional commitments on this front. From this perspective, ballot initiatives should really bother us not because they are conducted on unfair terms, but because they take up questions that should be decided by principles of justice, and not by voters. This is not to say that we should ignore popular will and eliminate public authority in the education arena. But when popular will repeatedly fails to protect minority rights of the sort that Moses writes about, then we may be justified in putting principles above process. Moreover, such violations at the polls are arguably a testament to shortcomings in political education itself — a fundamental problem that we need not entrench by giving its victims license to curtail the educational opportunities of others. I thank Moses for focusing a theoretical lens on this troubling political practice, and for raising questions about why we might oppose it.

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1. Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper and Brothers, 1947).
 2. Jon Elster, "The Market and the Forum: Three Varieties of Political Theory," in *Deliberative Democracy: Essays on Reason and Politics*, eds. James Bohman and William Rehg (Cambridge, Mass.: MIT Press, 2002), 10–11.
 3. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1997), 27.
 4. Harry Brighouse, *School Choice and Social Justice* (Oxford: Oxford University Press, 2000), 56.