Law as a Democratic Means: Deweyan Jurisprudence and Democratic Experimentalism

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I investigate law and legal thought in relationship to Dewey’s demand that within a truly democratic society the ends as well as the means of a democratic society must be democratic. I outline a conception of law that is a democratic means to the greater end of democratic society. This contrasts with a conception of law, and especially constitutional law, as an anti-majoritarian framework needed to set the ground rules for democratic procedures. First, a conception of Deweyan democracy is offered in combination with a conception of “democratic law” found in Dewey’s works. It is made more concrete through mapping of it on to the picture of constitutional practice offered by Michael Dorf and Charles Sabel. It is then used to give a description of what a Deweyan judge’s decision procedure would be like. This construction of a work-able conception of law as a democratic means can offer support for the possibility of a democratic society composed of democratic institutions “all the way down.”

1. Introduction

In this paper I investigate law in relationship to Dewey’s demand that within a truly democratic society the means as well as the ends of society must be democratic. This demand, of course, goes against a standard conception of the rule of law, especially that of the rule of law under a constitutional government, wherein law and large parts of the legal system is seen as a framework which is, most essentially, outside of the democratic process, indeed is the non-democratic foundational means that sets the game rules for the democratic ends and procedures that it makes possible. Indeed, this very standard conception of law is that of a system that gives, necessarily, final decision making authority to a professional judiciary, a judiciary following rules set down by a duly ratified constitution, a constitution enacted with the express intent that its ruling framework would serve as a limitation upon the otherwise potentially dangerous if
uncontrolled excesses of democratic passions. This conception of law seems to reinforce the idea that democracy ultimately rests, necessarily, upon the use of nondemocratic means. If correct, such a claim is damning to Dewey’s demand for democratic means as well as ends in the structuring of a truly democratic society. In this paper I aim to outline a plausible and workable conception of law as a democratic means. If this can be accomplished, not only will the radical nature of Dewey’s conception of law become manifest, but also the limitations and quite possibly unfounded dogmas of standard conceptions of law and its relationship to democracy will be exposed.

In order to do this, the following steps will be followed. First, a conception of Deweyan democracy will be offered in combination with a parallel ideal of “democratic law” found scattered throughout his works. Then an attempt to live up to the aims of a truly democratic legal procedure, one that satisfies Dewey’s demanding requirement that democratic ends can be ultimately furthered only through democratic means, will be made concrete through the use of Michael Dorf and Charles Sabel’s article “A Constitution of Democratic Experimentalism.” Their article offers a Dewey and pragmatism inspired picture of law as a democracy enhancing and experiment encouraging democratic social institution. From this conception of law a decision making model for the Deweyan judge will be analyzed. This is necessary because of a critique of Dewey’s legal theory offered by Richard Posner. Dewey’s legal theory, Posner claims, is too abstract and top-down to be useful for a judge confronted with the need to come to a judicial decision in a real-world case with all of its concrete particulars. If correct, and universalizable to any attempt to construct a Deweyan picture of law as a democratic means. It will be argued that the system that Dorf and Sabel offer goes a long way in answering Posner’s objection. If successful, the construction of an alternative conception of law as a democratic means will offer strong support for the plausibility of the Deweyan aim of creating a society where democracy is practiced throughout all of its institutions, that is, “all the way down.”

1. Deweyan Democracy and the Concept of “Law”

While Dewey did not write a major work on legal theory, there are multiple works in his oeuvre that when read together offer a consistent philosophy of law. Indeed, the works where Dewey discusses law actually combine to form a strong and coherent picture of law, one that maps quite nicely on to his conception of democracy.

In outline, the following aspects are most important to note. First, and most importantly, for Dewey democracy “must affect all modes of human association.” This, of course, is the requirement that society be democratic “all the way down” that raises such a problem for standard conceptions of law. And this is a requirement that Dewey emphasizes. Indeed, Dewey holds that,