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Ludvig Beckman

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Deciding the demos: three conceptions of democratic legitimacy

Ludvig Beckman

Department of Political Science, Stockholm University, Stockholm, Sweden; Institute for Futures Studies, Stockholm, Sweden

ABSTRACT

The prevailing view is that democratic procedures are unable to confer democratic legitimacy to decisions about democratic procedures. This paper examines this claim in detail and uses referendums on the inclusion of previously disenfranchised groups in the demos as a running example. The paper distinguishes between pure, imperfect and quasi-pure models of procedural democratic legitimacy and sub-versions of them. To various extents, each model does have the capacity to confer legitimacy to demos decisions under well-defined circumstances. The paper argues that quasi-pure procedural legitimacy represents the most promising account of democratic legitimacy in cases where democratic procedures are the subject of collective decision-making. According to this model, the decision to revise the rules for membership in the demos is permissible by democratic standards if and only if the revision is not forbidden by democratic principles for inclusion. The point is that the range of alternatives that are not forbidden by democratic principles of inclusion are likely to be considerable due to vagueness of the principles themselves and/or them being subject to reasonable disagreement. The paper concludes with a discussion about the possibility of democratic legitimacy for democratic institutions not introduced as a result of democratic decision-making.

KEYWORDS Democratic legitimacy; demos decisions; procedural democracy; referendum; voting rights

Introduction

In the summer of 2015, the Grand Duchy of Luxembourg held a referendum on two different proposals for extending the right to vote to people who were at that time disenfranchised: to lower the voting age to 16 and to include resident non-citizens in the demos. The referendum offered an opportunity for those that were members of the electorate at that time to decide whether many people...
who were not members should henceforth be able to participate in elections or not. An overwhelming majority of Luxembourgers, however, rejected the proposals. The members of the demos thereby determined that others should not be members of the demos – they made a *demos decision*.\(^1\) Does it follow from the fact that the decision was made through democratic procedures that it should be regarded as legitimate by democratic standards?

Joseph Schumpeter is well known to have believed that ‘every populus’ is entitled to define itself (Schumpeter, 1942). The implications of his view are rather extreme; if just any group of people was entitled to define the rules for membership in the demos, we would have to accept the democratic legitimacy of a white minority deciding to deny a black majority or of male citizens deciding to deny female citizens the right to vote. As noted by Robert Dahl, the idea of the self-defining demos obliterates ‘the distinction between democracy and a nondemocratic order’ (Dahl, 1989, p. 128).

Dahl concluded that the proper boundaries of the demos depend on a *principle* of democratic inclusion, not on a *decision* made through democratic procedures. However, it is not clear whether Dahl believed that collective decisions about membership in the demos are legitimate if and only if consistent with democratic principles of inclusion and whether, therefore, the making of such decisions through democratic procedures does not in any way contribute to their legitimacy. On the other hand, a host of democracy theorists deny that demos decisions can be resolved through democratic procedures. In his seminal paper, Frederic Whelan (1983, p. 22) argued that ‘democratic methods themselves are inadequate to establish the bounds of the collectivity’. The upshot of this is that democratic procedures are inappropriate for deciding who should or should not be a member of the demos; the attempt to ‘determine the limits of membership through democratic means’ is ‘paradoxical’ (Olson, 2016, p. 12). This view is summarized in Rainer Bauböck’s claim that ‘the question of who must be included as a citizen in order to achieve democratic legitimacy cannot itself be answered by democratic decision’ (Bauböck, 2009, p. 14). The present paper challenges this view. I shall argue that, in a number of well-defined situations, it is possible to ‘establish the bounds of the collectivity’ by collective decisions that are legitimate by democratic standards.

First, I wish to make a preliminary comment on the notion of democratic legitimacy. *Political legitimacy* refers either to acceptable reasons for the permissible uses of coercive power or to acceptable reasons for being obliged to obey the state (Peter, 2016). For convenience, I will take political legitimacy to mean the permissible exercise of coercive power by the state, although this is not of much consequence in this context. Given that democratic legitimacy is concerned with the procedures for collective decision-making (Hershovitz, 2003, p. 212), claims about *democratic* legitimacy entail that the permissibility of coercive decisions is conditioned either by the intrinsic properties of the procedures through which they are made or by the tendency of these procedures to
produce certain outcomes. In sum, democratic legitimacy is procedural, though not necessarily purely procedural. An account of democratic legitimacy specifies the procedural requirements that democrats should accept as sufficient for the permissible uses of coercive power by the state (Applbaum, 1992, p. 250; Hershovitz, 2003, p. 202). Consequently, the democratic legitimacy of demos decisions is dependent on the procedural requirements for collective decisions about who should be able to vote.

Democratic legitimacy is of particular importance for demos decisions, since such decisions represent attempts to regulate the procedures for the making of collective decisions. The challenge, then, is to identify the procedural conditions for the democratic legitimacy of collective decisions about democratic procedures. Though several writers have previously concluded that democratic legitimacy is lacking in relation to demos decisions, this paper systematically identifies possible ways in which such decisions can be legitimate on the basis of three distinct accounts of democratic legitimacy. The first is that procedures for the making of collective decisions are legitimate by democratic standards to the extent that they are procedurally inclusive. The point is that demos decisions can be legitimate, provided that they satisfy more demanding requirements than simple majority rule. Once these higher standards are satisfied, demos decisions can be resolved through referendums or any other democratic method. The second view holds that collective decisions about membership in the demos are democratically legitimate to the extent that they are instrumental to the realization of democratic procedures as defined by the principles of democratic inclusion. To vote on who should be able to vote is perfectly fine, if the vote is likely to produce the correct result. Following this model, procedural legitimacy derives from the expected outcomes of democratic procedures.2

The third view stems from the observation that the principles of democratic inclusion are not necessarily conclusive. The presumption is that at least some aspects of democratic inclusion are not fully determined by principles for democratic inclusion. The point is that decisions on alternatives that do not follow from principles of democracy should be considered permissible in accordance with these principles and, therefore, a legitimate subject for collective decisions.

The Luxembourg referendum is judged very differently, depending on by which of these three accounts of democratic legitimacy it is assessed. The first perspective would consider the referendum highly problematic, since it excluded people subject to the rules from participating in it. Following the second view, the legitimacy of the outcome of the referendum depends on what we, on independent grounds, have reason to believe is the correct answer to the question voted upon; the outcome is legitimate if the decision is the correct one, and vice versa. Following the third view, the referendum is legitimate in so far as the issues voted are not determined by democratic standards. The paper concludes by presenting some considerations in favor of the third view of democratic legitimacy.
Pure procedural democratic legitimacy

An account of democratic legitimacy is purely procedural if it specifies some procedure as both necessary and sufficient for the legitimacy of a collective decision. The hallmark of a pure procedural account is, as Rawls famously noted, the absence of any procedure-independent criteria for the assessment of the legitimacy of the outcome (Rawls, 1971, p. 75). One example of a pure procedural account of democratic legitimacy is Schumpeter’s, according to which a majoritarian decision by the people already enfranchised is sufficient for the legitimacy of the rules determining membership in the demos. However, even other pure procedural accounts of democratic legitimacy are clearly conceivable. What Samuel Freeman (2000, p. 18) terms ‘pure procedural democracy’ requires that legitimate collective decisions are inclusive. Following this view, everyone affected by or subject to a decision must be able to participate in it in order for the decision to be legitimate by democratic standards (as is well known, each principle of inclusion is subject to further qualifications in order to accommodate the exclusion of children, transients, etc.). Both Schumpeter’s and Freeman’s accounts are purely procedural, as they hold that legitimacy follows from the intrinsic value of the procedure through which collective decisions are made, not from their instrumental value in securing some pre-defined outcome. The legitimacy conferred is ‘retrospective’ in the sense that it is determined by ‘looking back’ at the procedure whereby the decision is made (Estlund, 2009, p. 69).

The insistence that inclusion is among the conditions for democratic legitimacy derives from the more abstract precept that public authority must be justified to the people affected or subject to it. Hence, the claim that demos decisions must include the people subject to them in order to be legitimate is premised on the importance of correspondence between the people subject to public decisions and the people making them. A democratic justification of public power requires participation by ‘all those over whom [coercive political power] is exercised’ (Abizadeh, 2008, p. 45). The relationship between democratic inclusion and democratic justification is summarized by David Owen’s claim that ‘all those who are subject to coercively-enforceable law are entitled to inclusion within the demos’ (Owen, 2012, p. 146, see also Saunders, 2011, p. 63).

The significance of inclusion for democratic legitimacy implies that demos decisions must include not only the people already enfranchised but also the people whose participatory rights are at stake. For example, a referendum on the lowering of the voting age from 18 to 16 requires the participation not only of the citizens already enfranchised but also of the citizens whose enfranchisement is at stake (i.e. citizens aged 16–18).

To include both the people already enfranchised and the people whose participatory rights are at stake is not necessarily sufficient for democratic legitimacy, however. The people entitled to a democratic justification for a decision that revises the demos could include everyone subject to or affected by that
decision. It is conceivable that people that are neither already enfranchised nor whose voting rights are at stake can nevertheless be subject to or affected by a demos decision. A decision about the voting age might, for example, affect the likelihood for the voting age to be lowered even further in the future. Hence, it can be argued that citizens between the ages of 14 and 16 should be able to participate in deciding whether the voting age should be lowered to 16, since the prospect for their inclusion is likely to be dependent on this first decision.

Depending on our understanding of democratic inclusion, demos decisions potentially require the inclusion of people excluded by both existing and potential rules for membership in the demos. A decision to alter the rules defining the demos might have consequences for future elections, which in turn may affect future policy-making of potentially great concern to people everywhere. If so, the democratic approach might require the inclusion of every likely or potentially affected present or future person or non-person (Goodin, 2007).

However, the extent of inclusion required for the realization of democratic legitimacy concerns the meaning of principles of democratic inclusion, not the consistency of the purely procedural account of democratic legitimacy in the making of demos decisions. In order to explore whether demos decisions are legitimate in terms of the pure procedural account, a distinction is needed between two versions of this idea. Following the general account, democratic legitimacy requires that people subject to binding collective decisions have an opportunity to participate in the making of these decisions. Since demos decisions are binding collective decisions, it follows from this general conception that people subject to demos decisions should be able to participate in making them. However, there is nothing special about demos decisions in this regard. People subject to demos decisions deserve participatory rights for reasons that are essentially the same as the reasons that justify participatory rights of people subject to other binding collective decisions.

By contrast, the specific account proceeds from the assumption that the requirements for democratic legitimacy are more rigorous in ‘constitutional’ decisions, since they are concerned with the constitutive elements of democratic procedures. Given that demos decisions are concerned with the constitutive element of democratic procedures, it follows from the specific conception that anyone whose ‘allegiances and affiliations’ are affected by them should be able to participate (Owen, 2010, p. 64).

**The general account**

Let us assume that the inclusion of A and B is sufficient for pure procedural legitimacy of a collective decision regulating membership in the demos. Now, imagine that A and B jointly decide that B should be excluded from the demos. Is the decision legitimate? One answer is that it is not, since it denies B the ability to participate in future decisions to which B will be subject. After all, the general
conception of pure procedural legitimacy requires that anyone subject to public decisions should be able to participate in them. On the assumption that B will indeed remain subject to A’s decisions, democratic legitimacy apparently requires that B continues to be included in the demos.

The problem is that this answer betrays the nature of pure procedural legitimacy. As we have seen, any outcome should be regarded as legitimate, provided that the procedural requirements are satisfied. Since we have already accepted that the decision to exclude B from the demos is made in accordance with the procedural requirements of democratic legitimacy, there is no basis for refuting its legitimacy. In sum, it is incoherent to hold that decisions made in full compliance with the standards of pure procedural legitimacy are also illegitimate by the very same standard.

Perhaps a better response would be to accept the decision as legitimate precisely because it complies with the procedural requirements of democratic legitimacy. Of course, the implication is that B should not be able to participate in future decisions, even though B is subject to them. To accept the exclusion of B from the demos is hence to undermine the prospect for pure procedural legitimacy in the future. As noted by Waldron (1999, p. 301), the decision to exclude people that are entitled to be members of the demos upsets the democratic legitimacy of future decision-making through these procedures. Yet, to perform an action that undermines the possibility of undertaking the same action in the future is not inconsistent. It is plainly self-defeating, however, to hold on to an account that negates the conditions of its own application.

The problems confronting the pure procedural account of democratic legitimacy in relation to demos decisions can be illustrated by reference to real-world examples, such as the 1968 referendum in Liechtenstein on women’s suffrage. Although only male citizens were at the time entitled to vote in Liechtenstein, women were granted the right to participate on this occasion. With respect to the procedural requirement of inclusion, this referendum consequently satisfied the standards of pure procedural democratic legitimacy. Despite the inclusiveness of the election, the majority of the voters rejected the proposal and concluded that women should not be entitled to vote (see Marxer, 2012).

The question, then, is whether the continued disenfranchisement of women in Liechtenstein would be acceptable in terms of the standards defined by the general conception of pure procedural legitimacy. On the one hand, to reject the legitimacy of the outcome would contradict the purely procedural nature of the present account of democratic legitimacy. However, to accept the legitimacy of the outcome would undermine the application of democratic legitimacy from then on. Future elections with the participation only of men would fail to meet the standards of pure procedural democracy. In sum, the general conception of democratic legitimacy is either inconsistent or self-defeating.
The specific account

Let us turn our attention to the specific conception of the democratic approach to democratic legitimacy. According to this view, there are special reasons that people subject to demos decisions should be able to participate in them. The specific conception does not require that people subject to any decision should be able to participate in its making; it requires only that people subject to demos decisions be able to.

Imagine that A and B together decide on the future participation of B and that the outcome is that B should be excluded. Is the outcome legitimate? By the standards defined by the special conception of pure procedural legitimacy, it is unproblematic to affirm the legitimacy of the decision. No contradiction arises, since the exclusion of B from ordinary decision-making is not contrary to this notion of democratic legitimacy. For the same reason, the specific conception is able to condone the 1968 referendum in Liechtenstein. The exclusion of women from national elections is legitimate if decided upon by procedures that included women. The requirement that everyone subject to demos decisions should be included is consistent with the exclusion of some people subject to non-demos decisions.

The consistency of the narrow conception is nonetheless restricted. It is able to confer legitimacy to demos decisions, provided that they involve membership in the legislative demos. The legislative demos is the set of people entitled to participate in decisions that determine the substance of regular law. In contrast, the constitutional demos is the set of people entitled to participate in decisions that determine the substance of constitutional law (Owen, 2017). Given that the rules deciding membership in the legislative demos are part of constitutional law, only the members of the constitutional demos are entitled to participate in decisions regulating membership in the legislative demos. However, it is conceivable that a demos decision is concerned exclusively with the rules of membership in the constitutional demos. This is when the specific conception of democratic legitimacy gets into trouble.

Decisions about membership in the constitutional demos regulate who should be able to participate in decisions that define the rules of membership in the legislative demos. Now, consider a referendum on the proposition that the members of the constitutional demos should coincide with the members of the legislative demos. Note that the proposal offers what seems to be a procedural account of membership in the constitutional demos. The people entitled to vote on constitutional matters should coincide with the people entitled to vote on matters of ordinary law and policy. The problem with this proposal, however, is quite clear and conflicts with the requirements of the specific conception of democratic legitimacy.

To illustrate, imagine that the legislative demos includes only male citizens. Hence, only male citizens are entitled to vote in regular elections. Imagine,
furthermore, that it is proposed that the rules for membership in the constitutional demos should be the same as the rules for membership in the legislative demos and that this proposal is to be decided by referendum. Following the specific conception of pure procedural democratic legitimacy, the referendum should allow for the participation of both male and female citizens. However, if the proposal is passed in the referendum, the result is that the constitutional demos will only include men. Hence, an inclusive constitutional demos is introducing rules according to which the constitutional demos is to be exclusive. The decision is made in accordance with the procedural requirements of democratic legitimacy yet yields a result that violates the precepts of democratic legitimacy. The conclusion is that the specific conception of pure procedural legitimacy runs into problems that are similar to those afflicting the general conception whenever the rules governing membership in the constitutional demos are at stake.

**Imperfect procedural democratic legitimacy**

The problem facing a pure procedural conception of democratic legitimacy is that it allows for outcomes that contradict the procedural requirements defined by it. Strict adherence to democratic procedures is not enough for outcomes to be acceptable by standards of democratic legitimacy. The remedy seems obvious. In order to guarantee that only outcomes that preserve the procedural conditions for democratic legitimacy are legitimate by the same standards, we should conceptualize those standards in terms of procedures and outcomes.

Democratic legitimacy requires that procedures as well as outcomes be acceptable. With regard to demos decisions, the implication is that procedures as well as outcomes should be inclusive. Not only should demos decisions be made by everyone subject to those decisions, but the rules of membership resulting from such decisions should also include everyone subject to them.

The objection to this view is that few alternatives are left for the participants to decide over if democratic legitimacy determines both how they are to make decisions and what decisions they are to make. This need not be a problem, of course. There is nothing objectionable about a standard that requires both that some specific procedure be followed and that the outcome be of a specific kind, if in fact the procedure produces that specific outcome. This would be a case of perfect procedural legitimacy. Democracy would be similar to assembly instructions for IKEA products. There is a correct way to follow the instructions, and if the instructions are followed correctly, the outcome is guaranteed to be correct.

Democratic procedures, however, never guarantee correct outcomes. More plausible is the claim that democratic procedures can produce correct answers and the expectation that they do produce correct answers often enough. More appealing than the analogy with IKEA is the analogy with legal procedures followed in courts of justice. The procedures of legal justice derive legitimacy from the fact that they are instrumental in convicting the guilty and freeing the
innocent. Even if this end is not always achieved, the legitimacy of procedures of legal justice derives from them being superior to all feasible alternatives over the long haul (Arneson, 2003; cf. Ceva, 2012).

The analogous point is to argue that democratic procedures are legitimate by virtue of them producing better results than any feasible alternative over the long haul. Demos decisions that are made through democratic procedures are no guarantee for correct outcomes, as dictated by principles of democratic inclusion. Yet, democratic methods have ‘epistemic value’ by virtue of being the ‘best (or close to it) among those that are better than random’ (Estlund, 2009, p. 98). Democratic procedures confer legitimacy by virtue of both their intrinsic qualities and their tendency to produce correct outcomes; this is the idea of imperfect procedural legitimacy.5

In order to accept that demos decisions satisfy the criteria of imperfect procedural legitimacy, some warrant is needed for their epistemic value. In the context of demos decisions, this translates into the hypothesis that referendums on membership in the demos are better than random in producing outcomes that are acceptable from independently defined criteria of democratic inclusion. For referenda on demos decisions to be better than random, they must yield correct results with a probability greater than 0.5. Provided that referendums are decided through majoritarian methods, the requirement would be that each voter is more often correct than not (>0.5).

Now, there is reason to be pessimistic about the capacity of voters to make the correct decision about who should be allowed to vote. Provided that the correct decision is to accept a more inclusive demos, voters face strong incentives in the opposite direction. If the members of the demos are rational, they will have an interest in preserving their voting power. Hence, voters have reason to reject proposals that increase the size of the demos, since this deflates the value of their vote.

The contrary incentive to accept a more inclusive demos is stronger, if the expansion of the demos only marginally deflates the value of their vote. The incentive to accept a more inclusive demos is also stronger the costlier rejection is. The enfranchisement of male workers in many Western countries was introduced following extant mobilization among the disenfranchised that presented the privileged classes with the risk of violent revolution. Thus, the groups in power had reason to conclude that granting suffrage to those excluded would be less costly than resisting it (Acemoglu & Robinson, 2000; Przeworski, 2008, p. 293). More recent illustrations include the 1979 referendum in then Rhodesia and the 1992 referendum in South Africa. In both cases, the democratic rights of the black majority were voted on by the white minority, and in both cases the looming threat of civil war and international sanctions proved decisive in persuading white voters to accept a more inclusive demos. There are, consequently, circumstances that enhance the epistemic value of majoritarian methods and that make them legitimate by standards that are sensitive to outcomes as well
as procedures. Yet, in so far as these circumstances are absent, we should not
expect majoritarian methods to produce the correct decisions about member-
ship in the demos. The epistemic case for majoritarian methods to resolve demos
decisions is thus unconvincing.

The second concern about the imperfect procedural account is that it sets a
standard for democratic legitimacy that is unlikely to ever be met. Although it
does not require that democratic procedures always produce the correct answer,

it does require that democratic procedures are adhered to. This is what separates

a procedural account of legitimacy from a results-driven account. Typically, how-

ever, major reforms introducing more democratic rules for demos membership

were not themselves based on democratic procedures. Consider the referen-
dums in Rhodesia and South Africa in 1979 and 1992, respectively. In both cases,
an exclusive demos collectively decided to introduce a more inclusive demos.

However, the procedures whereby these decisions were made barely satisfied

standards of democratic legitimacy. If imperfect procedural legitimacy is the

thesis that collective decisions are legitimate in so far as they respect both pro-
cedural and substantive requirements and if racial exclusion from the demos

is unacceptable in relation to procedural requirements, then referendums that

only allow white voters are always illegitimate. The wider implication is that
demos decisions are unlikely to ever qualify as legitimate.

To illustrate, consider somewhat less controversial cases concerning voting
age. A large number of referendums on voting age have taken place, initially

on the proposal to enfranchise 18-year olds, later on the proposal to allow even
16-year olds to vote. Denmark is exceptional in having held no less than five

referendums between 1953 and 1978 on voting age, which eventually reduced

it from 23 to 18. However, in relation to the standards defined by imperfect
procedural democratic legitimacy, it is unlikely that any of these referendums
were legitimate. Given that some specific age of voting is required by democratic
standards, the referendums arranged were probably deficient, with respect

either to the procedures followed or to the outcomes produced. In some cases,
the referendums were illegitimate because they were conducted on the basis
of a voting age that was undemocratic; in other cases, they were illegitimate
because they produced an outcome that was undemocratic. In many cases, the
referendums were illegitimate on both accounts. A referendum on voting age is
legitimate only if conducted in accordance with the correct democratic voting
age and if the proposal voted upon is rejected (since any proposal to revise the
correct voting age must be rejected in order for the outcome to be correct).

The standards of imperfect procedural legitimacy require that the deciding
demos and the decided upon demos both comply with independently defined
standards of democratic inclusion. As indicated above, this leaves very few
legitimate alternatives; collective decisions about demos membership are
legitimate by democratic standards only if the outcome is correct while the

procedures employed in the making of the decision are also correct. For these
requirements to coincide, it would take a perfectly democratic demos collectively deciding to reject a proposal that would have made the demos less than fully democratic. In this case, both procedures and outcomes are democratic in terms of independent standards of inclusion. Though this situation is most likely uncommon, it is possible. The more optimistic conclusion is, therefore, that it is possible for demos decisions made through imperfect procedural standards to be legitimate.

**Democratic legitimacy as permissibility**

The imperfect procedural conception of democratic legitimacy allows for very few acceptable demos decisions, since it requires that both procedures and outcomes match an independently and conclusively defined principle of inclusion. These principles are conclusive if they provide precise norms for inclusion and exclusion that apply to every imaginable case. However, what if the principles of democratic inclusion are not conclusive? In that case, the principles of democratic inclusion are imprecise and/or inapplicable in certain cases. The implication is that some restrictions on demos membership are neither forbidden nor required but merely permissible. Evaluated on the basis of inconclusive standards of democratic inclusion, the inclusion and exclusion of some groups may be undetermined, while the requirement to either include or exclude other groups may remain.

Permissible exclusions define a range of equally acceptable demos decisions, given that permissible decisions are by definition legitimate (Peter, 2016). Thus emerges the prospect for legitimate use of democratic methods in the regulation of the procedural conditions of democracy (Bauböck, 2017, p. 161). Collective decisions about membership in the demos are unobjectionable from the standpoint of principles of democratic inclusion if all of the alternatives on the agenda represent permissible outcomes. Hence, the use of a referendum to decide on voting rights for a given group is democratically legitimate if the exclusion or inclusion of that group is permitted by the principles of inclusion. Decisions taken through democratic methods are legitimate because of the intrinsic qualities of the procedure and not because of their propensity to generate correct outcomes. In this sense, this is akin to the purely procedural conception of democratic legitimacy. On the other hand, the intrinsic qualities of the procedures confer legitimacy upon the decision only under the condition that outcomes fall within a range permitted by independently defined principles of democratic inclusion (Dahl, 1989, p. 165).

What, though, are the grounds for conceptualizing as permissible some restrictions on the demos? One suggestion is that the vagueness of principles of democratic inclusion renders certain alternatives permissible. A principle is vague if it is indeterminate with respect to borderline cases. A borderline case is characterized by not clearly belonging to either one or the other category. If
the principles of democratic inclusion are vague, there are at least some cases of membership in the demos that are indeterminate in the sense that exclusion or inclusion is arbitrary from a democratic point of view.6

Vagueness about democratic inclusion is best illustrated by voting age (Endicott, 2011, p. 22). Voting age varies between countries and has varied greatly in the past. This variation could be interpreted as the consequence of mistaken demos decisions. However, a rival and potentially more plausible explanation is that variation is a natural consequence of the vagueness of the principles of inclusion. Given that voting age is grounded in the belief that adulthood, competence or judgment is required for membership in the demos, the vague character of these properties is almost certain to preclude a uniquely justified voting age. The characteristics required for being able to vote are not specific enough to identify any single voting age, and, therefore, the principles of democratic inclusion are likely to be consistent with a range of equally permissible voting ages.7

Reasonable disagreement over the grounds for democratic inclusion represents a distinct reason for the existence of a range of permissible demos decisions. Disagreement is reasonable when conflicting positions are supported by sufficiently strong moral and rational reasons consistent with generally accepted cannons of thought, semantic convention and empirical evidence (Hinsch, 2010, p. 45). Clearly, not every disagreement is reasonable. It is unreasonable to disagree with a position for reasons that are dependent on either invalid or false premises. The point in this context is that beliefs about who should be able to vote in a democracy can be the subject of reasonable disagreement. The voting rights of some group of people is a case of reasonable disagreement if there are arguments for and against the inclusion of that group that cannot be invalidated by reference to mutually recognized facts or values and if each position can respond to objections generated by the rival position.

It is beyond the scope of this paper to demonstrate how far reasonable disagreement applies to arguments about exclusion and inclusion from the demos. It should be stressed, however, that the ‘zone of reasonable disagreement’ is not co-extensive with the range of conflicting opinions on voting rights in political life. Only positions that are competently, sincerely and deliberatively held qualify as reasonable (McMahon, 2009, p. 37). However, the state of disagreement in contemporary literature suggests that the voting rights of non-resident citizens is a plausible candidate for reasonable disagreement (Bauböck, 2009; Beckman, 2009; Lopez-Guerra, 2005; Owen, 2010).

Given the vagueness of principles of democratic inclusion and the fact that such principles are to some extent subject to reasonable disagreement, it follows that there are several permissible ways to regulate the demos. The reason for this is that no objection against the outcomes yielded can be produced by appeal to principles of inclusion. No objection is available, since the meaning of inclusion is either not precise enough or not sufficiently agreed upon on the
basis of reasonable standards. Hence, to decide the membership of people in such cases is permissible and thus legitimate.

Vagueness and reasonable disagreement provide distinct rationales for permissible demos decisions. Where vagueness is the rationale, a collective decision serves the purpose of resolving an issue that is rationally undecidable and in that sense arbitrary. Democratic decisions are needed when membership in the demos ‘cannot be fully specified’ by principles of inclusion alone (Hinsch, 2010, p. 48 emphasis added). A similar position is taken by Seyla Benhabib, as she acknowledges the ‘incompleteness to [sic] the democracy principle’. The precise meaning of political rights ‘neither precedes nor equals’ the outcomes of the democratic process and, therefore, provides for a ‘legitimate range of legal variation’ (Benhabib, 2016, pp. 121–124). Of course, the vagueness of democratic procedures does not preclude strong and conflicting preferences about the alternatives. The point, though, is that because the alternatives are vague, they are equally acceptable from the point of view of democratic principles. Hence, when the issue is resolved through a vote, the losers can console themselves with the thought that the alternative adopted by the majority is not worse in terms of democratic inclusion.

Reasonable disagreement suggests a different rationale for the permissibility of demos decisions. The purpose of voting as a means of resolving boundary questions is not to resolve an issue that is arbitrary but to adjudicate between conflicting understandings of democratic inclusion. The people losing out from the decision might still feel that there are reasons that the alternative preferred by the majority is mistaken. Yet, if they recognize the ambit of reasonable disagreement, they should accept the decision as legitimate, since they should realize that some beliefs about democracy can be mistaken and yet reasonable. As noted by Applbaum (1992, p. 257) in the context of principles of justice, there can be legitimate conceptions of justices that are nevertheless mistaken. Likewise, we should accept the legitimacy of at least some mistaken understandings of democratic inclusion.

By way of illustration, consider the controversy surrounding voting rights for non-resident citizens. Though some believe that depriving citizens moving abroad of the right to vote is contrary to the precepts of democratic inclusion, others believe that not depriving them of their vote runs contrary to the precepts of democratic inclusion. On the assumption that reasonable disagreement pertains to the issue of democratic rights of non-resident citizens, the decision to exclude them from the demos should be accepted as equally legitimate as the decisions to include them in the demos.8

In line with the third and ultimately more plausible conception of democratic legitimacy, demos decisions are legitimate if the alternatives decided on are permissible in terms of principles of democratic inclusion. A range of alternatives is permissible in accordance with these principles to the extent that they are vague or subject to reasonable disagreement. This conception of democratic
legitimacy is ‘quasi-pure’, following Rawls’s (1971, p. 176) terminology concerning procedural justice. We should, however, add that this conception of democratic legitimacy does not merely require that the alternatives are permissible in accordance with the principles of democratic inclusion but also that the procedures employed in deciding them are permissible. The necessary and sufficient conditions for the democratic legitimacy of demos decisions are, consequently, that both the procedures by which the decisions are made and the alternatives decided upon are permissible in terms of standards of democratic inclusion.9

According to the quasi-pure procedural conception of democratic legitimacy, not every conflict surrounding membership in the demos lends itself to legitimate resolution through democratic procedures. The best real-world example is, once again, the 1968 referendum in Liechtenstein, which included both women and men but which nonetheless produced the outcome that women should continue to be excluded from the demos. The outcome of the Liechtenstein referendum falls beyond the range of outcomes that are acceptable in terms of quasi-pure standards of democratic legitimacy, since the inclusion of women is required by any plausible understanding of democratic inclusion. The more general conclusion is that democratic legitimacy depends on a core of substantive commitments that take priority over the legitimacy-conferring capacity of democratic procedures. The intrinsic qualities of democratic procedures are unable to secure the legitimacy of collective decision-making when the outcome undermines the very same procedural qualities.10

**Final discussion**

Democratic theorists have frequently questioned the possibility of democratic legitimacy for collective decisions about the procedural conditions for democracy. Yet, as shown here, democratic legitimacy is possible in demos decisions on any of the three understandings of procedural democratic legitimacy examined here. Given a pure procedural account of democratic legitimacy, demos decisions are legitimate to the extent that everyone subject to them is included in making them. As argued above, this understanding is consistent only if applied exclusively to decisions regulating membership in the legislative demos. Even when consistent, pure democratic legitimacy is vulnerable to the objection that it is self-defeating in the sense of conferring legitimacy on outcomes that undermine democratic procedures.

Following the second account, demos decisions are legitimate if the procedures comply with the conditions stipulated by democratic principles and if they generate outcomes that are consistent with these principles. In order for democratic legitimacy to obtain, both procedures and outcomes must be acceptable in terms of democratic principles (imperfect procedural legitimacy). The objection to this account is that it is largely irrelevant, as the conditions for democratic legitimacy defined by it rarely exist. Demos decisions would be
legitimate only if a perfectly democratic demos collectively decided to reject a proposal to introduce undemocratic rules for demos membership. While the idea of imperfect procedural legitimacy avoids the inconsistencies of the pure procedural account of legitimacy, it rules out most, if not all, demos decisions as illegitimate by democratic standards.

The third account holds that collective decisions on demos membership are legitimate in so far as they are made through procedures that are permissible in terms of democratic principles and the outcomes fall within the range of permissibility defined by the same principles. The range of permissibility of procedures and outcomes depend on the vagueness of the principles of inclusion and the extent to which they are subject to reasonable disagreement. This quasi-pure procedural account of democratic legitimacy is neither inconsistent nor self-defeating and, therefore, compares favorably with the pure procedural account. The main difference between the quasi-pure procedural account and the imperfect procedural account involves the range of demos decisions that could possibly be legitimate in terms of democratic standards. The quasi-pure procedural account leaves a greater universe of demos decisions open to legitimate democratic contestation, since it is premised on a less determinate understanding of the principles of democratic inclusion.

Each account examined here must face the more fundamental objection that democratic procedures ultimately depend upon some collective decision made through non-democratic procedures. Every system of democratic decision-making can be traced to some prior decision taken by procedures that were not democratic. In the context of referendums on voting rights, the best examples are those in South Africa in 1992 and in Rhodesia in 1979, where more inclusive demoi were introduced through collective decisions made by procedures that were blatantly undemocratic. The question, then, is whether we ought to reject as illegitimate the outcomes generated by these referendums merely because they were made through non-democratic procedures, even though they generated outcomes that were essential for the creation of democracy. An affirmative answer to this question means regarding democratic procedures as being contaminated by their non-democratic origins and categorically rejecting the legitimacy-conferring capacity of such procedures. The implicit idea is that ‘democratic provenance’ is essential for the legitimacy of a constitutional regime (Sager, 2001, p. 126). Following Arash Abizadeh, electoral rules should be evaluated genetically. The democratic legitimacy of electoral rules depends on the nature of the procedure whereby they were selected (Abizadeh, 2017, p. 188). Yet, this position is bound to generate what Michelman (1998) terms the ‘paradox of the founding’. Democratic procedures fall short of democratic legitimacy, since they are born out of non-democratic procedures, meaning that constitutional democracy is ‘inherently paradoxical’ (Olson, 2007, p. 330).

It is debatable, however, whether there is reason to be concerned about the democratic legitimacy of decisions that establish democratic procedures. An
alternative standpoint is to argue that democratic procedures stand in no need of \textit{democratic} legitimacy in order for them to be acceptable (Owen, 2012, p. 152, n. 28). The legitimacy of democratic procedures does not depend on them being \textit{decided upon} but on them being \textit{called for} by normative considerations.

The implications of this response can be more fully appreciated by observing that democratic legitimacy is a \textit{value} and that democratic procedures are the means for the realization of this value. The claim that democratic procedures owe their existence to non-democratic decisions is thus equivalent to the claim that the realization of certain values is not conditioned by the prior realization of these values. Put in those terms, the problem of democratic provenance quickly evaporates. The value of procedures that incarnate democratic legitimacy is not diminished by the fact that they derive from procedures that did not themselves incarnate the value of democratic legitimacy.

The analogous problem is well recognized in legal theory. Constitutional regimes are typically created through procedures that are not authorized by their own provisions. For example, the procedures followed in the creation of the American constitution in 1787 were not authorized by the then existing Articles of Confederation. Indeed, the US Constitution does not authorize itself, and the means through which it was adopted contravenes the constitution’s principles for constitutional revision; the ‘foundation of American legality was itself the product of a blatant and conscious illegality’ (Kay, 1987, p. 57). It would be a mistake, however, to infer that a constitution is illegitimate merely because it does not originate from procedures that are legitimate according to the procedural standards defined by it. As observed by Honoré (1967, p. 268), validity and legality must not be confused, and sometimes ‘illegal acts create valid outcomes’. The claim that the constitution depends for its existence on decisions that violate existing standards of legitimacy renders it illegitimate only on the further assumption that a ‘legitimate source’ is a necessary precondition for legitimacy (Albert, 2009, p. 8; Kay, 2011, p. 756). However, obsession with the sources of legitimacy is bound to lead one astray in the context of constitutionalism, just as in democratic theory.

If we care about the kind of legitimacy that constitutions or democratic procedures can generate, we care about the existence of entities with the capacity to generate the particular values manifested in such procedures. The question of whether entities that manifest these values \textit{originate} from procedures that also manifest such values is irrelevant. On the basis of these reflections, we should say that the referendums in South Africa and Rhodesia made the value of democratic legitimacy possible. The referendums were certainly not themselves legitimate by the standards of democratic legitimacy. However, nothing follows from that observation. The institutions necessary for democratic legitimacy are not rendered defective merely because they were established through procedures that deviated from the requirements of democratic legitimacy. In the absence of procedures having democratic legitimacy, the best we can hope for
is that a ‘legitimate democratic system emerges some way or another’ (Waldron, 1999, p. 300).

Notes

1. The proposal to lower the voting rights age to 16 (from the present 18) was rejected by 81 percent of the voters, whereas 78 percent rejected the proposal to extend voting rights to resident non-citizens. See also Qvortrup (2014), Tierney (2012) and Ziegler, Shaw, and Bauböck (2014) for helpful overviews and discussions on referendums on territorial and constitutional issues.

2. The first and the second views are very similar to what Verschoor (2015) and Viehoff (2011, p. 249) name the ‘democratic’ and the ‘liberal’ view, respectively.

3. There is a longstanding debate on the relative merits of alternative accounts of democratic inclusion. Yet, nothing in the following analysis depends on whether the criteria of democratic inclusion are determined by reference to the people subject to or affected by collective decisions. For reasons of convenience, I am, in what follows, speaking only of ‘the subjects’ to collective decisions. For contrasting approaches, see Goodin (2016) and Beckman (2014).

4. A concrete example is the exclusion of UK resident non-citizens from the Brexit referendum. It is not unlikely that it had a dramatic effect on the outcome of the election and thereby had a dramatic effect on the citizens of all other EU member states as well.

5. The difference between perfect and imperfect procedural legitimacy may not be that significant, as it has been shown to be sensitive to the narrowness of the characterization of just outcomes (Gustafsson, 2004).

6. I disregard whether the vagueness of principles of democratic inclusion is itself vague (higher order vagueness), in which case it is unclear whether, for example, voting age represents a borderline case or not.

7. Note that we are exclusively concerned with the vagueness of principles of democratic inclusion. Vagueness might also be a property of the legal rules employed for the purpose of regulating membership in the demos. The vagueness of the rules defining the right to vote raises issues concerned with arbitrariness in the law and arbitrariness in its application (Endicott, 2011).

8. Altman (2005, p. 264) argues that voting rights for prisoners is also subject to reasonable disagreement and should, therefore, be the permissible object of collective decision-making. Altman’s argument is distinct, as he claims that reasonable disagreement applies to the moral justifiability of felon voting, not to the meaning of democratic inclusion.

9. Hinsch (2010) appears to argue that any attempt to define the substance of political rights is either vague or contested and that collective decisions on the substance of inclusion are, for that reason, permissible and legitimate. However, the claim that principles of democratic inclusion are necessarily vague in every instance is implausible. Vagueness applies to borderline cases, and in order for the borders of a concept to be vague, it must be a concept with a meaning that is distinct from other concepts. That is, a conceptual core that is not a borderline case is presupposed by the very idea of a distinctive conception of democratic inclusion.

10. Similarly, Rawls (1993) insists that judicial bodies should refuse to recognize the legality of collective decisions that undermine the ‘constitutional essentials’ of a just democratic state. (See also Colón-Ríos, 2010, p. 225.)
11. It is worth noting that the paradox of the founding undermines the legitimacy of any decision; decisions on child allowances are just as impossible to legitimate by democratic standards as decisions about democratic procedures. For this reason, ‘the paradox of the founding’ obscures the nature of the specific problem associated with using democratic procedures for the purpose of regulating democratic procedures.

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Notes on contributor

Ludvig Beckman is professor of Political Science at Stockholm University and the Institute for Futures Studies, Stockholm, Sweden. His books include Territories of Citizenship (with Eva Erman, 2012) and The Frontiers of Democracy. The Right to Vote and its Limits (2009). His research centers on democratic theory.

ORCID

Ludvig Beckman http://orcid.org/0000-0002-2983-4522

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