

DEMOCRACY, DELIBERATION, AND POLITICAL LEGITIMACY

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INTRODUCTION

Authority and Legitimacy¹

An entity that is authoritative is sometimes said to have the *right* to issue commands. The concept of authority, however, is both descriptive and normative. Thus, it may concern the authority of an entity that says *what* should be done; or the *requirement* that it be done because it was issued by an appropriate authority. In the latter case, the concept contains a claim, more or less explicit, about the right of the authority to command. An authority could possess this right only if its authority is justified by a standard independent of its command issuing procedure.² If it is justified in this way, it is legitimate – hence authoritative in the normative sense. Consequently, a properly normative account of authority seems to entail a duty to obey its commands.

Not everyone will agree that a duty to obey arises with legitimate authority. For example, a doctor may legitimately prescribe medicine; but this fact does not entail a duty to obey the doctor's orders to take it even if it is prudent to do so. That an authority is legitimate in this way seems necessary but not sufficient for a duty to obey it. However, authority in this case refers to *expertise* (to which I will refer as “authoritativeness”). If Citizen Y has a duty to obey Citizen X then she has a sufficient reason to obey even if X is incorrect about what she ought to do. In this case her duty to obey is not based upon the expertise of the doctor since the doctor may be wrong.

¹ Nothing I say here about authority or legitimacy pretends to be comprehensive. The concepts themselves are complex, as are the possible ways of relating them. For evidence of this fact, see Raz's *Authority* (1990). As the argument develops, it will become clear I am applying them to a particular type of authority.

² This requirement is very general. An authority that is “self-justifying” seems to beg the question of legitimacy. In Chapter 2, I will address the question directly of whether this standard is moral or non-moral. I will argue in favor of the former over the latter view.

Consequently, if a duty to obey corresponds with legitimate authority, this duty does not arise in response to expertise, but in some other way. A duty to obey the doctor may arise, for instance, if one has a duty to preserve oneself.

If one asserts that the doctor's prescriptions should be followed because of some relevant, underlying duty, one has apparently asserted a distinctive type of authority — thus, a distinctive type of reason to obey. In this case, having a duty to do something will be sufficient reason to do it, though not always a necessary one. Thus, if one has a duty to obey the authoritative medical practitioner on the basis of — e.g. the duty to preserve oneself — the conditions that justify one's obedience *seem* satisfied. But the duty to obey the doctor seems to depend upon other requirements independent of the facts about the doctor's expertise.³ The criteria for legitimate authority are logically independent of the command issuing procedure (whatever it is).⁴ Legitimacy is not conferred in this case simply by the substantive features of a *de facto* power. This includes any antecedent, substantive agreements among the members of various types of associations.

The concept of legitimacy, then, may be understood in two different ways (with respect to “internal” justification and with respect to “external” justification). External accounts of legitimacy stem from the identification of the moral or epistemic features of a particular external command-issuing authority as a basis for legitimacy. Internal accounts typically locate the source of legitimacy in duties *logically independent* of the command producing procedure.⁵

³ I am not claiming here that there are such duties; the example so far is for illustrative purposes only.

⁴ To simplify things, then, we may distinguish between the “internal” and “external” command. I will refer to the “external” command as having been produced by a “command issuing procedure,” and the “internal” command simply as a duty.

⁵ One should keep in mind that these definitions are rough at this stage. It may be helpful to keep in mind Kant's distinction between “external” and “internal” sources of authority. I am treating the “external command issuer” as substantive here.

External and Internal Interpretations of Legitimacy

Some political theorists have believed that authority in the “external” sense is sufficient for legitimacy. Plato believed it; and so did Rousseau.⁶ On their view, authority derives in particular from moral and epistemic qualities of certain citizens. Plato understood these qualities to be manifest in the true philosopher, while Rousseau understood them to be in the majority.⁷ Thus, the belief in the sufficiency of authority (*qua* expertise) for legitimacy is not specifically democratic or undemocratic. To the extent that each depends on the substantive correctness of their outcomes, I will refer to them as *substantive* accounts of political legitimacy. The most fundamental question about political legitimacy, on this view, concerns which political authority is most reliable. Since legitimacy is indexed to reliability, the most reliable procedure would be the legitimate one.

Not all theories of political legitimacy are substantive in this way. Non-substantive views reject the claim that epistemic authority is sufficient for legitimacy; but they do not always reject that it is necessary for legitimacy (or so I will argue).⁸ As suggested above, these theories also relocate the source of authority, redefining what justification requires. Non-substantive views accept that the outcome of a political procedure has authority, without accepting that its legitimacy flows from the epistemic authority of citizens or the substantive correctness of political outcomes. I will identify

⁶ I hesitate to call Rousseau’s account “external” in this way. The idea of the General Will suggests the possibility of an “internal” structure of justification. However, it is difficult to see how outcomes are justified to the minority voter given that the minority voter votes contrary to the majority which, Rousseau claims, is justified because it is *correct*. To this extent, Rousseau and Plato seem to disagree largely about who the expert is, but not about the role of expertise relative to legitimacy.

⁷ Rousseau’s account finds some support in Condorcet’s Jury Theorem.

⁸ Some views reject that it is even necessary. I will turn explicitly to one such view in Chapter 3.

this class of views about legitimacy for which epistemic authority is not sufficient as procedural views, and say something about what it means.

There are *prima facie* reasons to think that procedural views are superior to substantive ones when it comes to the concept of legitimacy. First, and most obviously, skepticism that political outcomes are categorically correct – even if they are the products of expertise – seems well-motivated. Second, the medical analogy suggests the duty to obey the doctor does not derive from her authority as, e.g. “reliable disseminator of wisdom about cancer treatment,” but from some other obligation — even if it happens that the doctor is correct. So for procedural views, the concept of legitimacy is fundamental, even prior to the concept of authority. Procedural views explicate the duty to obey by appealing to reasons *available to* — indeed binding on — anyone (e.g. duties arising in virtue of reason generally considered). The central question of political legitimacy from this point of view, then, is not which authority is the expert. Rather, it is which procedure produces legitimate outcomes, independently of their being correct. Moreover, it contends that the reasons sustaining an outcome as legitimate are not necessarily referred to the reasons for which one initially adopted the procedure (i.e. its reliability). Thus, the legitimacy of outcomes must be referred to a procedure independent standard.

There is a dispute about whether or not this standard is moral, thus whether legitimacy must include a moral account of motivation. Theorists on either side of this divide can hold that obedience is in some way appropriate to legitimate political authority. However, their accounts of obedience will differ. As suggested, this difference turns on whether such duties are necessary to the normative account. Those who argue it

is, view the failure to obey under certain conditions as a kind of moral failure. Those who argue it is not, contend that the fact citizens voluntarily obey can be considered evidence that a regime is legitimate. The mere fact of obedience is evidence of legitimacy, while the motivations for obedience are viewed as irrelevant. So the non-moral account of the “reasons” (here meaning causes) of obedience emphasize the acquisition of knowledge about psychological, economic, and sociological relations as part of the calculus of widespread (voluntary) acceptance. Deciding whether moral reasons are necessary for legitimacy, then, is an important part of any political theory since this judgment shapes its overall outlook.

I contend that legitimacy appeals not simply to facts about voluntary acceptance, but to independent moral criteria. A simple example can show why. The reason for adopting a “knife-procedure” is to cut. However, one is not justified in cutting Jim even if cutting him satisfies the conditions for which the knife was adopted in the first place – its cutting capability. Whatever reasons there are to justify the use of the knife seem different somehow from those justifying its adoption. The reasons justifying the adoption of a knife as a cutting instrument are quite general. Those that might justify turning it on Jim are quite a bit more specific. They are introduced when we consider what is cut, or even how, when and by whom it is cut. In short, the justification of the outcome depends upon moral reasons not necessarily introduced in adopting the procedure. There is no particular moral significance to the adoption of a knife-procedure, unless in picking it up I have the intention to cut Jim or do, in fact, cut him. Even so, the nature of the independent moral standard (i.e. justice) is disputed; and a moral theory of democratic legitimacy must negotiate the problems arising from these disputes.

Democratic Authority

A standard procedural view abstracts from the substantive features of outcomes. It suggests outcomes are legitimate for reasons that concern the procedure and not their substantive quality. So, procedural accounts typically hold that the procedure is legitimate if it is fair or if it conforms to background principles of justice. Procedural views suggest that the fact an outcome is correct is no more a reason to accept it as legitimate as the fact that an outcome is incorrect would be a reason to disobey. This is because a procedural view of legitimacy does not typically include epistemic criteria in its concept. More typically democracy is understood as occupying a relatively subordinate role in the framework of a civil constitution. Call this “limited democracy.” The merits of democracy and its products can be evaluated, from this point of view, in one of two ways: (1) according to its tendency to produce stability (as argued by Schumpeter and Posner); or (2) being constituted by “the conditions of background justice” (as argued by Rawls). But the substance of justice is disputed; and even if we adopt a view of justice as fairness we have not yet addressed, much less made plausible, the capacity of a democratic procedure to track just outcomes. There are reasons to think democratic procedures should have this capacity if it makes sense to adopt them at all.

Citizen Y has a duty to obey Citizen X if X has legitimate authority over Y. If X has this authority illegitimately, then Y could not be said to have a duty to obey, even if she does so as a matter of fact. How X could be said to have the authority to command Y is particularly puzzling in democratic justification. In part, this puzzlement stems from the assumption of the principle of equality. If X and Y are equal in some fundamental way, granting X authority over Y seems to contradict the principle of equality. An

account of political legitimacy aims to determine the criteria necessary for X to have legitimate authority over Y. In any ordinary case, however, while obedience to X is not predicated on X's authoritativeness, it would seem equally irresponsible to obey X if X is unreliable. Provided this analogy holds, something must be said about the epistemic features of democratic procedures if their claim to be obeyed can be plausible. The legitimate authority of X over Y seems to arise only if democratic procedures meet epistemic criteria which would enable them to track just outcomes.

Epistemic and Non-Epistemic Interpretations of a Democratic Procedure

As suggested, epistemic interpretations of democracy are commonly associated with a substantive view of authority – the idea that the authority of political outputs rests on their substantive correctness. Given the difficulties with the claim that authority (*qua* expertise) is sufficient for legitimacy, however, procedural democracy offers a way to establish criteria for democratic legitimacy without appealing to the authority (epistemic or otherwise) of an external command producing procedure. I will argue, however, that this cannot exclude the requirement that democracy meet epistemic criteria, even as understood within the procedural framework.

Epistemic views of legitimacy suggest, then, that what makes a procedure good is its capacity to effectively track just outcomes. This capacity is owing to its epistemic character. Thus, even if we understand legitimacy in procedural terms, some account must be made of the features of a procedure that indicate its reliability. Outcomes are legitimate, then, if they are the result of a reliable democratic procedure.

I have already suggested why it would be wrong-headed to conceive of democratic procedures as constitutive of correct outcomes. Some of these reasons are moral; but not all of them are. The skeptical thought is that many democratic outcomes can be *shown* to be incorrect by an independent moral standard. Thus, putting any faith in the infallibility of democratic procedures (even theoretically) seems misguided. Nevertheless, the tendency of a procedure to produce good outcomes – its epistemic character – would be a reason that would justify adopting it. But the question arises of what democratic procedures are epistemic, if not truth or the good directly?

The answer to this question depends, I will argue, on the view we take of practical reason and its role in political justification. I will propose that only a constructivist account of practical reason can accommodate the problems arising from reasonable pluralism and lay the groundwork for tracking just outcomes. It does so by tracking the *reasons* for them. This means, on the view I present, that they will track a moral good, albeit indirectly. The procedure must be framed, then, to accommodate disagreement about this good while not undermining the epistemic benefits of democracy.

Reasonable Pluralism and Epistemic Criteria

The foregoing suggests that authoritative democratic procedures would meet both moral and epistemic criteria. However, it is not always clear that a procedural view of democracy can accommodate both. To see this, consider Rawls's account of political liberalism.⁹ He writes,

⁹ This view is a type of “contractualism” and related to other types articulated most notably by Scanlon, Barry, and others.

The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some of these are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions (Rawls 2005, 4).¹⁰

How to understand this statement depends in an important way upon how to understand “diversity among reasonable doctrines.” If we understand it as the happy circumstance that reasonable doctrines will tend to converge we might hope or even expect that reasonable doctrines will value more or less the same things and to the same degree. On this view, one assumes that antecedent, substantive agreement about values and their rank underwrites political legitimacy. However, according to Rawls, the lack of such agreements is indicated by the fact equally reasonable doctrines may be “opposing and irreconcilable.” That they are reasonable, then, does not indicate the hope for comprehensive convergence. Rather, it indicates the hope for a theory of legitimacy despite their lack of convergence (a condition that may be permanent). Consequently, no particular moral principle abstracted from any of the possible moral doctrines could be a legitimating reason for coercion unless it is acceptable to all other (possible) reasonable political participants.¹¹ Since political agents may be *distinguished* by their

¹⁰ One may claim that Rawls unjustifiably slips “reasonable” into his description here. Why, after all, should those of some religious or philosophical disposition or other think those of another disposition are reasonable when their claims are false and their evidence shaky, or their outlook reprehensible? This matter cannot be dealt with fully here.

¹¹ Indeed, at its most basic level political liberalism may be construed as an argument that the inclusion of moral content in questions of political legitimacy and authority is necessary for these reasons. Thus, it must defend not only the solution to the problem it poses but the formulation of the problem itself, since it seems to arise for doctrines that are morally equal in a certain respect.

reasonableness, political liberalism presents a proposal for legitimacy whether there are *comprehensive* moral agreements or not.¹²

A constructivist understanding of practical reason provides a framework within which such dilemmas may be resolved. Generally, constructivism says something is good if there is a reason to choose it. Disputes about what ought to be done are motivated by disagreement about which reasons are better. If something is valuable to the extent there are good reasons to choose it, conflicts in value reflect conflicts in practical reason and result in different practical judgments (e.g. “X is good” or “Y is good”). Reasons (understood here as practical evidence) are governed by inferential and non-inferential norms. So settling disputes rationally is accomplished largely by reference to these norms. However, there may be cases in which value commensuration is not possible, hence cases in which the defeasibility conditions of X or Y cannot be determined. Such cases reveal an incommensurability of value. I contend that Rawls’s political liberalism is built on the possibility of such cases in political deliberation. In these cases, the fact of reasonable pluralism may be entered into political deliberation *as a governing reason*. Consequently, A’s *knowledge* that “X is good” (assuming A has such knowledge) could not be a reason for B to defer her judgment. Moreover, it could not be a reason for her to accept A’s judgment as legitimate unless it meets moral requirements imposed by reasonableness. Reasonable pluralism cannot be rejected (i.e. is a fact of sorts) because it is a fact about practical reason as such. The fact of reasonable pluralism is, then, both a moral concept and an epistemological constraint on practical judgments and their role in political justification. This does not say, in itself, what epistemic criteria democratic

¹² This doesn’t entail that Rawls’s procedural view is not supposed to produce substantive, authoritative results. It’s just that it’s supposed to do so without appealing to controversial religious, moral or philosophical doctrines.

procedures must meet in order to produce good outcomes. It does, however, establish a moral framework within which such an account must be given.

From here, I argue that an account of deliberation may be developed according to which reasonable pluralism operates as a regulative principle without impinging on the conditions for deliberating well since citizens deliberate directly about reasons and only indirectly about justice. After all, if liberal principles impede deliberation, they impinge on its epistemic benefits and the conditions (e.g. participation) necessary in order to realize them. These impediments diminish the legitimacy of democratic procedures.

However, there is more than one type of theory that may be considered epistemic in this way. I have two in mind. One will be referred to as Epistemic Proceduralism; and the other as Pragmatic Deliberativism.¹³ The former view introduces epistemic criteria based upon an analysis of the presuppositions of democratic procedures. In particular, it claims they are constrained by features of a procedure that could not be reasonably rejected, in particular, by “the fact of reasonable pluralism.” Moreover, it counts the fact of reasonable pluralism as an epistemic constraint. The other position (which will be referred to as Pragmatic Deliberativism) introduces epistemic criteria into democratic procedures *vis a vis* an account of deliberation.

I will argue that there is a notable methodological difference in these views that produces different results in response to democratic legitimacy. This difference centers on the order and priority of deliberation in the account of legitimacy. Epistemic Proceduralism argues that the criteria for legitimacy may be determined prior to

¹³ Both Epistemic Proceduralism and Pragmatic Deliberativism are descriptive and technical. The former I have taken from David Estlund, in particular, his essay, “Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority” (1999). The latter will be used largely to refer to Cheryl Misak’s “Peircean pragmatism,” but the name is taken from *Democracy After Liberalism* (2005, 116).

deliberation. Pragmatic Deliberativism suggests that legitimacy flows in some way from deliberative acts.

In addition, I will argue that there is at least one reason to prefer a model of legitimacy in which the criteria for legitimacy are established independently of any actual deliberative acts. This has to do with its moral force, namely that it explains a duty to obey democratic outcomes in a way that seems absent in Pragmatic Deliberativism. An important part of the argument turns on whether or not a duty to obey is necessary part of the concept of political legitimacy. If it is not, then this would be an argument against my view. If it is then how to derive it must be explained. Given moral pluralism, however, one might claim that the “necessity” imposed by this type of argument is antithetical to a genuinely pluralist conception of democracy. Thus, one might eschew appeals to “necessary presuppositions,” and claim that my argument assumes there are such things. However, if there is no necessary place from which to begin, there is no reason not to make this assumption.

The Strength of Duty

Having a duty to obey an authority would be a sufficient reason to obey it.¹⁴ There is reason to think it is not necessary. One may do what the doctor tells one to do, for instance, even if one is under no obligation to do it. Predictably, one does so if it is prudent with respect to one’s own well-being.¹⁵ If one has moral reasons to obey a

¹⁴ I will understand legitimacy in terms of reasonable rejection rather than reasonable acceptance largely for the reasons Scanlon (1982) cites. “Reasonable acceptance” does not capture the normative force of political consensus, letting us confuse political liberalism with theories that demand deep substantive moral agreement as a basis for political legitimacy. But, in this case I am arguing, we would miss the force and interest of the argument.

¹⁵ In this case, the duty arises on the basis of other duties (e.g. to one’s own well-being).

political authority, it must be shown these reasons govern what one should do, even if one does not believe it, acknowledge it, and so on.¹⁶ In particular, moral reasons would serve as motivations to obey even when one disputes the political outcome. Otherwise, the acceptability of moral reasons would be contingent on the beliefs one happened to have, and one could reasonably reject them on this basis.¹⁷ These reasons are overriding regardless of one's specific moral doctrine. This would be true even if these reasons are viewed as the consequence of a procedure of construction. It must be shown, then, how these reasons serve as reasons to obey independently of one's beliefs about the substantive value of the outcome.

An obvious question arises about the relative strength of the duty to obey legitimate political authority. If the authority of moral reasons were absolute with respect to each instance, there would be no apparent justification for civil disobedience. This stance would undermine the sort of criticism made against Rousseau since it suggests that outcomes must at least be treated as if they are correct, even if they are badly wrong. Civil disobedience can correct for the moral errors in outcomes. Thus, it must be incorporated into our view. So I will argue for something weaker. These general duties to obey can be overridden if outcomes require, for instance, that one do something immoral or if they require that one do something to diminish the epistemic quality of the outcomes. But this does not mean they allow for disobedience simply *because* one believes the outcome is incorrect. While the proposal leaves room for civil disobedience, it suggests that disobedience must be justified on grounds whose merits extend beyond

¹⁶ To this extent, I follow Herman's account of moral judgment (1993) described as not being able to except oneself given any number of special circumstances. If one cannot except oneself from the law, one cannot reasonably reject the reasons that make it applicable to one's own case.

¹⁷ In this case, I may not have a reason to obey if, for example, I disagree with the outcome.

one's beliefs, feelings, etc. Reasons for rejecting outcomes must be put in terms that others could accept given the norms of political agreement (and disagreement). While the norms of practical reason impose certain restrictions upon political deliberation, they do not exclusively define the motives or reasons for political action, nor do they make civil disobedience impossible. They act only to regulate it in cases where it is warranted.

The Argument

The outlines of an argument can now be made clear. The general thesis is this: No duty to obey democratic outcomes arises unless the procedures of which they are a product meet some epistemic criteria. The epistemic features of a procedure enable it to track outcomes correct by a procedure-independent moral standard.

So I will begin with a case of "simple pluralism" in which one acts "politically incorrectly" but ostensibly out of a kind of moral or religious conscience. Then I ask what would be required in order to justify the use of force against such actors. The general answer is that some appeal must be made to reasons that are authoritative, but not necessarily reasons that they accept from the point of view of their particular doctrine. On this basis, I claim that the relativity of value must be rejected without rejecting the possible plurality of moral value. After all, to reject the latter would be, it seems, to reject democracy as such. Indeed, legitimate political authority must be justified in asserting a duty to obey. Otherwise, it would remain unclear what authority it had with respect to the individual moral and religious conscience. The possible plurality of moral value, then, will frame the discussion of democratic legitimacy, in particular how to justify a duty to obey democratic outcomes given this plurality.

The justification of a duty to obey as a part of the concept of democratic legitimacy is itself a matter of dispute.¹⁸ It is often thought that such duties arise from tacit or explicit consent, as if consent were fundamental to the idea of self-rule. I will utilize Chapter 1 to show why consent is of limited use even within the procedural conception. From here, I will outline available alternatives to consent theory along with some of their merits and problems.

In Chapter 2, I will consider a justification of democratic authority that does not depend upon consent, and in fact, proposes to remove questions of moral value from the “public table” altogether as a means to articulate a conception of legitimacy. Call this account minimalist. Minimalism is positivist regarding value and law. However, it is faced with serious internal flaws. To the extent it explains political obedience in terms of psychology, sociology, and economics its account of legitimacy (in particular the “duty” to obey) is grounded in its positivism. Minimalism, however, makes the mistake of supposing that the reasons for adopting a procedure are also reasons that can be employed as justifications of democratic outcomes. It cannot for this reason adequately account for the legitimacy of political outcomes. For this reason, the appeal to a procedure independent *moral* standard for evaluating political outputs is necessary.

In Chapter 3, then, I will consider Kant’s persuasive, comprehensive, and critically acute view of democratic legitimacy. Unlike the positivist doctrine, Kant’s contends that political legitimacy is a moral concept. It contends that the duty to obey political outcomes is indeed categorical; and that its nature in this regard is grounded in the transcendental principle of publicity. If we assume that Kant’s view is absolutist, it can be shown how this stance leads the transcendental view of legitimacy into a problem.

¹⁸ Indeed, it is disputed whether or not the concept of legitimacy requires any claim about a duty to obey.

The goals of this view are clear enough, viz. the capacity of citizens to utilize their practical intelligence in public matters. However, there are cases in which the transcendental philosophy seems to place obstacles in the way of these goals. In particular, it places obstacles in the way of democratic deliberation and undermine legitimacy.¹⁹

In Chapter 4, then, I will turn to a collection of recent work on democratic legitimacy and deliberation. It includes relatively recent essays by John Rawls, David Estlund, Cheryl Misak, and Michael Sandel. By placing these views in conversation with each other, I argue that the criteria for legitimacy may be established prior to political deliberation, though they inform democratic deliberation in vital ways. However, making this argument will require establishing the proper role of deliberation in democracy that is not, as Cohen writes, merely a derivative rather than a normative ideal of democracy. To these matters I turn in Chapter 5.

Because individual deliberations may not be a suitable model for democratic deliberation, I have endeavored to put a number of thinkers and perspectives in conversation with each other. The idea of democratic deliberation in Chapter 5 is restricted to its political context. Even though the chapters will proceed in conceptual rather than historical order, I have included a substantial amount of relevant historical content as a background for present day political theory. Though I argue there are differences to be drawn even among epistemic views of democratic legitimacy, if nothing else, I hope to make it manifestly clear that any theory of democratic legitimacy must

¹⁹ I will not, however, contend that the reading I give here is the correct reading. The goals for the chapter are to provide a contrast to the non-moral conception of legitimacy and to undermine an absolutist understanding of the duty to obey. The contrast will provide a basis for the development of a Rawlsian conception of democratic legitimacy in Chapter 4. An interpretation of Kant's view of moral reasons that seems closer to correct may be found in Herman (1993).

include an appeal to epistemic criteria however these more particular disputes are ultimately resolved.

CHAPTER I

POWER, AUTHORITY, AND TRUTH

1. Political Power and Legitimate Authority

As the 21st century commences signs of fanaticism — religious, political, and otherwise — abound. Fanaticism often erupts within the enlightened states that claim to have overcome it in ideology if not in actuality. In 2004, the filmmaker Theo van Gogh was murdered in Amsterdam — historically, the most tolerant of western cities — for his criticism of the treatment of women within Islam. More recently, riots have erupted worldwide in response to the cartooning of the Islamic prophet, Mohammed.

The spirit of fanaticism does not belong to a particular religion, politic, or nation. Abortion clinics and gay nightclubs have, over a number of years, been bombed in the United States. Abortion clinic doctors have been murdered. These events considered individually may not indicate a spreading social or political fanaticism; but taken together they are at least suggestive of discontent and instability. It is notable, moreover, that these events often occur within political environments in which speech and abortion is legally protected, and homosexuality is not (as a matter of practice at least) illegal.¹

Aside from the immediate shock at events like these, they reveal deeper dimensions of dispute. In particular, they suggest underlying disputes about which form of political authority, if any, is legitimate.² To this end, Philo's statement in Hume's

¹ Some states in the US still have anti-sodomy laws. However, such laws are rarely, if ever, enforced.

² One might object this fact does not indicate a dispute about political legitimacy. Everyone agrees that democratic outcomes are legitimate. However, this does not entail agreement about the nature of that authority, and its justification.

Dialogues seems both prescient and familiar: “But, where the interests of religion are concerned, no morality can be forcible enough to bind the enthusiastic zealot. The sacredness of the cause sanctifies every measure which can be made use of to promote it” (Hume 1980, 84).³ The *sacredness* of the ends, from the point of view of the zealot, justifies the means employed to realize them. Their illegality does little apparently to stem this sentiment. Thus, zeal tends to “weaken extremely men’s attachment to the natural motives of justice and humanity” (Hume 1980, 84).

Hume suggests that fanaticism — for political purposes at least — is a condition in which “sacred objects” are the determinants of politically authorized action. Practices organized around these objects claim the right of legitimate political authority. But a legitimate political authority must prescribe political duties for the zealot as for anyone. Since political society, commonly understood, is justified in employing coercion and sometimes force to achieve its ends, we must be able to show that the political authority in question has a *right* to its authority — that, indeed, what is lawful is prior to what is sacred. Otherwise, political authority appears to be only the exercise of power without justification — indistinguishable from zeal and not insulated from its effects. In this case, we could not identify who the zealot is and is not — thus against whom force may be rightly used — without begging the question against the zealot. Without such a demonstration, the zealot may be alternately a saint, a freedom fighter, or a martyr against an encroaching and illegitimate form of life; hence justified, at least to those she believes share her point of view. Consider the zealot, then, as an instance in which legitimate authority and its nature is disputed. This dispute depends in some way upon

³ My aim is not simply to address religious fanaticism except insofar as it manifests itself in larger and more diverse political communities.

one's view of the correct determinants of authorized public action. The resolution of this dispute entails the monopolization of political authority. But solving this problem has nothing to do with the question of whether the fanatic can psychologically give due weight to democratically produced outcomes. Rather, it has to do with determining why she *ought*. Thus, it is a normative problem – a problem about the justification of political authority. It remains a question in political justification whether or not a duty to obey arises in correspondence with rightful authority. I address this question in a somewhat limited way – arguing only that if there is such a duty the command-issuing procedures must meet some criteria of epistemic soundness. This would be true of democratic procedures inasmuch as any other. Thus, the task will be to show that democratic procedures either possess or may be constructed (by appeal to an ideal conception) to possess such features.

2. The Exclusivity of Legitimate Authority

A political authority issues commands. If an authority legitimate, then a duty to obey its commands arises. To this extent, it must give reasons validated by an independent moral or epistemic standard. Legitimate authority has, then, the exclusive right to issue political commands. In this way, it has a kind of moral authority.

Obedience to political authority could be morally required only if the authority in question is legitimate. Thus, it is required only if the reasons that determine its legitimacy are valid according to a moral standard independent of its assertion of power. Political legitimacy, then, does not refer simply to psychological facts or to prudential considerations on the part of individuals trying to estimate in particular cases whether

they should obey or whether obedience is owed. Rather, justification refers to the right of a political authority to issue commands, and the corresponding duty to obey them.

One might ask why the requirement of justification falls on any political power. After all, the amassing of power can be accounted for and explained by various psychological and economic phenomena. The greatest power commands plain and simple. In part, the answer to this question has to do with the exclusivity of legitimate political authority. That is, if there is more than one “authority,” there are potentially conflicting commands both requiring obedience. A practical question about which one (if any) should be obeyed naturally arises. The political authority that should be obeyed is the one that is legitimate. The question of legitimacy is generated as a problem of practical reason. Its apparent solution assumes the form of an “exclusivity” thesis. The exclusivity thesis says that there could be one and only one legitimate authority for the purposes of issuing commands to which citizens have duties. Because there are numerous views as to which commands procedure produces legitimate commands, there is a need for a theory.

This theory, I claim, must assume that distinguishing between commands that are legitimate and those that are illegitimate requires appealing to procedure-independent moral standards. Without an appeal to an independent moral standard, it would not be clear which authority has the right to issue such commands, thus, why it is legitimate. Legitimate authority is unified and monopolistic. The defense of a political authority, then, depends upon the *quality* of the reasons for it, not merely the *quantity* of the power behind it. No rightful authority could be so without a sound justification; and no

justification could be sound if it does not appeal to standards independent of the power in question.

Putting the problem in this way also suggests something about the form of political outputs. Since they are commands, obedience is required even in cases where laws are bad (e.g. unjust).⁴ The requirement of obedience stems from the form of the output, not simply its content. The *form* of the output commands obedience even when the correctness or quality of its content(s) is the subject of dispute, which it frequently is. The legitimacy of the outcome depends, then, upon whether it is *justified* as a command—that is, whether it rightfully requires obedience even if there are disputes about the correctness or quality of their content. With respect to the range of political outputs, we might say that the command is categorical over the range of its outputs.

3. The Epistemic Element of Political Justification

A political output as understood here is a distinctive kind of claim about what should be done. It is distinctive because it is a command; and as a command it is binding on those subject to it, even when they disagree about the correctness of the content of the outcome. This is true even in democracy, where citizens are represented as free and equal. A typical problem of democracy concerns how to reconcile freedom and equality with the command structure of a political authority. Because of the requirements of this problem given pluralism (as noted above), it is atypical in democratic theory to suggest that the evaluation of the quality of democratic outcomes has much significance with respect to democratic legitimacy. A more typical view suggests that outcomes are legitimate if the procedures producing them reflect the qualities of freedom and equality.

⁴ Whether or not this entails that civil disobedience is ever justified will be discussed in some detail in Chapter 3.

Yet, some philosophers have argued, contrary to the typical view, that the quality of political outcomes is relevant to their legitimacy (Cohen 1986; Estlund 1999).

Democratic legitimacy would, in this case, have what David Estlund has called an “epistemic dimension.” As suggested in the Introduction the requirement of an epistemic dimension stems from the shortcomings of various types of substantive and procedural understandings of authority and legitimacy. In the former case, legitimacy does not seem to follow from authority without specifying some other set of duties. Procedural conceptions of democracy tend to under-emphasize the reliability of the procedure, hence its epistemic features. Before examining the possibilities for this type of justification, however, I will examine and critique a more typical view—the idea that legitimacy derives from the free consent of citizens, and that consent is sufficient for legitimacy. The understood significance of consent as part of democratic theory lies in the fact that it makes freedom and equality “operational.” That is, if it could be shown that one *consents* to a procedure or to an output, we assume that one validates the output (i.e. the law or policy). One could not be said to be enslaved or dominated by outputs or procedures to which one freely consents. One is bound, then, by one’s consent regardless of the epistemic quality of the outcome.

4. Self-Rule as Consent

At least two traditional views suggest that appealing to an epistemic element in democracy, as a part of its justification, is implausible. Appealing to an epistemic element to justify *democracy* seems contrary to the most recognizable, and perhaps forceful, criticism of it—the one forwarded by Plato.⁵ In particular, Plato claims, democracy

⁵ Plato’s conception is epistemic; but he does not believe democracy can muster the resources to produce good outcomes.

cannot produce true beliefs about what should be done because citizens generally are lacking in political wisdom. Individually and collectively, then, they are lacking in knowledge about what should be done. However, this claim is not unique to the non-democrats. The contention that democracy could be morally or epistemically reliable does not always fit comfortably with some *justifications* of democracy—in particular those found in the liberal tradition of political justification. This tradition shares with Platonism the concern that democracy is beset by severe epistemic deficiencies, and deep moral conflict. As a consequence of these deficiencies and internal moral conflicts, democracy is liable to tyranny (Mill 1869, Riker 1982).⁶ Or as Richardson more recently suggests, democratic reliability is a “rickety” basis upon which to place a duty to obey (2002, 73). Were democratic outputs high in epistemic value, neither characterization would make much sense. Thus, one can only assume they share with Plato the claim that democratic procedures as such are not epistemically reliable.

Understanding self-rule as consent is an attractive way to address substantive moral disputes, without appealing to the epistemic features of democratic procedures. In particular, the appeal to consent shifts the focus away from the disputed outcomes toward some other value, like a moral commitment or prudential judgment. Obedience to outcomes, then, is required even if one disputes their correctness. This is because obedience depends upon facts about the procedure in relation to consent rather than its particular product. This does not explain how democratic outcomes are limited. So within consent-based theories, it is standard to limit democratic outcomes within the framework of a civil constitution that outlines the moral bounds beyond which legitimate outcomes

⁶ The present essay does not trade on any claim of being “anti-liberal,” though it does suggest that many strategies for justifying consent-based approaches to liberal justification are unsuccessful.

may not pass. The civil constitution may attend to justice, even if democracy as such cannot.

Unanimous consent to the civil constitution in which democracy is an article authorizes the majority to rule. The idea is this. Since one has authorized the ruler to command, one is obliged to obey. Not to obey would be a contradiction of will. Thus, the minority is obliged to obey outcomes, even those with which they disagree. If consent is genuinely rational, then, we would have to explain upon what the claim to the rationality of the procedure is based.⁷ There are at least two explanations. One of these understands consent in terms of prudence; and the other one understands consent to have distinctively moral content.

Consent as Prudence

In his *Second Treatise on Government*, Locke claims that in a democracy “the act of the majority passes for the act of the whole” (2003, 142). On this view, it is not obvious why the rule of some should pass for the rule of all, if consent is required for authorization.⁸ Without consent, it seems the majority would be aligned with power instead of right. If democracy means “self-rule” it must be explained how this expression could be applied to a political or social minority inasmuch as to the majority.

⁷ Objections about the general rationality of democratic procedures have been raised. To be rational, a procedure must conform to general rules of logic (e.g. transitivity). At least two problems arise from claims about the rationality of these procedures: (1) the voter’s paradox (Wolff 1999, 58-67) and (2) the paradox of the minority voter (Wollheim 1962, Estlund 1989). Both criticisms focus on the interpretation of democratic legitimacy that appeals to the rationality of democratic procedures as ways to explain how citizens generally or citizens in a minority determine political outcomes and are, therefore, free. In the case of the voter’s paradox, the democratic voting procedures do not (given certain preference orders) meet the most minimal requirements of logic (i.e. transitivity). (See Wolff’s account of “transitivity” in the page noted above.) It would be not add much to the present thesis to treat both types of problems here. Thus, I will assume there is some tenable solution to the general rationality of democratic procedures and continue to concentrate on the problem of the minority voter. Even if the first set of problems can be resolved, it is not clear that these solutions affect the problem of the minority voter.

⁸ Whatever the answer here the appeal is not to unanimous consent about outcomes.

Locke suggests this justification conforms to the justification for the authority of *any* government. Consent is rational if government promotes “their [the people’s] comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it” (2003, 142). The purpose of government is to make the good of citizens possible; and it is rational for citizens to consent to be governed provided it does so. Obedience justified by consent maximizes equal liberty. Thus, if one gains more by giving up some, one has made a good trade.⁹ That government which cannot secure these conditions cannot be legitimate. This is because it cannot secure the reasoned consent of citizens.¹⁰ And if it cannot secure this consent, it cannot convert the will of the majority into a general will. The will of the majority would represent force without justification—hence without reason, and so without legitimacy.

Of course, the idea of rational consent utilized in this way does not seem to suggest that an *act* of consent has taken place. It represents what it would be to give one’s consent as a rational being. And if this is true, it is not clear why one should be obligated to obey. It simply outlines what rational beings tend to *prefer*. It does not seem to show why the outputs are commands whose legitimacy is categorical.

There are cases in which I may withdraw consent. Thus, if I find democracy unreliable in furthering the ends of liberty it is not clear that my consent would be rational. I may withdraw it just as reasonably and freely as I gave it. In this case, consent seems a thin basis for sustained political obedience by democratic minorities. On the

⁹ This view may be likened to Rawls’s difference principle. Inequalities can be justified if they produce greater equality overall.

¹⁰ For this reason, I believe Locke includes rights of rebellion. This distinguishes Locke from Kant who includes no such right, even when a legitimate authority has broken the social contract. I will turn to this feature of Kant’s account at the end of Chapter 3.

prudential view, no one has a reason to remain a democrat when the vote goes against one's own interest. Obedience may be rational, but there is no *duty* to obey if consent is formulated on the basis of prudential judgment.

Consent as Promise-keeping

Kant, like Locke, emphasizes the authorizing power of consent—and so the necessity of obedience—when he writes, “the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established” (1991, 79). The duty to obey on Kant's interpretation has the form of a promise. In adopting democratic procedures, one makes a commitment to accept the outcomes as legitimate even in cases where one believes the outcome is wrong. The duty arises from the fact of *unanimous* acceptance of the contract within which democracy is one article. Having adopted the procedures (and so their outcomes at least formally), one is bound to obey the outcomes. One could not disobey without implicitly withdrawing one's consent. And one could not do that without breaking the promise to obey even in cases where one believes the outcome to be incorrect. Consent, in this respect, has the form of a promise and is governed by moral norms. Disobedience is *wrong* because it is a contradiction of the universal will irrespective of the quality of the content of democratic outcomes.

The key to this proposal lies in the fact that democracy is represented as an article of a civil constitution. Thus, democracy is authorized to command *if and only if* it is constrained within this framework. The civil constitution is, then, the means by which democracy is legitimately actuated and limited. Simple democratic procedures, independent of the civil constitution, could not be legitimate. Hence, obedience to their

outcomes could not be justified without appealing to justice understood as the object of the social contract.

Within the framework of a civil constitution democracy is justified relative to this limited role. The question, however, is why the legitimacy of democratic procedures is made to depend on a civil constitution in the first place. The justification for democracy within the framework of a civil constitution concerns its capacity to enable “citizens voting in periodic elections to remove elected officials when they become discontented with the officials’ performance” (Dahl 1989, 154). So democracy is an effective means to restrict political power.¹¹ There is no suggestion here that the justification of democratic procedures concerns its capacity to indicate the truth about what ought to be done; thus, no suggestion that democracy has any epistemic merit apart from its limited role within the civil constitution.

Both characterizations of consent—the prudential and the moral—seem liable to the same critique. Allen Buchanan writes, “If consent is really necessary for political authority, then there are not and are never likely to be any entities that possess political authority” (2002, 699). Since no one really consents, then, there is no authority.¹² Nothing like a full refutation of consent theory needs to be attempted here. It is enough to show that consent theories are limited when it comes to the justification of political authority. Neither prudence nor the consistency of keeping a promise seems sufficient to

¹¹ One assumes this means that in this narrow way at least, democracy is able to reflect something like a popular will (Arrow 1951; Wolff 1998). An underlying supposition of the present essay is that even if the general rationality of the procedure—that it does not, for example, violate transitivity—can be worked out, it does not resolve the problem of the minority. Thus, most of the work here focuses on the problem the minority poses for democratic justification.

¹² Cf. Simmons 1979.

establish a duty to obey. In any case, if Buchanan is right, since no one ever really consents, there is no duty to obey political authority on the basis of consent alone.

For all that, it is not necessary to rule out that consent plays some role in political justification. Instead, the point is to show that if consent is a meaningful part of political justification, its authorizing power cannot be conceived except by reference to duties or obligations to which one *does not consent* but are nonetheless binding.

5. Reliability as a Component of Legitimacy

The appeal to consent as a basis for political authority is enabled by a longstanding prejudice against the epistemic features of democratic procedures. Within the Platonic tradition, the appeal to democratic reliability is blocked by presumed facts about public ignorance. The many are not philosophic. Thus, what is required in order to rule the city well — knowledge of the Good — is lacking in democracy since it is by definition, rule by the many (490e; 557a).¹³

Within the liberal tradition, this prejudice against democracy is reflected in the limited role to which democracy is assigned. Were it believed that democracy produces good outcomes by a procedure independent standard there would be no reason to confine it to the role of limiting the power of government. Instead, democracy, so defined, is justified if it promotes liberty, stability, and the like. Thus, within the liberal tradition democratic procedures are commonly understood as preserving liberty by restricting external power.¹⁴ On this basis, an epistemic view of democratic procedures and legitimacy receives marginal treatment.

¹³ Cf. Kane (1994, 120-122). Kane gives a vivid and concise account of the entailments of Plato's criticism of democracy.

¹⁴ This view should be distinguished from democracy as a means to further autonomy, which has republican sources.

Now, suppose that each time I want to know the answer to a question about what to do, I consult a “Magic 8 Ball.”¹⁵ I ask the 8 Ball a question, turn the 8 Ball over, and it provides a response with the form of a command about what I should do. I appeal to this method exclusively. The trouble is that it tells me the right thing to do only about 12% of the time. It is unreliable. In other words, its outputs do not have typically high epistemic value. So I suffer the consequences of doing the wrong thing, commit egregious moral offenses against others and so on. I may still continue to defer my will to the 8 Ball. In other words, I may sustain my willing consistently over a large number of cases; however, it begins to seem that I do so irrationally, assuming there is a better alternative. One will wonder *why* I continue to do so given the epistemic unreliability, indeed the grave moral consequences, of the procedure. Consent seems rational *only if* the procedure is epistemically or morally reliable.

By contrast, if I have cancer and wish to preserve my health, I go to the oncology boffin rather than the local faith healer. My judgment in putting myself in the care of the oncologist (e.g. following her instructions) concerns the reliability of the procedure to produce the desired outcome. Some of my reasons for submitting to medical authority are epistemic. But the epistemic nature of my reasons for submitting to the instructions of the doctor or the 8 Ball does not justify obedience in one important way. It does not *obligate* me to obey their instructions. In other words, even if I take the doctor as authoritative, I would have the duty to do what the doctor says only if I have other duties (e.g. natural duties to preserve my health). Unless there are such duties, it is not clear that I have a *duty* to obey even if I consent to the procedure.

¹⁵ “Magic 8 Balls” are toys made popular in the 1970s. There is a window in the 8 Ball. One is supposed to ask the question, and turn the 8 Ball over. An “answer” to the question appears on the window.

From this point of view, it seems wrong-headed to base political legitimacy — as having to do with an obligation to obey — on the epistemic value of its outcomes. On the other hand, it seems reasonable to defer to the oncologist in a way it does not seem reasonable to defer to the 8 Ball or faith healer. This could only be because the authoritativeness of the oncologist derives, in part at least, from her reliability in treating cancer. Authoritativeness, unlike legitimate authority, however, does not entail obligations to obey unless there are other duties on which to base them. Political legitimacy, then, would depend upon these other duties. Since their authority does not depend upon consent, consent alone cannot be the basis of political legitimacy. I may withdraw consent as easily as I gave it, and on the same epistemic basis. The unreliability of the 8 Ball, for example, may be a good reason to withdraw consent to follow its commands. This situation seems improved only if it is the case that a failure to consent would be wrong according to an independent moral standard.¹⁶ On the other hand, it seems implausible to think that democratic outcomes can carry much weight over a large range of cases among a diverse population if they have no epistemic quality.

The question is how to account for the duties that make consent operant. In other words, if consent is authorizing, it could be so only on the basis of a doctrine that specifies these duties and justifies their authority (i.e. something to which I could not be said to consent but am obligated in any case). Thus, while it is far from clear that the epistemic quality of outcomes alone secures an obligation to obey it is equally uncertain whether a theory of democratic legitimacy can dispense with an appeal to reliability.

¹⁶ Along the lines suggested above, Buchanan (2002) claims that the justification of obedience depends upon a deeper duty, namely a “robust natural duty of justice.” Obedience is not to the abstract entity of a state but to a somewhat less abstract entity of a government composed by others citizens. There are duties to obey person, on his account, but not governments (considered abstractly). But this duty derives from justice.

Whatever else can be said about democratic legitimacy, it is hard to imagine there could be a duty to obey the outcomes of random procedures, or procedures that consistently produce the wrong outcome. Naturally, there will be concerns about what this proposition implies. Before addressing these concerns, I will further define three possible views of a democratic procedure in terms of the duty that justifies obedience.

6. Three Conceptions of a Democratic Procedure

Any viable view of democratic legitimacy must observe the distinction between legitimate and correct political outcomes. Any acceptable view must be procedural in some way. That is, if political legitimacy is framed as a problem about justifying obedience, and we assume the categorical form of outputs along with disputes about their correctness, we have to assume that political outcomes may be legitimate even when they are not correct. Thus, it seems the only plausible theories of legitimacy will be procedural. This does not entail that procedural theories necessarily lack a regard for the substantive correctness of outcomes. Since, however, these considerations must avoid the claim that legitimacy requires correctness, it remains to be seen how this concern should be integrated into a procedural conception.

Several possible causes of political legitimacy may now be distilled and outlined in terms of these duties. Distinguishing between them does not entail that they are incompatible at every point. It only suggests that they are importantly different.¹⁷ In the following, I will alternately consider the merits of the duties to fairness, to justice, or to truth as causes of procedural political legitimacy.

¹⁷ I will discuss a kind of prudential conception of democracy in Chapter 2. It may be traced in part to Hobbes but reappears in the positivism of Schumpeter and, more recently, Posner.

The Duty of Fairness

In “Justice as Fairness,” Rawls writes,

Now if the participants in a practice accept its rules as fair, and so have no complaint to lodge against it, there arises a *prima facie* duty...of the parties to each other to act in accordance with the practice when it falls upon them to comply” (1999, 60).¹⁸

On this view, the outcomes of a procedure are legitimate if fairly produced. If fairness is adequate to the legitimacy of the outcome, then, voters have on this view sufficient reason to accept the outcome as legitimate. On the other hand, they have reasons to think the outcome is illegitimate if the product of a procedure was not produced fairly.

There is a dispute about the meaning of “fairness” as applied to political procedures. Thus, there may be a dispute about the *justification* of the outcome, even if there is no dispute about its cause—the procedure that produced it. If fairness is marked by equality of input (e.g. the “one person, one vote” rule), then, legitimate outcomes (assuming a simple voting procedure) could only be those that are fair so far as each eligible voter has one and only one vote and, in fact, votes once. Fairness on this account is purely a matter of the distribution of political input. It represents a strict and formal egalitarianism.

Some accounts of the democratic procedure, then, are strictly egalitarian with respect to the distribution of input and some are not. Non-egalitarian understandings of fairness may, instead, peg it to what makes persons unequal (e.g. differentials of

¹⁸ This view was stated in a 1962 version of “Justice as Fairness.” I make no claim whether Rawls continued to accept it since it is used here only to illustrate such a view.

education, wealth, intellectual gifts et. al.) In these cases the fair distribution refers to “proportional” distribution given the relevant differentials.¹⁹

So there is a deeper question about the nature of fairness. Egalitarianism pegs the fairness norm to that which makes persons equal. Both models assume that a democratically legitimate outcome is legitimate if it is produced by a democratic procedure, whether they assume distributive equality or not. Though there may be a *de facto* consensus about the proper view of fairness as strict distributive equality, we cannot yet assume a normative consensus as a condition of legitimacy. That is, democracy does not apparently *require* fairness if we mean by this “one person, one vote.” Whether or not democratic procedures *should* be egalitarian and in what degree is, then, a separate question and must be defended on separate grounds. If an egalitarian ideal of political input adds anything to democratic legitimacy, this argument must appeal to a standard independent of the majoritarian procedure as such. Clearly, these considerations are not devastating to the interpretation of democratic legitimacy in terms of fairness. Given these persistent doubts, however, it does suggest that the strength of the claim depends upon the strength of an underlying substantive moral theory.

The perceived advantage of fairness as the criterion of legitimacy is that it avoids “certain philosophical and metaphysical claims” (Rawls 1999, 388). But if the dispute about what *is* fair can only be resolved on the basis of substantive moral argument, it is not altogether clear this advantage can be realized. In other words, if the duty of fairness depends upon a substantive moral doctrine, then it is to such a doctrine we must look for the justification of this duty.

¹⁹ Cf. Estlund “Why Not Epistocracy?” (2003). Estlund contends in this essay that the claims the educated have superior wisdom is not available as a justification for unequal political authority.

The appeal to fairness may be a sufficient justification in particular, relatively unproblematic, cases (Estlund 1999; Christiano 2004). The fairness model in these cases is unproblematic as an instrument of bureaucratic expedience. But expedience alone does not justify a moral authority as such (Richardson 2003). Thus, the appeal to fairness seems weak, especially in difficult cases where deeper moral problems may hang in the balance. It does not give citizens sufficient reasons to defer to democratic authority unless they already accept fairness (described in a particular way) as the basic procedural constraints. They may, however, have good reasons, moral and epistemic, to reject it. Procedural fairness is, therefore, inadequate to address problems of political legitimacy and justify political obedience.

The Duty of Justice

The appeal to procedural fairness and the dispute about the meaning of fairness suggests that purely procedural views find roots in deeper substantive moral doctrines. We find some effort to establish the moral foundations of democracy in the political theories of Rousseau and Kant (among others).²⁰ Rousseau writes,

Apart from this general contract, the votes of the greatest number always bind the rest; and this is a consequence of the contract itself. Yet it may be asked how a man can be at once free and forced to conform to wills that are not his own. How can the opposing minority be both free and subjected to laws to which they have not consented" (1968, Book IV, Chapter II)?

Both Rousseau and Kant formulate the problem as one of recognizing the moral autonomy of individuals given the coercive nature of the external, legislated laws. If one is, by nature, free how is coercion justified? Why must one obey laws one has not

²⁰ Though Kant is reputed to have kept a picture of Rousseau on his wall, there are differences between the two political theories that will not become clear until later in the essay.

authorized oneself? A moral conception for democratic rule suggests that the foundation of such rule lies in procedure independent *moral* principles.

Consent, on this view, invokes a moral obligation on the part of the political subject. We see this when we recognize that “consent” is tacitly a promise. In consenting to the procedure, one promises to obey despite the results of the procedure. Thus, the norms governing promising may be applied in this way to the adoption of the political procedure. Withdrawing one’s promise to obey is tantamount to violating the minimal conditions for autonomy—in particular, the consistency of will required by the practice of promising.

There are, in addition, other theories about the nature of selfhood and citizenship. In this case, the problem concerns to which substantive doctrine one should turn to establish the duty to justice as a basis for political legitimacy. The most obvious answer would be “to the true one.” In this case, however, political justification cannot do without “certain philosophical and metaphysical claims.” As in the case of fairness, there are reasonable disputes about the duty of justice including its relative priority as a political value (Sandel 1982; Rawls 1971 and 2005).²¹

Duty and Truth

Conceiving of a socially complex political procedure as having the tendency to produce correct outcomes has fallen into some ignominy both for moral and epistemic reasons.²² Morally, it seems possible that it ignores the minority view. Theoretically, the

²¹ I will discuss in some details Rawls’ attempt in *Political Liberalism* to put a certain kind of dispute about the priority of justice, one he thinks of as philosophically motivated, to rest.

²² Consider Riker’s *Liberalism Against Populism* (1982). In contrast, Cohen (1986) argues that Riker misconstrues the epistemic dimension of populism. To this extent, the account I give will follow Cohen.

worry is that democratic procedures in particular are incapable of generating outcomes of high epistemic value.

An epistemic conception of democracy holds that democratic outcomes are legitimate if they are the outcome of a procedure that reliably produces true statements about what should be done (Cohen 1986, 34). Thus, an epistemic account of democratic procedures is an account of how they might do so.²³

In *The Social Contract*, Rousseau argues that democratic procedures produce *correct* outcomes. They reveal the General Will, even in cases where the outcomes are disputed by the minority. Since the outcomes are correct, they are legitimate. Hence, the minority is incorrect about what the General Will is. The minority must be *forced* to be free.

The distinction between legitimacy and correctness notwithstanding, Rousseau's conception is (as many have noted) dangerous. Ostensibly, on Rousseau's conception do not merely register the judgment of the minority. Since the majority is interpreted as being correct, it threatens to dissolve the minority view altogether since the minority view does not reflect the General Will.²⁴ As suggested earlier, however, the reliability of the doctor places me under no obligation to obey her unless I have other obligations (e.g. to preserve health). Rousseau's claim apparently is that the majority represents the correct view while the minority represents the incorrect one. If so, correctness is sufficient for authority since the majority view is the view about what is correct for the minority, too. This is because the minority consents to be ruled. Thus, they consent to do what the

²³ There is a dis-analogy between this notion of duty and the others. That is, it seems to refer only to general conditions of agency. Whether or not it depends upon a deeper metaphysical conception of persons is an outstanding question.

²⁴ In Chapter 3, I will argue that a similar problem is raised with Kant's conception of political authority.

General Will requires, though in this case they are wrong about what it is.²⁵ “Individuals must be obliged to subordinate their will to reason; the public must be taught to recognize what it desires” (Rousseau 1968, 83). Aside from the fact Rousseau’s view is not really a procedural view of legitimacy, there are cogent empirical reasons to think that the majority is not always right in the way the theory suggests.

The lynchpin of Rousseau’s claim concerns the appeal to the correctness of democratic procedures. On this point, he explicitly challenges the Platonic estimation of democracy — asserting what Plato denies. How Rousseau’s claim about democracy is understood, depends upon one’s view of democratic voting — in particular, whether one interprets it cognitively or not. To interpret voting non-cognitively means that the voting inputs are something non-cognitive, such as desires, preferences, et. al. The interpretation of the General Will in this case does not refer to what voters believe it to be. This interpretation is attractive; but it leads to a problem. If the majority voted for A and the minority for B (not-A), and we interpret the result as being correct, then the minority must *really* prefer A. But then it becomes hard to explain why they voted for B if they did not really prefer it. On the other hand, that the minority voted for B becomes comprehensible if we understand the minority view as a *judgment*. On the non-cognitive interpretation, the minority view disappears. The minority view is incoherent. It is, so to speak, a “non-view.” Understood cognitively, however, the judgment of the minority cannot be disposed of even if the majority view is correct. Recalling earlier examples, the correctness of the democratic output does not secure its legitimacy, hence a duty to obey. If the minority judgment does not necessarily change or disappear with the democratic

²⁵ Admittedly, this account is not very nuanced.

outcome, the understanding of this duty (if there is one) must be framed according to a cognitive interpretation.

7. The Epistemic Interpretation of Democratic Legitimacy

“The usual view of voting,” writes David Estlund, “is that it involves *favoring* one of the alternatives over the others” (1989, 143). The usual view of voting is that it is not epistemic. This view has a notable consequence for the minority voter in particular. If the voter is democratic, she wills that the majority outcome rules. As an individual voter, however, she may will the opposite of what the majority wills. Thus, she is put “in the incomprehensible position of willing A and not-A” (Estlund 1989, 143). She could not, then, “be subject to her own will” even in the minority. Rather, she could not be said to have a will at all since the minimal consistency conditions of willing have not been met.

Estlund’s view, I take it, is that the non-epistemic interpretation of voting in all its variants (i.e. preferring, willing, desiring) makes nonsense of the minority will. This result has, of course, a moral dimension since it suggests the minority view is eliminated from the political spectrum. Given the non-epistemic interpretation of voting, then, the most obvious way to address this moral concern is to impose restrictions upon the democratic process. In particular, we might impose “rights,” that are inviolable by any political outcome. Thus, even when the minority view is eliminated from the political spectrum it may appeal to this body of rights for protection. Rights-based theories of democracy seem to grow naturally from the non-epistemic interpretation. The point of this essay is to examine whether this interpretation is correct, whether an epistemic one is plausible, and if so, what it entails—in particular what it entails for the minority voter.

Democratic procedures may be employed as a decision procedure in groups of people who exist in a common spatial and temporal situation and are often associated with each other in other particular ways — for example, by history, culture, or profession. The particular application of the democratic procedure with which I am concerned here is its application in groups who may be associated in the ways described above, but are also *politically* associated. Their political association gives rise to a quantity of power that groups or individuals may exercise over each other and may be aggregated or distributed in numerous possible ways.²⁶ In democratic associations, it is often thought that those over whom the decision has authority would, on reflection, find the decision procedure — hence the outcome — to be justified. Its inability to achieve desirable results, at least for some, might be a reason to reject it (Dahl 1989, 163).

To see this, consider the 2004 Presidential election. In this election, George Bush won the votes of a majority of American voters. Let us suppose that those who voted for him did so because they believed that he was the only acceptable candidate; let us also suppose that those who voted for Kerry did so because they believed that he was the only acceptable candidate. So those who voted for Kerry believed that Bush would be an unacceptable president. On their view, to elect Bush would be to make a kind of mistake, perhaps even to commit a grave moral wrong. Nonetheless, the expectation is that, at the end of the election, the minority voters will defer political authority to the majority decision. In essence, then, the minority voters must acknowledge the outcome as *legitimate* — and hence authoritative — even though they believe the outcome to be

²⁶ *A Theory of Justice* (Rawls 1999) argues that the norm of this distribution is egalitarian. Thus, a well-ordered political society aims at a distribution where differences in wealth and so on are justified to the extent they benefit the least well off. This principle need not be interpreted as a “strict egalitarianism.” It does not seem it could meet these stringent criteria (Estlund 2000).

incorrect. In this way, the *legitimacy* of a democratic outcome seems wholly distinct from its *correctness*. The *legitimacy* of an outcome can be assessed entirely by reference to the character of the procedure that produced it; presumably, the *correctness* can be assessed only by appeal to some moral or epistemic standard independent of the democratic procedure. Call this common picture “narrow proceduralism.”²⁷

While it is true that a democratic outcome can be legitimate without being correct (and *vice versa*), matters are more complex than narrow proceduralism suggests. Returning to the example, suppose now there had been a terrorist attack during the course of the campaign, and that, as a result, the President issued an executive order calling for a state of emergency, ostensibly for reasons of national security. This meant imposing media restrictions, turning out the White House press corps – a general blackout of information and public debate between the candidates. Despite the general ignorance of the electorate about the candidates, their policies and their characters, the election was held to “preserve democracy.” Because of the terrorism, the overwhelming majority voted to retain Bush as president. In the meantime, a memorandum had been floating around suggesting that the President is a member of a secret society with various financial and personal relationships to the terrorists responsible for the act. Let us stipulate that such relationships would render the President unfit for office (according to objective criteria), and would almost certainly end his presidency. As a result of the general media blackout, however, voters vote without knowledge of the memorandum. Yet it is reasonable to suppose that, had they known about the memorandum, they would have voted differently. (In fact, I will stipulate that reliable polling shows as much.)

²⁷ This view of proceduralism is not as specific as David Estlund’s “fair proceduralism” in “Beyond Fairness and Deliberation” (1999). Though fair proceduralism would count as a form of narrow proceduralism.

According to narrow proceduralism, a proper democratic procedure is simply a matter of un-coerced fair voting; hence the present case presents no issue regarding the legitimacy of the outcome. That is, on the narrowly proceduralist view, provided the procedure is fair (defined here as equality of voters recognized in the vote), the outcome is legitimate despite the content of the memorandum. There was no procedural foul we assume; but somehow the outcome seems not only wrong, but illegitimate.

Suppose, however, that some who voted against Bush (members of the minority) were aware of the contents of the memorandum. They have, *ex hypothesi*, procedure independent moral knowledge that the election of Bush is an unacceptable outcome. On the narrowly procedural view, they cannot challenge the legitimacy of the outcome since it was procedurally fair. It seems though that something has gone wrong; that there has been a *failure of democracy* — one that cannot be addressed within the framework of a narrow proceduralism. “Narrow proceduralism” is too narrow.

8. Problems with the Procedural View

So “narrow proceduralism” needs to be revised to accommodate a broader conception of a proper democratic procedure. It should, after all, be a sign of a sound procedure that it characteristically results in good outcomes, or at least avoids the worst.²⁸ But if we generalize the claim that procedures must produce correct outcomes in order to be legitimate, we suggest that the outcome of *any* democratic election could be challenged on substantive moral grounds. There is not agreement, we assume, about what is correct. Thus, taking correctness as the basis of legitimacy seems to result in

²⁸ One may be reminded here of Churchill’s famous and ironic quip about democracy as the worst form of government, save all the rest. Of course, if he is right, this would make it the best form.

instability. The appeal to substantive moral grounds seems too strong. Yet, the appeal to “fairness” seems too weak.

Assuming a distinction between legitimacy and correctness, then, democratic authority seems more complex than first imagined. We are frequently lacking in the kinds of knowledge (e.g. secret memoranda) that suggest the outcome is wrong. Because of this narrow proceduralism is an attractive alternative for interpreting democratic outcomes. However, upon discovery of the content of the memorandum, citizens would have good reason not to accept the outcome — though it had been fairly produced. Thus, democratic procedures narrowly construed do not alone provide a full justification of democratic authority. If each voter operates as though she has independent knowledge confirming the correctness of the desired outcome, why should she be expected to defer to the political power of those elected to rule and what they produce (i.e. law and policy)? Though they have political power, it is not clear that they have power legitimately.²⁹ Not only does it become unnecessary to respond with appropriate obedience to political outcomes, one may be armed with powerfully good reasons not to do so.

The scenario indicates, as Dahl suggests, democratic procedures (as any political procedure) may produce noxious outcomes. Nevertheless, given the “command structure” of legitimate political outputs, the noxious outputs seem to require obedience inasmuch as the sound ones (1989, 163). Since not everyone will agree about the correctness of specific outcomes, it seems that the legitimacy of democratic outcomes has something to

²⁹ Representation adds another degree of complexity, and in a certain respect, another level of justification to the understanding of a democratic procedure. Suppose that 80% of an electorate opposes gay marriage, but that a much smaller percentage of those charged with political power share this view. To the extent some citizens have charged other citizens with more political power, the former citizens are morally bound to the judgments of the latter. Where there is a divergence between the will of the people and that of their representatives, it seems as though voting represents the abdication of power to those whose wills, in fact, run counter to an electorate. The political outcome desired by citizens is impeded by the means employed to produce it.

do with the procedure according to which they were produced. However, the procedural conception whose defining criterion is fairness seems weak. In any case, it seems to depend in some way upon a substantive moral doctrine. The task for a procedural theory of democracy is to integrate the procedural and substantive concerns without violating the procedural constraint on legitimacy. To conceive of a democratic procedure in this way is to conceive it as a process “more likely than another to arrive at the right result” (Dahl 1989, 164). This is the problem of how to think of democratic procedures as reliable. The reliability of political procedures would, in this way, be part of the justification of obedience—despite the possibility (endemic to any political process) that it will produce undesirable outcomes.

Since the problem of political authority is about the right to command, and in democracy it is the majority who commands, democratic outputs have the form of practical propositions, “A ought to be done.” Another problem that centers on the minority voter arises. If the democratic procedure produces the output “A ought to be done,” and the minority voter claims “B ought to be done,” these propositions apparently negate each other. Why ought one to think that the majority view is superior, hence authoritative, with respect to that of the minority?

9. A Semantic Solution to the Problem of the Minority Voter

In “A Paradox in the Theory of Democracy” (1962), Richard Wollheim describes the paradox in the following way.³⁰ A vote is cast “A ought to be done,” and the result (given democratic procedures) is sometimes an outcome, “B ought to be done.” The form of the argument is the same as that suggested by Estlund’s variations on the non-

³⁰ It is unclear to me whether Wollheim’s representation of this matter as a paradox is quite accurate.

epistemic interpretation. In this case, however, we are dealing with beliefs about what should be done rather than preferences.

At first glance, the epistemic interpretation leads to the same problem as the non-epistemic interpretation of democratic voting. In voting for A, the minority voter believes that A is the correct outcome. As a democrat, however, she believes that the majority outcome is correct. Thus, she wills not-A. Apparently, her view is incoherent as in the cases of non-epistemic voting.

Wollheim's strategy is to show that the two "ought" statements — the one represented by the minority voter's view of the correct outcome and the democratic output — are compatible. If they are compatible, there is no paradox; and if there is no paradox, the path to a procedural justification of democratic outputs is, at least, open. Wollheim claims that the two statements are compatible because they *mean* different things. Call his view, then, a semantic solution to the problem of the minority voter.

In order to show they have different meanings, Wollheim distinguishes between "direct" and "oblique" principles. A principle is direct (DP) if it refers to the morality of actions or attitudes like "murder," "envy," "benevolence," et. al. A principle is oblique (OP) if it refers to the morality of actions, policies, or motives picked out by means of an "artificial property" bestowed "as the result of an act of will of some individual or in consequence of the corporate action of some institution" (Wollheim 1962, 70). It was noted that the conflict arose when the voter apparently subscribed to two "oughts" — the "ought" supplied by their particular moral perspective and the ought produced by a democratic procedure. In the latter case it is generated by the voter's commitment to the democratic procedure as a method for public decision-making (e.g. for laws, policies, et.

al.). Thus, when the latter generates an outcome that contradicts one's substantive moral commitments, democracy seems to require the transference of political authority away from the moral commitments of individuals or groups. It is not immediately obvious, however, why the democratically produced output should command this authority or how it could be justified to those who lose out.

Wollheim addresses this difficulty in a rather minimal, and ultimately unsatisfactory, way. By claiming that there is nothing fundamentally incompatible about the two "oughts," he can claim there is no reason in principle (even on a cognitive interpretation of voting) why a citizen in a democracy cannot hold both direct and oblique principles. The argument he gives is "skeptical" and semantic. It is skeptical to the extent it does not assume the truth of any particular view. It is semantic to the extent it attributes our understanding of the compatibility of the usages of "ought" to the different ways in which the meaning of "ought" is determined in each case. That is, what the "ought" in DP means is different from what the "ought" in OP means given the *distinctive procedures* by which each one is derived. Since "ought" in its use in DP means something different from its use in OP (given the different ways in which they are produced), they are not in principle incompatible with each other.³¹ The procedural difference is cashed out as a semantic difference — and therefore not indicative of contradictory truth claims.

This may, in fact, be the case. But this much, I believe, is already understood in the recognition of the difference between legitimacy and correctness. There are, indeed, conflicts between one's moral evaluations as a free moral agent equal to other free moral

³¹ I'll take for granted, for these purposes, the correctness of this account of the meaning of "ought." So I largely ignore the question that arises about Wollheim's semantic theory: Is the meaning of a statement a consequence of the "method" of its derivation? I will address the following question but only within the context of democratic procedures. Is the authority of normative statements ("oughts") conferred by the authority of the procedure that produces them?

agents and the political evaluations of the majority. Whether or not the two “oughts” are in principle compatible seems beside the point if one does not have good reasons to defer authority when the outcome is from one’s point of view not justified on substantive moral grounds. The semantic argument *assumes* the normative priority of oblique principles to direct principles. Thus, it begs the question of democratic authority.

The semantic argument does not show *why*, especially in cases where the moral substance of political outcomes really matters, one should believe the outcome is justified because of the manner in which it is produced. To do this, it would have to show why the democratic procedure is justified, and *should* be adopted over one’s commitments to direct principles (whether one does so or not).

Wollheim’s account of the problem of the minority voter is important because he frames democratic outcomes as possessing cognitive content — as beliefs about what should be done independently of the content of the inputs. When the problem is set this way, the question becomes why the democratic output is authoritative with respect to the others. Wollheim suggests this is a fact about the procedure. However, it remains unclear how to understand the authority of the democratic output as opposed to the minority view, unless it is linked somehow to the substance of its outputs — that is, to their epistemic quality. Thus, while Wollheim may have successfully shown that there is no fundamental incompatibility between democratic outputs and those of other procedures with moral authority, why one is obliged to obey the democratically produced output over one’s particular moral claim is not yet clear. In other words, the semantic solution might reveal the necessary feature of an epistemic interpretation that the claims be compatible. However, by itself it does not justify the authority of the one over the other. On the other

hand, since procedural interpretations typically do not rely on the epistemic quality of the outputs of the procedure, an account of democratic authority in these terms must be justified.

10. Conclusion

Wollheim's semantic solution to the problem of the minority voter outlines what must be true of any viable democratic theory — that democratic outputs are justified even when some voters dispute the correctness of their content. It is meritorious also in recognizing democratic outputs as cognitive. It does not show, however, how to justify democratic authority given the cognitive view of voting and the epistemic interpretation of democratic outputs.

Estlund's characterization of the problem of the minority voter is like Wollheim's since it adopts a cognitive view of democratic outputs. In addition, it retains the general idea that the problem of the minority voter arises when there is a conflict between what the minority voter wills or believes *qua* democrat and what she wills or believes *qua* individual voter. To establish that there is no contradiction, Estlund appeals to a difference between beliefs and desires, rather than direct and oblique principles. Beliefs are about what is the case, while desires are about what one would like to be the case. Since beliefs and desires are different, the fact that the majority view is authoritative does not require that the minority alter her judgment about the correct outcome. In fact, it is not possible to predicate the deference of the minority to the majority on belief. "I believe whatever the majority believes' is no belief at all because it makes the mistake of supposing the belief can refer to its content as an object, by description" (Estlund 1989,

149). Estlund claims, there can be no such belief. Thus, the outcome can be legitimate without being correct, and without requiring epistemic deference.

Estlund's view is highly suggestive, however, about the nature of democratic authority. Even if the minority is obliged to defer its will to the majority will the fact of the contingency of the deference of judgment is significant. In particular, it leaves open the possibility that the minority view of the correct outcome is right. Thus, which judgment — that of the majority or that of the minority is true — is not a question that can be settled simply by appealing to the democratic procedure construed narrowly. So democratic procedures are truth seeking, without requiring that the majority view be understood as correct. This view, then, is both procedural and epistemic.

In the following three chapters, I will turn to three distinctive interpretations of democracy. Each interpretation is understood to have well worked out views of democratic legitimacy. Two of these — the minimalist interpretation and that of Kant — have metaphysical underpinnings. The former asserts a positivist doctrine about political objects while the latter is normative. The third one (that of John Rawls) articulates a normative theory of democratic authority without appealing to any particular comprehensive doctrine. Each view, however, conceives the legitimacy democratic outputs (and their procedures) non-epistemically. I will show that this stance affects their various theories of deliberation or adjudication that result in deep problems, and discuss the difficulties they introduce into political justification. In the final chapter, I will show how the epistemic interpretation of democracy avoids these difficulties.

CHAPTER II

WHY MINIMALISM FAILS AS A THEORY OF DEMOCRATIC LEGITIMACY

1. Minimalism as Reasoning about Means

A deliberative ideal of democracy, as Joshua Cohen writes, is “an association whose affairs are governed by the public deliberation of its members” (1999, 67). According to Cohen, this means that deliberative democracy is not simply a “derivative ideal that can be explained in terms of the values of fairness or equality of respect” (1999, 67). Nevertheless, there is skepticism about the ideal of deliberative democracy. This skepticism is often rooted in the notion that deliberative democracy cannot resolve complex moral disputes. That is, disputes among people who disagree fundamentally about moral truth and its origins are not likely to be turned by democratic deliberation. Much less are they likely to submit their own moral views to the authority of others or to a generic political authority. This is because, as some have argued, there is no common moral good. This being so, democratic deliberation may produce more disputes – indeed, more political instability – rather than less.³²

Writing out of this skeptical temper, Richard Posner claims, “The problem of democracy, as of government generally, is to manage conflict among persons who, often arguing from incompatible premises, cannot overcome their differences by discussion” (2003, 112). Political acts are not, then, tied to deliberative acts and aimed at what David Estlund has called, “the impartial application of intelligence to the complex moral

³² For now, I will use the expression “stability” only in its positivistic sense. That is, a regime may be considered stable when it is not in danger of being overthrown, citizens accept political outputs more or less, and their acceptance is an indication of their legitimacy, et. al.

question at hand” (1999, 195). Because there is not really any such thing as “public reason” according to the skeptic, political acts should be thought of (and indeed are) strategic and negotiative. This is because “deliberation is not effective in bridging fundamental disagreements” (Posner 2003, 135). Thus, it is “doubtful that deliberation over fundamental political goals and values is feasible” (Posner 2003, 137).

Posner’s views echo those of Joseph Schumpeter who writes that rational argument is beside the point of political action “because ultimate values – our conceptions of what life and society should be – are beyond the range of mere logic” (1976, 251). At what, then, does political strategizing and negotiation aim? Posner and Schumpeter contend that it aims at achieving stability. Consequently, it would be a kind of mistake of instrumental reason to utilize deliberation (and appeal to the norms of deliberation) as a means to achieve stability. To this end, a democracy should take fundamental questions of value off the table for the sake of political stability. Beyond this, it should have nothing to say about the disputes that arise because of differences of value. While liberal institutions may act as *political* arbiters, they cannot act as moral ones. The dispute between the deliberative and the non-deliberative democrat, then, seems to turn in part on the question of whether democracy could or should resolve complex moral disputes over fundamental values.

One attempt to make the non-deliberative case for democracy is based upon what may be called “economic arguments.” These arguments, I claim, fail as justifications of democracy. They do so, I will conclude, because of two untenable assumptions. One of these assumptions I treat here as internal to the view that the justification for politics is instrumental with respect to stability. The first assumption may be stated as follows.

(A1) The reasons for which a procedure should be adopted are also the reasons that justify the outcome of the procedure.

The other assumption seems to develop in critical response to deliberative conceptions of democracy.

(A2) The purpose of deliberative democracy is to *resolve* moral disputes.

The trouble with (A1) is as follows. Economic arguments that assert stability is the proper political goal contend that (non-deliberative) democracy serves this end better than other possible political methods. Of course, there are good reasons to pursue stability as a political goal. However, economic arguments for democracy confuse the reasons for which a procedure should be adopted with the reasons why the outcomes of the procedure are justified. Consequently, if the reason for adopting democratic procedures is that they produce stability, one supposes that an outcome of the procedure is justified if it produces stability. A simple example, however, shows why this assumption must be mistaken.

The reason for adopting a “knife-procedure” is to cut. However, one is not justified in cutting Jim even if cutting him satisfies the conditions for which the knife was adopted in the first place – its cutting capability. Whatever reasons there are to justify the use of the knife seem different somehow from those justifying its adoption. The reasons justifying the adoption of a knife as a cutting instrument are quite general. Those that might justify turning it on Jim are quite a bit more specific. They are introduced when we consider what is cut, or even how, when and by whom it is cut. In short, the justification of the outcome depends upon moral reasons not necessarily introduced in adopting the procedure. There is no particular moral significance to the adoption of a knife-procedure, unless in picking it up I have the intention to cut Jim or do, in fact, cut him.

However, economic arguments take specifically *moral reasons* off the table as relevant to political legitimacy. The justification for this move has to do with the instability to which the attempt to justify moral reasons under conditions of pluralism supposedly gives quarter. In this light, consider the positivist claim against the deliberative democrat. If specifically moral reasons are rooted in certain sets of values, and there is a plurality of sets, disputes about what is valuable or the priority of values arise. Since there is no way to commensurate these values, there is apparently no way to resolve the disputes arising between “moral” reasons. Deliberation, from this point of view, does not resolve disagreement, so much as make moral disagreement and its irresolvable character more evident. How there could be democratic political life at all becomes, from this perspective, a mystery to be contemplated, rather than a state of affairs to bring to fruition. Consequently, assuming some type of moral pluralism, moral reasons cannot be handled in political reasoning. Strictly speaking, there is no “reasoning” to be done about democratic ends, hence not enough convergence for deliberative democracy to be viable.

2. Economic Arguments as Minimalist Arguments

An economic justification of democracy stands on two premises³³:

- (1) There is no common moral good. (Positivist Thesis)
- (2) The democratic procedure is a method for selecting leaders. (Minimalist Thesis)

³³ One might characterize these arguments as prudential. However, I emphasize the argument as more specifically “economic” in order to capture claims about democracy relative to capitalist economics in particular. I will not discuss capitalist economics in any detail, but I do suggest later in the essay the strong analogy supposed in minimalism between capitalist and democratic practices as well as a supposed causal relation between capitalism, democracy, and stability. In the end, it is unclear whether the minimalist has a right to either claim.

Given the truth of (1), on this view, it would be a mistake to aspire to a deliberative democracy. It would be a fault simply because there is no common good to be known; thus, everyone who claims to know it is mistaken both about their own condition as well as the truth about the common good. The idea of a common good – excepting the non-moral good of stability – would be unrelated to political legitimacy. Democratic outcomes are legitimate, on this view, if they are acceptable to citizens in ways explainable by psychology, sociology, political science, and so on. To this extent, political reasoning is the reasoning of experts, experts whose goal it is to maximize the capacity of democracy to produce stability by maximizing *de facto* acceptability.³⁴

The economic interpretation of democracy may be construed in two ways. First, “economic” is a general expression having to do with the costs of achieving an end relative to the effectiveness in achieving it. “Economic” used this way appeals to measurements like efficiency in weighing the value of a procedure. Second, “economic” may refer to the particular ways in which a political society arranges wealth creation and distribution, currency value, ownership, and the like. The minimalist democratic theories of Schumpeter and Posner have something to say about both. In the first case, minimalism asserts that stability justifies political association and that democracy is the most efficient means to that end. In the second case, minimalism suggests that particular economic arrangements — particularly capitalist ones — are vital to the development of democratic institutions and practices. Political reasoning on this account is about means rather than ends; and political wisdom concerns the knowledge required to identify and

³⁴ To this extent minimalism may be considered to belong to the class of political theories that fall under “social choice theory.” As Elster writes, it is characteristic of these theories to “share the conception that the political process is instrumental rather than an end in itself, and the view that the decision political act is private rather than a public action, viz. the individual and secret vote.” Jon Elster (1999, 3). Thus, it might be fair to class Riker’s *Liberalism Against Populism* (1982) as akin to the views of Schumpeter and Posner.

implement the economic conditions of democracy. Since these matters are the subject of various empirical sciences, and are not generally or widely known, those who manage the political system are experts — at least to the extent they have knowledge of the means to stability. In this respect at least, the authority entailed by the bureaucratic role is thought to be justified.

Consequently, the participation of the general public in politics is restricted to voting, not primarily because they lack knowledge of political ends (since there are none to be known) but of political means. I will complete this portion of the argument by showing that these political arrangements lead to premises for an argument in which we could just as easily conclude that minimalism produces instability. To this extent, minimalism is inefficient, and violates its own criteria of legitimacy. This pattern, as I will show, is especially evident in its account of democratic leadership (e.g. who democratic leaders are, why they are the leaders, their relation to minimal democracy, et. al.).

3. The Positivist Thesis

Schumpeter and Posner have taken as the singular triumph of minimalism to justify democracy without appealing to the “common good,” or other concepts necessary to argue on its behalf. Schumpeter writes, “There is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument” (1975, 254). Democracy, considered in this way, has no epistemic value. It does not produce true beliefs about what should be done.

Beyond stability, minimalism rejects any idea of a common good as a basis for politics. Thus, it takes a step away from the moral justification of democratic procedures. First, there is no object (e.g. a General Will) to be known. Second, if there were such an

object citizens in general could not know it. Finally, if there were such an object, it would not necessarily contribute to stability, hence to political justification. Thus, appealing to it to justify democracy would be undesirable. The first question of politics, on this view, concerns the conditions for stability, and the rational way to approach this question is economically. Minimalism makes somewhat explicit what we may have guessed the two other types of liberal justification—that democracy is not cognitive.

Minimalism stands, as Schumpeter suggests, upon philosophical positivism. Positivism is closely associated with empiricism and the verifiability criterion for meaning. The verifiability criterion — at least in its more modest form — just says that the meaningfulness of a proposition depends upon the possibility of producing evidence that indicates the likelihood of its truth. If it is in principle impossible to verify the truth of moral statements (“ought” statements roughly speaking), then, such statements are not meaningful unless they are simply analytic. In the latter case, however, they make no binding moral prescription.

Schumpeter seems committed to this positivist stance in claiming, “ultimate values—our conceptions of what life and society should be—are beyond the range of mere logic” (1976, 251). That is, when it comes to producing evidence for the truth of moral propositions (and political ones) we are at a loss. There are no objective tests for the truth of moral claims. Supposing no unifying moral standard one should appeal instead to stability. The degree to which various practices and institutions are productive of political stability can be measured with psychological and sociological instruments. Even if it could show that democracy promotes stability, this does not mean that minimalism

adequately *justifies* democracy. This is because it has not appropriately justified stability as the political end.

4. The Minimalist Thesis

According to minimalism, a democratic regime is legitimate if it is (along with other social and institutional arrangements) widely accepted and uncontroversial.³⁵ One need not appeal to the concepts of freedom and publicity (as moral ideals) to establish democratic legitimacy, much less to the equality of citizens. Rather, one appeals to the broad based, voluntary acceptance of the positive laws, the methods for producing them, and the results of social science in determining the conditions (economic or otherwise) for political stability. It is an “economic” conception to the extent it aims at the production of stability at a minimum of coercion.

According to the minimalist, the value of democracy lies in its efficiency at producing political stability. In particular, democracy optimizes stability with respect to the use of coercive power. This capacity is optimal, on this view, under certain economic (particularly capitalistic) and institutional conditions. Indeed, democracy conceived as a generally deliberative politic may stimulate irresolvable political conflict, and so instability under conditions of social pluralism. Democracy (under certain conditions) is best at satisfying the human good defined “by reference to human needs and interests” (2003, 71). These needs and interests are defined materially in large part – terms that are, it should be noted, as neutral as possible. The role of the state is, in part, to arbitrate between conflicts in these interests.

³⁵ Schumpeter does not himself use the “pragmatic” with respect to his own theory in any systematic way. Posner adopts this term for his own purposes, but distinguishes his view sharply from “deliberative” forms of pragmatism (e.g. Dewey). I will also refer to the Schumpeterian model of democracy as “economic.”

Minimalist criticism of non-positivist democratic theories (e.g. those rooted in more rigorous moral and epistemic principles) suggests they cannot explain why a democracy functions well in spite of lower voter turnouts, disinterest in politics, and so on.³⁶ Thus, they generate moral criticisms around issues of inequality, lack of voter participations, and the like without grasping the fact that a democracy performs well despite this. They may even encourage political participation without explaining how disputes will be resolved. Again, the positivist doctrine plays a role here in this assessment. Since moral disputes have no general and authoritative solutions, a political language that deepens them, creates the conditions for deepening social disagreement, hence stability.

Minimalism, then, disputes the concept of the persons for the sake of which many of these moral disputes are raised. Persons, at least considered within the framework of political stability, are more or less what can be described by the positive sciences. Thus, the minimalist proposes to take persons as they *are* rather than as they *might be*. Given their flawed assumptions about persons (among other things) traditional liberal theories of democracy must be incorrect in a fundamental way; and given their efforts to unify a political conception under the head of a single moral conception, they may in fact represent some form of theoretical and practical totalitarianism.³⁷ Since democracies do not produce or assume common moral objects or the possibility of knowing them, we should look to other types of explanation of and justification for them. Schumpeter and Posner find this explanation and justification in the stability produced by democracy considered as a political method and interpreted economically.

³⁶ Naturally, this proposition begs the question of whether or not they do function well. It seems difficult to make any general claim about this matter. Some times and in some ways, they do and some times and in other ways they don't.

³⁷ As an economist, Schumpeter in particular was motivated by the threats of communism and the adaptation of Marxist ideology into democratic political theory.

The minimalist contends not only that stronger moral and cognitive requirements fail to explain a democracy as it does work. It claims in addition that these requirements, to the extent they foster disagreement, may be counter-productive to democratic stability. These claims, considered collectively, assume that instability follows rather naturally from religious, philosophical, and cultural differences when they are not somehow neutralized. Thus, if it can be shown that the “goods” of democracy (e.g. stability) can be and are, in fact, produced without appealing to a unifying moral theory, the notion of a “moral good” seems irrelevant to democratic theory.

An apparent advantage of the minimalist interpretation of democracy is that, if adopted, certain conceptual problems seem to disappear. In particular, we need not worry for the purposes of democracy or liberality about articulating a common *conception* of justice, the self, or how to structure hypothetical situations in order to get the results we want. Nor need we worry about the idea of a “common good.” Efforts to articulate democracy “philosophically” lead us into a myriad of proposals and disputes that divert attention from present practical cultural and social needs and interests. So for political reasons at least we might dispense with philosophical armaments like the metaphysics of the person, and substitute empirical forms of inquiry. Indeed, one might dispense with any normative theory of democracy that claims to have been derived from concepts *a priori*. All we require is a theory of justification that explains democratic authority in terms citizens are willing to accept.

Rather than appealing to concepts whose content is difficult to specify and about which disagreement seems interminable, we might treat political input as a market phenomenon. In this case, politics represents the possibility for the expression, conflict,

and negotiation of interests according to an “economic” model. The efficient political system is the one that produces the most stability with the least force.

To meet the challenges presented by this conception, Schumpeter makes two key proposals: 1) The definition of democracy should be restricted to a political method³⁸; 2) Democracy (at least in certain formulations) is more efficient than other regimes at producing political stability. Democracy as a political method is “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote” (1976, 269). In this way democracy may be distinguished from other political methods. Thus, the theory of voting as the aggregation of preferences or interests is restricted to the selection of candidates, not of policies. Defined this way the relation between democracy (as a political method) and public choice is narrower than broad, controversial “philosophical” theories of democracy suggest. Political outcomes are produced by a professional class of elites elected democratically whether or not they use democratic processes in the development and selection of policies. The constraints upon democracy are institutional.

On Schumpeter’s view, democratic voting performs a stabilizing function by serving as a check upon the power of public officials. Electoral politics, then, is generally democratic in the narrow procedural sense. However, matters are more complex in the formulation of social policy and the adjudication between preferences and interests (1976, 290).

“Democracy,” if by this we mean that the people rule in a literal or direct way, ceases to apply. Policies, as types of political output for example, need not be rigorously justified to citizens once citizens have selected those responsible for political output.

³⁸ A political method is just “the method a nation uses for arriving at decisions” (1976, 243). One might further characterize this view as having to do only with particular types of decisions (e.g. voting). Contrast the minimalist view with one that understands politics as an end in itself.

Citizens register their approval or disapproval in their vote. Minimalism justifies democratic voting if it works to limit power for the ends of political stability. “To simplify matters we have restricted the kind of competition for leadership which is to define democracy, to competition for a free vote (1976, 271). Politics, on this view, is Thrasymachean rather than Socratic.

Consider Thrasymachus’ stance in the *Republic* with respect to the nature of the ruler.

This, best of men is what I mean: in every city the same thing is just, the advantage of the established ruling body. It surely is master; so the man who reasons rightly concludes that everywhere justice is the same thing, the advantage of the stronger (338e).

From the fact that “the best” rules, according to Thrasymachus, we can conclude that “the best” is stronger than others. If the stronger rules, moreover, justice is simply the advantage of the stronger. If we accept Thrasymachus’ account of the nature of ruling as the advantage of the stronger, and democracy is fundamentally the rule by a majority, then, we accept that legitimate outcomes are those produced by the majority *qua* stronger. Thrasymachus’ account, however, has added import. He suggests that the ruler (in the case, considered as the majority) will know how to produce its own advantage. Nevertheless, he is also constrained to admit that the rulers are fallible. Thus, the rulers will often rule in a way not to their own advantage. When they do not rule to their own advantage, they are not rulers even by Thrasymachus’ own definition. By what measures, then, could one determine whether or not the rulers meet the requirements of their own advantage, and thus qualify as rulers?

Clearly, Schumpeter’s defense of democracy does not refute Plato’s argument directly. He does not claim that any citizen can possess the sort of knowledge required to

rule. Rather, he claims that there is no common moral good to be known. Thus, political justification should not proceed by trying to determine which procedures, strategies, or institutions best achieve knowledge of it (1976, 284). A political theory should not, then, address the problems of deep moral, religious, and ideological disagreement. It should not, in short, aspire to being philosophical.

Democracy, then, is nothing more or less than a political method that chooses between rulers who *compete for the vote of the electorate*. As an economic argument, Schumpeter's may be considered in two ways: (1) *an analogical argument*: Given the non-cognitive view of voting the actual institutional workings of democracy may be best understood by analogy to the competitive features of markets. If we discount the possibility of democracy producing "correct outcomes," we must be able to explain why there should be voting at all such that it promotes the ends of democracy (e.g. stability), and (2) *an efficiency argument*: that capitalist economies most efficiently achieve the ends of democracy (frequently emphasized by efforts at moral justification) because they best set the material conditions for liberty (understood here as "non-interference").

It is clear from (2) that the analogy between democracy and capitalism (given the first thesis) is meant ultimately as more than an analogy. It is meant to suggest that democratic voting is not sufficient to achieve what we usually think of as democratic goals (e.g. liberty). Rather, democracies require other institutional instruments to achieve the ends of stability and its subsequent benefits. Thus, the Schumpeterian account of democracy is not merely descriptive of how democracies in fact operate. It suggests that the fundamental political values are non-moral; and that the best way to produce them is through competitive voting and economic practices.

Along with many other things, then, the economic model of democracy suggests a way to engender social stability by inoculating political society from religious, moral and ideologically oriented social disputes. On this basis, we may develop the means (in the form of interest groups and the like) by which preferences or interests may be manifest in institutions, laws, and policies.³⁹ That is, we discover or develop alternate means to express political power. And when these expressions are managed according to the correct institutional understanding of democracy, the total product should be stability.

Preferences and interests, even in voting, are not themselves formed independently of “political shaping.”

Its [the electorate] choice—ideologically glorified into the Call from the People—does not flow from its initiative but is being shaped, and the shaping of it is an essential part of the democratic process. Voters do not decide issues. But neither do they pick their members of parliament from the eligible population with a perfectly open mind (1976, 282).

Voters play, on this view, a largely passive role with respect to politics. Indeed, the vote itself may be understood as a function of the initiative of the candidate and not the voter. “The psycho-technics of party management and party advertising, slogans, and marching tunes, are not the accessories. They are the *essence* [my italics] of politics. So is the political boss” (1976, 283).

Minimalism does not assume the interests and preferences of citizens are given or that they are uniform. Assuming the “machinery” of politics described above, it would seem that Schumpeter’s account of democracy can be identified with Thrasymachus’ account of the rulers. The rulers are those who are stronger. They are the ones whose strength is evident in victory. But the interests and preferences of citizens diverge and it

³⁹ One of the problems of this view is that such means usually presuppose great differences in substantive equality between citizens.

is not obvious why — except perhaps for prudential reasons — the ruled (the minority in the case of democracy) ought to defer to the rulers. Given these various interests and preferences, the need for an adjudicative structure arises. Public political life, then, is largely enacted as the negotiation between private interests. This seems to be a natural consequence of the positivist commitments of the economic view.⁴⁰ In the following section, I will show how Posner justifies democratic arrangements in which some are put in political authority over others through democratic voting. I contend his view is internally inconsistent.

5. Political Authority as Expertise: The Problem of Democratic Leadership⁴¹

Suppose that voting on the non-cognitive model, as I have suggested, loosened the checks on political power to such an extent that a democracy is governed by an elite of experts and their associates who not only wield power, but have the tools at their disposal to conceal the means by which they do so, who benefits most by it, and so on. Such persons may have some scientific or adjudicative “expertise.”⁴² Moreover, this institutional function is carried out under the rubric of the negotiation and satisfaction of private interests towards the end of creating political stability. However, even if such a political society functions with optimal efficiency with respect to stability, it does not seem as though its outcomes are necessarily justified. We can see this even if we look at relatively modest political outputs like the electoral selection of leaders.

⁴⁰ Posner gives a detailed account of the structure of “pragmatic adjudication” (2003, 57-96). I will not engage this account here since it takes us beyond the scope of his theory of “democracy” *per se*.

⁴¹ Posner’s theory depends upon a theory of adjudication into which I shall not delve here since the focus concerns the role of democracy as “rule by the people” relative to problems of ignorance. However, his theory of adjudication suffers from many of the same deficiencies as the theory of democratic. I believe all of these difficulties can be traced by to the positivist philosophical doctrine.

⁴² I assume that Posner advocates something like this in his defense of “elite democracy.”

The non-cognitive interpretation of democratic voting suggests that it is not oriented towards selecting the best candidate on objective grounds. Rather, it is the expression of preferences. Preferences and interests are rather particular to the voter. Voting aggregates these interests in electing a leader. The election of the leader as such — whatever institutional form leadership takes – does not necessarily imply the election of one who is expert at anything except getting elected. And it may not even imply that. According to the minimalist, however, this is not problematic for its theory.

The Schumpeterian model of democracy, however, narrows the role that voting plays to the competition and selection of candidates (not, as he says, policies). It is natural to think, then, that voting as a non-cognitive activity would not be sufficient for the determination of available options for law and policy and their selection. But why, given what Schumpeter refers to as the “essence” of politics, would it even be a sound means for selecting winning candidates? Posner addresses this question in a “theory of natural leadership.”

The theory of natural leadership depends upon the premise that “the outstanding fact about human beings is their inequality” (2003, 183). To this end, Posner employs the Nietzschean metaphor of “wolves and sheep” in characterizing this inequality. “In other words, society is composed of wolves and sheep. The wolves are the natural leaders. They rise to the top in every society” (2003, 183). It is far from clear this metaphor illuminates the premise about inequality in identifying “wolf” with “democratically elected leader.”⁴³ If wolves lead at all they lead other wolves, not sheep. They eat sheep.

⁴³ I am not making a point about Nietzsche scholarship. I do not care in this case whether Posner got Nietzsche right or not. If Posner is wrong, then anyone characterizing political leadership in this way—including Nietzsche—is wrong. However, I don’t believe that Posner has read Nietzsche correctly here, and this, I think, is so much the better for Nietzsche.

If leaders are indeed wolves, their job is not to attend to what is good for everyone, but as Thrasymachus suggests, to pursue justice *as their own advantage*. Thus, the metaphor seems misplaced as part of an account of democratic leadership. Furthermore, Posner's account supposes that "the best" should have any interest in politics at all. It is not always clear that they do, or that they aspire to "rise to the top" of a political system or by political means.

The heart of the matter according to Posner is this: "The challenge to politics is to provide routes to the top that deflect the wolves from resorting to violence, usurpation, conquest and oppression to obtain their place in the sun" (2003, 183).⁴⁴ Following the metaphor a little further, we can say that the challenge of a political system is to turn the wolves into something more like dogs. It may be that democracy, and Christianity for that matter, has been very successful at taming these beasts. However, this claim itself is part of the Nietzschean criticism of democracy and Christianity; and in this respect points once more to the misapplication of the metaphor. Nonetheless, it does seem to be the case that part of democratic justification and practice should include an account of the means by which power is transferred between persons and generations with a minimum of violence and chaos. Indeed, it may be that democratic societies are better at producing stability with a minimum of coercion. But this fact alone does not justify democracy as such, much less the legitimacy of democratic outcomes.

Setting aside the correctness of the application of the wolf-sheep metaphor to democratic politics, there are other features of Posner's account of leadership that raise

⁴⁴ We should wonder whether or not this isn't the goal of any function of civilization and that there is nothing special about its being carried out through politics. Following Freud, then, all functions of civilization may involve violence, usurpation, and so on, in more sublime forms. Posner utilization of these ideas in this context is bizarre to say the least.

suspicion. He claims, for example, that politics may be the most important “route to the top” since “the natural leaders who have political talents and aspirations are the ones that pose the greatest potential danger to civilized society” (2003, 184). This idea is reminiscent of the motivations seemingly underlying Plato’s *Republic*. Why did the guardians need to be educated? Simply put, because they were the intellectually and physically strongest; and thus the ones who stood in the closest proximity to the possibility of political power. When their power is cultivated rightly, according to Plato, it is used for the good of everyone not only for themselves and those like them.⁴⁵

Posner has already claimed that democracy is the means by which candidates compete for the votes of the electorate. Coupled with the theory of natural leadership, we are led to suppose that those from whom voters must choose are in some way “natural leaders.” And those who are actually selected are “the best.” However, there is no apparent internal relation between voting as the expression of preference and interest and the selection of these best. So there is no reason to think that those selected are the best. And given limitations on democracy and value, there is no reason to suppose the educative measures by which “the best” are reliably selected and trained. The non-cognitive account of voting as the aggregation of preferences and interests makes the selection of candidates appear to be so arbitrary that there would rarely if ever be a good reason think that the best has been selected – unless all we mean by “best” is “best at getting elected.” One might claim that the pool of competitors is largely representative of these best; but this seems to get a no further in the argument. And there are, in fact, too many counter-examples to enumerate here.

⁴⁵ In fact, Plato’s argument may be read as an attempt to lead Athens’ best away from the typical trappings of political power. The sense in which they *rule* the city cannot be taken too literally in any case.

6. Complacency and the Restriction of Power: A Conundrum

Why, if Posner is right, should citizens vote at all where voters are characterized as centers of self-interest and are not quite sure which candidate serves their interests? Indeed, given the “political machinery,” it does not even seem citizens can be quite sure that “their interests” are their own. What is the relation of citizens to “their” political practices and institutions? Posner suggests that democracies, in particular capital driven democracies, function well, perhaps best, in cases where we expect low voter turnouts, little interest in politics and little knowledge of it. In part, this is because its citizens are engaged in more fruitful economic pursuits which also contribute to social and political stability. Democracy is not, and should not be, demanding in these ways. However, he also claims that voting in electoral politics is the primary check on the political and social power of the elites. As voter turnouts and political interest diminishes, should we not expect the check on the power of democratic leaders to be diminished as well? I am not here considering the decision to vote as a reasoned choice about the economic expenditure of time and money versus what one really gains on voting day besides the possible (and very formal) satisfaction of performing a civic function. I mean that Posner’s account of voters as centers of self-interest and voting as the expression of that self-interest is suggestive of two trends in the justificatory structure of this theory that pull against each other.

The essence of Posner’s argument justifying democracy may be summed up in this way.

1. The liberal principle of democratic voting is the basic check on political power. So it contributes causally to stability and continuity.

2. Voting is insignificant in the following ways: a) as an individual act with causal efficacy, and b) cognitively insignificant since the epistemic value of beliefs about one's interest is indeterminate.
3. Because of the limited role of politics in a population, most people will and should spend their time engaged in more productive pursuits while a certain "elite" class concerns itself with policy, strategy, and law.

However, the same features Posner argues justify democracy as a minimal political method, suggest otherwise. In particular, Posner apparently regards it as insignificant if interest in politics is not widespread — if, for example, people have no reason to vote. They may have no reason to vote because of its causal and cognitive insignificance. If voting constitutes one of the fundamental checks on political power, decreased political interest and input only increases the political power of the ruling elite. In short, its fundamental role as a check on power is undermined.

Indeed, it would seem that a correct understanding of the market model would demand a great deal of input. Markets do not function efficiently without it. However, minimalism narrows the range of available political inputs, and strips the motivation to participate in these. Thus, the minimalist theory of democracy seems to have undermined the conditions under which it could function even on its own market model.

Posner's reasons for suggesting that minimizing political engagement is actually more productive of stable democratic regimes rests on his claim that more political participation, even where regulated by deliberative constraints, creates more conflict rather than less. Here Posner assumes that instability follows from disagreement seems to be a stretch both on logical and empirical grounds. It is not hard to see why the issue arises in the context of interest politics. Where persons as political entities are defined as centers of self-interest, there is a greater propensity towards a conflict of interests. In

keeping with the economic analogy, we might say that deliberation, at least at a certain level of democratic participation, creates alternate currencies with varying standards of value. But if the non-cognitive view of democracy is implausible, as I believe it is, we need not worry too much about value pluralism given other moral and epistemic constraints.

These features of Posner's account present us with a puzzle: If a decline in political participation is desirable, then there will subsequently be fewer checks on political power. However, if there is an increase in political participation, the minimalist assumes, there will be greater conflicts of interest and more heated political competition that may over the long run promote various kinds of political or social instability. Thus, where democratic participation is restricted largely to voting on candidates and not on policies, there is an implied threat to stability whether participation rises or falls. So to encourage lower participation is to encourage less expression of interests and a detachment of citizens from the ruling class. To encourage more participation is to encourage conflicts of interest (given pluralism). Encouraging the first options seems to invite authoritarianism. Encouraging the second one, invites instability. Posner seems not to welcome either result. But having defined voting on candidates as the central activity of citizens as centers of self-interest according to the economic analogy, it is difficult to see what else we should expect. Either democracy gives way to some authoritarian tendency, or it promotes instability to the extent that mushrooming conflicts of interest cannot be managed effectively by the political structure.⁴⁶

⁴⁶ In fairness, Posner addresses these types of problems in his theory of adjudication which argues on behalf of some form of legal realism. These matters stand beyond the scope of the present essay.

The justification of democracy, according to Posner and Schumpeter, is discovered in its efficiency with respect to stability. However, justifying democracy as an instrument for achieving an end and showing why its outcomes are legitimate are two different questions. Even if democracy tends to produce stability, this still does not tell us why its outputs (including the selection of candidates) are legitimate. To do this, it seems that we must appeal to a procedure independent moral standard. However, the positivist thrust of minimalism ruled out any such appeal, ruling out other modes of political association and input as legitimate.

7. Deliberative Democracy, Moral Disagreement and Political Input

One of the apparent motivations for the minimalist theory of democracy is the notion that democratic deliberation cannot authoritatively resolve moral disputes – disputes that arise because of irresolvable differences in moral value. Given the positivist thesis that it cannot is explained by the fact deliberative democracy cannot erect a procedure independent moral standard to do this work. Any such standard, then, is either flaccid and inefficacious or deceptive. It would privilege some moral account over others arbitrarily, threatening stability in so doing. To the extent no such standard exists, appealing to it as a way to make democratic outcomes legitimate would be beside the point.

However, as I have tried to point out, the alternative proposed for justifying democratic outcomes, does not fair any better. The reasons for adopting democratic procedures (e.g. stability) do not justify democratic outcomes. They do not say why they are authoritative; hence why one should obey them even if one might do so as a matter of fact. To this extent, the disobedient citizen could not and should not be held accountable

for her disobedience. I doubt the positivist would, in the interest of political stability, accept this consequence. But by what right could she conclude otherwise?

The market requires a great deal of input to function properly and stably. The trouble with the Positivist Thesis in association with the Minimalist Thesis is that they seem to produce circumstances in which political input is reduced. If deliberative democracy could increase the available quantity of political input, this would seem to be a reason to endorse deliberative democracy as opposed to minimalist democracy.⁴⁷ This does not only mean that more persons may participate in it. It also means that there are more ways in which one may participate.

But a deliberative conception of democracy requires an appeal to a procedure independent moral standard. Consequently, it cannot stand upon the assumptions of minimalism or positivism. That is, we must reject both the Positivist Thesis and the Minimalist Thesis. In addition, the rejection of positivism means having to distinguish between the reasons for adopting a procedure and the reasons that make the outcomes of a procedure legitimate. Consequently, we must reject (A1). We may adopt a democratic procedure in order to produce stability. But this claim alone actually says nothing about what makes the outcomes of the procedure legitimate. What, then, are we to say about moral disputation in deliberative democracy?

I claimed that the case of the minimal democracy against deliberative democracy is built partially upon the assumption that deliberative democracy requires a capacity to resolve moral disputation (A2). Thus, one might argue, it requires a value scheme within

⁴⁷ I am not wholly endorsing a market model here. I am only suggesting that the minimalist has a good reason to adopt deliberative democracy if minimalism as such fails to produce appropriate quantities of political input.

which all moral values, and so all moral goods, can be seen as commensurate with one another. But this claim is not obviously true. Consider Rawls' characterization of pluralism in democracy.

The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some of these are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions (Rawls 2005, 4).

Notably, Rawls does not contend that there is a general moral scheme according to which disputes between moral values may be finally reconciled. Rather, he contends that it is within the purview of any reasonable moral doctrine to grasp that there is a diversity of *reasonable* doctrines – doctrines that have good reasons at their disposal to justify their views. This recognition provides the basis for the construction of distinctively *political* values without having said much if anything about the possibility of a general resolution of moral value. I do not aim at a complete defense of Rawls' view here. I aim only to show that there are cases in which political legitimacy is a defensible *moral* ideal without supposing the possibility of a final commensuration of value. Moreover, in such cases, the motivation may be akin to that of the positivist – skepticism about this possibility at least when applied in political theory.

Consequently, supposing a common moral good does not put the burden on a theory of deliberative democracy to show how it will authoritatively and finally *resolve* moral disputes under conditions of pluralism. A deliberative view must simply propose terms in which the outcomes of the political process are authoritative because they are legitimate. But their legitimacy depends neither upon their being in each case correct; nor upon general acceptance (in the positivist sense).

Though a deliberative framework for democracy invites a new set of problems, it frames the problem of democratic justification correctly at least. The alternative is not really between a minimalist and a moral theory of democracy. Rather, the alternative is between a moral theory of democratic legitimacy and the possibility that there is no general justification for democratic outcomes at all.⁴⁸

8. Conclusion

According to minimalism, the justification of democracy concerns its capacity to limit power and moderate political rivalry for the end of stability. Thus, it does not conceive of these restrictions as necessarily moral. If the foregoing argument is correct, however, minimalism is self-defeating. The very lack of interest or competence for politics it believes to be a sign of political health, is the instrument by which the check on power democracy is meant to be is undermined. Thus, its account of political input is fraught with difficulties imposed by its own standard of success.

The larger point here is that if the end of politics is understood to be stability, there is no principled reason to adopt *democratic* procedures over any others. Schumpeter and Posner, of course, both reject this contention. They claim, instead, that the principles are economic rather than moral. So democracy is justified on the basis of its efficiency with respect to stability. However, the argument above shows that one may, given the terms of minimalism, just as reasonably expect inefficiency.

The real problem, I think, lies in defining the end of politics in terms of stability. Even if stability is worthy political goal – and it is – it says nothing about what justifies democratic outcomes. This conclusion, while limited in scope, has one important

⁴⁸ For an account of the anarchical view see Robert Paul Wolff (1998).

entailment. However we reconstruct the economic justification of democracy it cannot be done without appealing to some moral or epistemic standard that cannot be reduced to stability.⁴⁹ For this, however, we need *a philosophy*; and that philosophy cannot be positivist.⁵⁰

One way or the other, a minimalist justification of democracy could not be rightly motivated by the claim that deliberative democracy implausibly resolves or supposes a resolution to moral disputation, for this is does not do. Other conceptions (like deliberative ones) promise only a moral answer to what makes political outcomes legitimate under the assumption that such disputes exist and that they are or that they seem intractable. This is not a liability of at least some deliberative views, but one of their strengths. In the Chapters to follow, I will articulate several efforts to integrate deliberation as part of the conception of democratic legitimacy along with the difficulties that arise from it.

⁴⁹ It is useful to consider Rawls' *Theory of Justice* (1999) in this regard—in particular, his utilization of game theory to secure moral premises as a framework for political questions of distribution, deliberation, et. al.

⁵⁰ One might, in this vein, consider the force of Sandel's criticism of "the procedural republic" in *Democracy's Discontent* and the minimization of philosophy relative to politics. While I do not agree with all of his conclusions about how such a philosophy might look, I certainly do agree with the difficulty of articulating it. Michael Sandel (1996).

CHAPTER III

THE TRANSCENDENTAL ORIGINS OF POLITICAL LEGITIMACY

1. Political Justification and Transcendental Philosophy

Unlike minimalism, Kant's theory of political legitimacy is viewed through the prism of distinctively *moral* concepts. In addition, this theory is couched within a philosophical view called "transcendental idealism" – the point of which is, in part, to define the subject of moral action. Articulating Kant's political theory, then, is no simple or straightforward task. This is because doing it well seems to require an account of the broader outlines of his moral and theoretical philosophy. Nevertheless, in this chapter, I will sketch these outlines of the moral and theoretical philosophy to see how the political theory is developed from them.

In particular, I articulate a fairly standard interpretation of Kant's political philosophy. I draw the consequence that the transcendental conception of the legitimacy commits one to a form of absolutism that generates substantively immoral results in moral and political deliberation. In particular, the transcendental justification of the prohibition on rebellion and "counter-resistance" seems to stand in the way of the development of fully legitimate political institutions, including the development of their deliberative capacities. I should make clear, however, that my intentions here are largely pragmatic. I do not claim that the reading of Kant given is the best or the correct reading of Kant's moral and political philosophy. However, it does seem in important ways the kind of reading endorsed by recent philosophers like Robert Paul Wolff (1998) as well as

the kind of reading supposed by Thomist critics (Macintyre 1984), civic republicans (Sandel 1982), and pragmatists (Misak 2000).

These critics find similar problems cropping up in the work of John Rawls (both in *A Theory of Justice* and *Political Liberalism*). Since Rawls himself viewed the later work as correcting for inadequately addressing democratic legitimacy in the earlier work, I will emphasize the latter. The argument developed against Kant's transcendental justification of political legitimacy is that its attention to the "internal" and moral conditions of legitimacy requires insufficient attention to the features of political procedures that make its outcomes reliably good. In particular, these criticisms suggest that the views of Rawls and Kant both diminish the conditions necessary for the participation of citizens in democratic deliberation. Consequently, they fail to adequately motivate participation and the deliberative features of democracy that secure the conditions under which it could produce reliably good (and legitimate) outcomes. Thus, I view this chapter as showing how these criticisms are generated in the effort to see later how they may be dispelled.

2. The Hypothetical Nature of Reasonable Acceptance

A political authority issues commands. If these commands are properly justified, one would arguably have a duty to obey them. If this justification is linked somehow to the nature of reason itself, then the failure to perform this duty violates one's dignity as a rational being. The right of this authority stems from the quality of its justifying reasons. Otherwise, the command could not be recognizably legitimate and its authority binding on every rational being.

This view is reflected in Kant’s claim, “the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract” (1991, 79). So liberal justifications of political authority typically assumes the qualifying reasons cannot appeal to democracy without begging the question. In particular, democracy does not produce reasons that everyone could accept. Democracy is justified, rather, only to the extent that it is embodied in a contract whose terms are accepted *unanimously*.⁵¹ This claim outlines a criterion for the acceptance or rejection of majority rule. Insofar as this acceptance must be unanimous, the criterion is a demanding one.

As suggested in previous chapters, “acceptance” is ambiguous. In Chapter 2, I noted that positivists treat “acceptance” as descriptive of a psychological condition that can — given the right techniques — be produced in citizens. In Chapter 1, I suggested that Hume also seems to accept a view of “acceptance” as a psychologically descriptive term. Two distinct problems arise for this view. First, since the psychological description imposes no necessity, whether or not a principle would be accepted unanimously would turn out to depend on contingencies that make unanimous acceptance seem impossible. Second, and perhaps more importantly, even if there were unanimous acceptance on these grounds, the fact of acceptance alone does not validate the principles. According to Kant, however, the principle of *being content* with majority decisions must be accepted. Now, the question concerns showing what is required in order that being content with majority decisions as a principle is different from what is required to produce acceptance of outcomes and that they be accepted for the right reasons. Otherwise, it is far from clear

⁵¹ There are variants (e.g. unanimously accepted, or *would be* unanimously acceptable or accepted) trying to get at the content of Kant’s claim. The first instance is clearly descriptive, thus incorrect. In any case, it is blocked by the general criticism of consent as *de facto*—which could be no normative basis for political authority.

that the account of political authority would have been properly justified. The question, then, is how unanimous acceptance may operate as a normative criterion.

There are, of course, a number of questions that arise: Are there terms in which it is possible to accept contentment with majority decisions *as a principle*? What does it mean to embody this acceptance in a contract? I assume that acceptance, in particular any sort of acceptance that could be unanimous, would have to be acceptance with sufficiently good reasons. So I assume acceptance is rational or reasonable in some way. Indeed, it would be the case that the principle could not be reasonably rejected. If the principle of contentment with majority decisions is justified, then it could not be reasonably rejected either.

It seems there are all kinds of good reasons to reject democratic outcomes, not the least of which may be their low epistemic value in the eyes of their various beholders. Thus, whatever is meant by a “good reason” on Kant’s view cannot be a principle validated merely by subjective determinations. The output is a legitimate command if one could not reasonably reject it; and one could not reasonably reject it, if one is *contractually* bound.⁵² Since the content of democratic outcomes (as that of any political outcome I suppose) is often disputed, the content of these outcomes cannot be the locus of “good reason.” This understanding of the principle of contentment, then, has features that refer to the form of the outcome. In particular, this form has a moral nature. Breaking the contract is akin to breaking a promise. So the social contract in which one is content with democratic outcomes has distinctively moral features, not simply prudential ones.

The virtue of the transcendental approach compared to the prudential one is discovered in its determination of the *necessary* conditions for the acceptance of

⁵² A little more about the special nature of this contract will be introduced later.

democratic outcomes. In neither case, however, is legitimacy thought to depend upon the epistemic value of the outcomes; and I assume this is because neither case gives much weight to that possibility.⁵³ In explicating this approach, then, some study must be made of this necessity and its moral nature.

Notice that, if successful, this account of democratic legitimacy (and implicitly democratic authority) may be carried out without any reference to the quality of its outcomes. Democracy is a limited but necessary feature within the framework of the civil constitution; and its underpinnings are moral and metaphysical. These premises present challenges to political justification.

3. Reason and the Moral Dimension of Persons

In order to define the political dimension of persons as Kant understands it, it will be useful (and, I think, interpretively correct) to define first the moral dimension of persons. Not surprisingly, morals and politics intersect in the transcendental interpretation of reason. I will look first at the *Grounding for the Metaphysics of Morals*, and then at the *Critique of Practical Reason* in order to spell out these features.

Kant's aim in the *Grounding* is to establish the correct method for determining not what one's duties are, but whether or not one is obligated (i.e. commanded) in particular cases to satisfy a duty. He names this method the Categorical Imperative. The Categorical Imperative results in no ordinary piece of legislation. Its products are: (1) universally binding, (2) issued in the form of commands, (3) representative of one's duties (i.e. are necessary).

Frequently, we act in a way that suggests obedience to law without considering the source of its authority, or we assume that the source of the authority of the law lies in

⁵³ Again, doing so seems to lead beyond a procedural framework, a move I too will try to avoid.

some feature external of our own thoughts and will (e.g. biblical authority as the “word of God”). Just as frequently, perhaps, we make little distinction between our thought and external authority. We think that it is simply enough to follow the laws. To respond to law in this way is to act merely in “accord with duty” on Kant’s view. To act merely in *accord* with duty is to follow a law in a law-like way without any internal reason or motivation for doing so. The right response to law — the response that preserves autonomy — requires something more than this. The proper response to law requires distinguishing between what is internal and what is external to thought – what can and cannot be captured in reason’s reflection upon itself.⁵⁴ In understanding what more it requires, we can understand the special nature of the Categorical Imperative, and the special nature of its moral authority with respect to us.

Kant is determined to show that morality requires something more than our natural and contingent obedience to our inclinations. These inclinations include not only various biological necessities. They also include inclinations and sentiments formed through our particular and various kinds of moral training. Given this training, we do not exercise full agency. We behave; and these behaviors are cultivated by a variety of coercive techniques and influences. In other words, the explanation of our behaving one way over the other is given by the *external* influences on us: e.g. the possibility of reward or punishment, our various biologically and culturally based affectations, emotions, sentiments, and the like. The correct understanding of moral action must, on Kant’s view, be understood in terms of a theory of motivation according to which the nature of one’s will, intentions, and actions is determined by reference to the moral law which is

⁵⁴ This problem itself opens many interesting and puzzling methodological questions that I will not address here.

“internal” to all rational being. In this respect, subjects are not the subjects of desire but of reason properly understood. This means that the moral view he wishes to articulate is rooted in a distinctive conception of the human will (or more generally, the will of rational beings).

Our will is not only the power to determine a course of action and enact it, but the power to intend even in cases where one’s intentions are frustrated or the objects of one’s actions are unmet. If we consider the will as part of a causal process, then we are only considering it *externally*. In other words, we are considering it relative to the various things that influence us to act in one way as opposed to another. (Behavioral science, for example, is concerned with the will as an object of influence.) Considered this way, the will is either a non-rational phenomenon or its relation to rationality is only instrumental. If this is the case, then the *value* of an action is determined by that action relative to its object (e.g. happiness, pleasure, knowledge, etc.). Success is the realization of the object considered in this case as “external.” *Value*, under these circumstances, is determined externally, not as an internal principle of will. The will, then, is not motivated to realize the object according to its own autonomy or freedom. It is persuaded or coerced by some principle external to itself. Thus, its imperatives are hypothetical. The freedom of the will, then, requires that the motive for an action (its principle) be somehow *internal* to the will itself. One’s responsibility for one’s intentions and actions depends upon the state of one’s will. A will that acts under the sole influence of external circumstances cannot be an autonomous will. To this extent, it is morally blameworthy as a will. The problem that the *Grounding* must solve is determining what the internal principle of the will is such that it is autonomous, free, and rational. We may rephrase the question this way: What

kind of principle would the will choose independently of any external influence – for reasons that are properly internal? The answer is that the will must make a principle of itself. To this extent, it must be consistent with itself.

The principle that the will would choose as the principle of its action, then, is a principle that admits of no contradictions. Otherwise, the will could not act as will. Self-consistency is a necessary, if minimal, requirement for law. One's relation (as a will) to the law ought to be conceived as a rational relation. Something could be law-like if one would be inclined to choose it in a regular patterned way for reasons independent of the law as such. But if a law is to be "internal," and not merely coercive externally, it must *in a sense* be one that would be chosen. A law is internal because one would choose it for no other reason than its being good. To will such a law is to express a good will. Thus, the rational will legislates the laws it follows. Such a will would be self-legislating and, in this respect, autonomous.

When one's actions merely accord with duty, then, there could be no rational relation to law or duty because it could not be chosen for its own sake. One merely behaves in a way we are inclined to by one's natures, or given earlier moral training. To act *out of duty* is to act out of respect for the law, and in the light of a rational relation to it. This means further that reason is not merely a tool or instrument for the will to fulfill its external desires. Rather, reason is constitutive of the will itself. There are no wills that are not rational wills.

Consider Kant's own example of the shopkeeper (1785, 10). Clearly the shopkeeper *could* take advantage of the young customer, and probably no one would find out. However, in the ordinary situation she probably would not. It would not correspond

to the conventions of shop-keeping to do so for a variety of reasons. In fact, it may be imprudent, eventually cutting into the shopkeeper's profits as time passes and customers become aware of her lack of trustworthiness. The key question though is how, for the purposes of moral valuation, to draw the line between the probability that the shopkeeper will merely act in *accord* with duty, and the possibility that the shopkeeper could act *out of duty*. Is it the customer who knows whether the shopkeeper acts in accord with or out of duty? Clearly, this cannot be the case. The concept "acting out of duty" does not admit to being described from an external point of view. But if this is true in what sense are duties objectively understood? It does not admit to being described as an object. We ask, then, "What is the source of moral valuation?" Who determines whether or not the shopkeeper's action merit moral praise, indifference, or chastening? This question is the same as "Who or what could know the intentions underlying the shopkeeper's actions?" Clearly, it isn't the shopkeeper *qua* shopkeeper — as a psychological subject of the community or a particular personality. Rather, it is the shopkeeper *as a rational being*, capable of surveying its own intentions. Considered in this manner, acting out of duty seems morally equivalent to acting in accord with duty insofar as it fulfills certain conventional moral requirements of the community. The determination of moral value properly speaking is a judgment issuing from a rational being *qua* rational being. And this is just to point to the internality of the moral self, and of moral valuation generally.

A variety of naturalisms suggest that the moral attributes and obligations of persons are determined in some respect by various kinds of facts. Depending upon the form of naturalism in question, however, just what is meant by "fact," and how "facts" are or come to be is a matter of debate. A sophisticated pragmatism will try to show how

“facts” are determined intersubjectively, in various historical, community practices with other persons. For it, there are no practice-independent moral facts, much less non-relational features of persons. A fact is not only a function of how things stand. It is also a function of what type of community we belong to or find our identities in.⁵⁵ Not surprisingly, then, what is “true” is either irrelevant, unknowable, or itself a construction of the self-image of the community – not something independent of that image or those images.

Moral obligations arise within communities as a function of the shared and learned understandings of one’s role as parent, child, husband, wife, lover, or other designated social role. Moral obligation finds its source in phenomenally relevant matters, and in our natural animal affections or disaffections for others. In playing and maintaining these roles we understand something like necessity – the “moral obligations” that derive simply from matters of fact. Moral obligation, if we may call it that, is understood as being part of a certain community – as a person of influence, and as one who can be influenced in relation to other persons. It is to understand one’s self as existing necessarily within complex sets of social relations – relations upon which one’s individuality itself may be considered derivative. It is not to understand one’s self as an autonomous rational being, but instead as a dependent rational being.⁵⁶

4. Moral Reasoning and Transcendental Reason

At this point, we may further specify Kant’s interpretation of reason – the interpretation on which the notion of a “rational being” seems to hang. The interpretation

⁵⁵ The one notable exception among “pragmatisms” might be found in Peirce though the notion of the way things are plays a regulative role in Peirce’s conception of inquiry.

⁵⁶ Cf. MacIntyre, *Dependent Rational Animals* (2001). Democracy as an *ethos* seems to refer itself to this theory of selfhood.

of reason is most conspicuously presented in the *Critique of Pure Reason*. The stated goal of the *Critique* is to demonstrate the possibility of meaningful judgments and transcendental normative value that are both synthetic and *a priori*. In other words, it aims to demonstrate the possibility of a form of knowing not given in experience, but one that is nevertheless a necessary condition for the possibility of experience in general – including the possibility of “moral experience.”

Kant’s intent is clear enough here. The specification of reason, if we are not to say that it derives from solely empirical sources, or if we are not to say that reason is instrumental (along with what both assertions seem to entail regarding freedom), suggests that we give an account of reason consistent with, if not wholly part of, the nature of freedom itself. The explanation behind this claim is complex. I will briefly review it, before turning back to the account of reason specifically.

One of the stories told concerning freedom takes the efficacy of scientific inquiry and mechanism for granted. What is a unit within the system of nature cannot count as self-determining since its characteristic action may always be caused by something else, not itself. To be free means to be self-determining or autonomous in the way suggested above. So to suggest that “reason” is itself caused as any other thing in nature might be to suggest that reason is lacking in autonomy, and so in freedom. The *Critique* must reveal first, then, the autonomous nature of reason – autonomous in the sense of its transcendental independence from nature and so independent of our efforts to transform reason into a “natural object.” Its existence as a condition for the possibility of experience – scientific, moral, or otherwise – is meant to do just this.⁵⁷

⁵⁷ Does this imply that the determinants of reason are “non-natural?” -- That reason itself is uncaused by any antecedent, and thus could never be itself be formulated as an object in the form of material

In order to demonstrate the nature of reason, Kant believes it necessary to show what the objects of reason in its non-empirical employment are. These objects are both empirical and ideal, concerning the transcendental employment of reason. The ideal objects of reason (God, freedom, and immortality) are the ideas of reason in its full understanding of itself. That is, they are not known by its empirical employment, but only as conditions of the possibility of any empirical employment when reason understands itself as an object. “The transcendental concept of reason is, therefore, none other than the concept of the *totality of conditions* for any given conditioned” (1787, B 379). Each transcendental idea represents the totality of synthesis of conditions for the possibility of experience, though no idea designates a “thing” *qua* substance.

The question from the point of view of the theory of reason is whether or not reason in its nature represents a prior synthesis of the totality of conditions – as a condition for the possibility of experience as we do, in fact, have it. Furthermore, if consciousness is an intrinsic part of personhood, what is its nature of consciousness? And if it is an element of any possible experience (and knowledge), then, what is its structure – and so the structure of experience in general? Is knowledge that is both synthetic and *a priori* possible? I do not intend a complete response to these questions or an interpretation of Kant’s complete thought on these matters. I intend only to show how they are responsive to his consideration of the transcendental principle of publicity, and how this creates some ambiguity in transcendental philosophy about political obedience.

implication. This question pertains a) to the question of freedom, and b) to the question whether or not a roughly Kantian interpretation of reason is compatible with a generally naturalistic, Darwinian world-view.

5. The Possibility of Objectivity

In the section above, I tried to explain briefly aspects of the theoretical underpinnings of Kant's moral and political theory. It includes these features: 1) a subjectivist interpretation of reason as the seat of the transcendental subject; 2) an account of objectivity that precludes knowledge of "the world" as it is in itself, but claims to be regulative of inquiry nonetheless; 3) the claim that the Idea of freedom is a necessary postulate of reason given its asymmetry with respect to phenomena. Thus, the interpretation of reason, and the objective necessity of the Idea of freedom is so far only subjective. The Ideas are not representative of any existent; and they possess no direct relation to phenomena or their understanding. It is unclear, then, even in what capacity they serve as conditions for the possibility of experience, much less correctness in the application of the categories to phenomena. From this account, there arises an apparent inconsistency between the claims regarding the objectivity of the Ideas of pure reason (i.e. the possibility that they are not simply subjectively necessary, but objectively true). In short, their role as the guarantors of correctness is mysterious. Thus, the normative role of the Ideas (in particular the value of freedom) may rightly be questioned.

Kant himself is conscious of the shortcomings of his theory of freedom accounted for in the context of determining the limits and structure of reason from a purely theoretical point of view. In part, I believe this is because the inquiry is aimed at the determination of the total synthesis of conditions for the possibility of experience. Given this orientation of the first critique, from this point of view, this total synthesis as a condition for the possibility of the total system of nature has only been subjectively considered. He refers to the particular difficulty of the determination of the principle of

reason as a subjective determination in transcendental philosophy in the preface of his *Critique of Practical Reason*. “Speculative reason could only exhibit this concept (of freedom) problematically as not impossible to thought” (1785, 14). And further on,

I omit to mention that universal assent does not prove the objective validity of a judgment (i.e. its validity as a cognition), and although this universal assent should accidentally happen, it could furnish no proof of agreement with the object; on the contrary it is the objective validity which alone constitutes the basis of a necessary universal assent (1781, 23).

Thus, Kant defines the nature of the proof that the second Critique is meant to undertake.

He does not construe this proof as “inter-subjective,” since the grounds of inter-subjective agreement and consent do not necessarily conform to freedom. Relations between persons, constituted as they are within particular religious and social traditions, habituation, et. al. (in general construed as psychological relations) are notoriously coercive. Sometimes this coercion is innocuous, sometimes for mutual benefit, sometimes detrimental. Freedom, as a non-coercive relation, cannot be construed psychologically. The objective proof requires, then, grounds that are objective and demonstrable independently of a particular mind or community of thought.

Here we have what, as far as speculative reason is concerned, is a merely *subjective* principle of assent, which, however, is *objectively* valid for a reason equally pure but practical, and this principle, by means of the concept of freedom, assures objective reality and authority to the ideas of God and Immortality (1785, 15).

The *Critique of Pure Reason* is incomplete precisely because of its inability to provide any objective justification for the principle of reason. The *Critique of Practical Reason* is, in one respect, the completion of the first Critique. Kant aims in that work to demonstrate that pure reason is in and of itself practical, and acts as a giver of law as an internal principle of the will. Only such a critique, on his view, could show how such a

law could be rational, objective, internal, and ultimately binding upon rational beings including human beings – despite their being subject to “pathological determinations.”

The task, then, is twofold: 1) to show what practical rule may be derived from reason itself, and is in fact constitutive of reason though not merely analytic; 2) to show why that rule is law-like, and unconditionally binding upon rational being. To show the latter is to show the conditions under which desire is subsumable under a rational principle. If this latter task is not accomplished, then showing the objectivity of the principle of reason does not disqualify the subjective validity of individual desire and inclination. It does not show why the submission of such desires to reason is necessary and obligatory.

6. The Objectivity of Freedom

While it is the rational being that is the subject of freedom, freedom itself designates an objective principle. Freedom is an idea we “possess” *qua* rational being without possibly having acquired that Idea from experience, since it represents the total synthesis of the conditions for the possibility of experience. Its sources, if they are not merely adventitious, lie in pure reason. This proposition leads us back to the original question, however. Why should we think that the concept of freedom is not merely a subjective principle?

Kant writes, “In this inquiry, criticism may and must begin with pure practical laws and their reality. But instead of intuition [as in the case of the first critique] it takes as their foundation the conception of their existence in the intelligible world, namely, the concept of freedom” (1785, 63). How are we to understand the “reality” and ultimately the objectivity of pure practical laws if not through intuition? Given the distinction

between phenomena and noumena, should we understand the causality of freedom in the physical world?

We learned from the first critique that the objectivity of freedom consists primarily in its relation to the series of conditions taken in their totality. That is, from the subjective point of view (the point of view that requires the fulfillment of the totality of conditions as a *requirement* of reason and the possibility of phenomenal causation), the concept of freedom is necessary. For finite rational beings, the concept of freedom is then subjective as conditions required for the possibility of *our* experience. But given the account in the first critique that includes material and categorical conditions, the necessity (and ultimately regulative nature) of the Idea remains mysterious. And where we have placed the regulative role of the Ideas in question, we may be inclined to reduce Kant's understanding of inquiry either to a type of coherency theory or a type of verificationism. Given his insistence upon the objectivity and the necessity of the Ideas, I don't think either position represents his self-understanding. Insofar as the Ideas are Ideas of Pure Reason, and are not "given" in experience, they seem to represent Reason's self-understanding. These conditions, insofar as they are generated through reason's reflection upon itself, are objective and necessary insofar as they represent the final and total conditions in the series of conditions – the unconditioned. As such, however, they are not objects within the scope of possible understanding. Instead, they are objects in the sense of making understanding possible. The hope of freedom is fulfilled in the possibility of reason. The Ideas are, more simply put, the final and ultimate conditions of inquiry. They suggest what inquiry is for, and finally how it is possible. In the practical realm (including the political), inquiry is *for* freedom as the fulfillment of the final causes –

including the causes of action. They are the final conditions into the inquiry into experience insofar as they represent the conditions for the possibility of inquiry itself. They represent the possibility of self-criticism. Thus, they cannot be represented in inquiry and are in this (non-psychological) sense foundational. The moral law, then, formulated through reason, determined from the perspective of reason (considered in terms of the fulfillment of its conditions) is given by reason itself from the point of view of its completeness – the fulfillment of its conditions objectively considered where reason is the content of its own inquiry.

The concept of Freedom (and God and Immortality) does not simply represent the final conditions of the inquiry into experience. It is a condition of the possibility of the moral law, where we understand such a law to be formulated in its completeness. Nevertheless, freedom remains the central concept of moral philosophy. It bears most directly upon issues of control and the possibility of self-determination and legislation (i.e. autonomy) in action. Freedom (as of the moral law) is enacted by the moral agent. What this means is that the moral agent freely adheres to the moral law – obeys it without coercion but *vis a vis* the autonomy of a rational being.

The form of reason that is unconditioned is moral in an absolute sense. This form of reason does not concern knowledge of objects directly – that is, knowledge of objects insofar as we suppose them to have material content. Rather, their objectivity consists in their necessity as the completion of the series of conditions for a system of nature. That is, they are objective requirements for the completion of the structure of reason. The structure of reason can be finally interpreted then as the total synthesis of the conditions for the possibility of experience. Freedom represents this total synthesis as the object of

inquiry from the point of view of subjective systematicity, and as an objective necessity for fulfilling all of the conditions of the possibility of inquiry.

7. The Moral Law and Desire

Kant's interpretation of reason has consequences for the determination of the relation between the moral law and desire—for the possibility of subsuming the latter under the former. This possibility lies in the doing of "theory."

A collection of rules, even of practical rules, is termed a *theory* if the rules concerned are envisaged as principles of a fairly general nature, and if they are abstracted from numerous conditions which, nonetheless necessarily influence their practical application (1792, 61).

If the subsuming of desire under the universal law cannot be accomplished, Kant suggests that one reason for this failure is the fact "that there is not enough theory" (1792, 61).

Clearly, the claim to the objectivity of what the Idea of freedom "represents" is hollow unless desire (e.g. as orientated towards happiness) can be subsumed under the moral law— in which case we could assert, the assertion about which Kant complains, that something may be "true in theory, but not in practice." Otherwise, we may very well be able to conceive of a transcendental order of reasons, but we would not be able to explain in what way they are obligating to rational beings. To be a rational being means to act according to reasons. To act "freely" (ideally speaking) means to act on the basis of reasons as principles that (a) have no further explanation, reason, or ground, and (b) that are reasons supplied internally, that is, *to one's self by one's self*. And Kant seems to believe that the concept of freedom is implied by the concept of rational being, insofar as such beings aim at the completion of the conditions for the possibility of their rationality. So Kant does not reject persons as being, empirically, centers of desire. He only rejects the claim that the series of conditions for this possibility itself have been fulfilled by this

conception. Thus, desire is regulated by reason (transcendentally speaking) insofar as reason aims at the fulfillment of its own conditions. There is one sense in which reason considered transcendentally represents the maximization of desire *vis a vis* its restriction.

Consider again this passage from the *Critique of Pure Reason*.

The unity of reason is the unity of system; and this systematic unity does not serve objectively as a maxim that extends its application to all possible empirical knowledge of objects. Nevertheless, since the systematic connection which reason can give to the empirical employment of the understanding not only furthers its extension, but also *guarantees its correctness* [my italics], the principle of such systematic unity is so far also objective, but in an indeterminate manner (*principium vagum*) (1781, A679/B707).

Phenomenally speaking we can supply ourselves with all sorts of reasons for committing to an action. Such reasons, insofar as they are desire-based, we might call “internal.” And insofar as they are orientated towards the good, or towards happiness, we can complete a chain of reasoning that shows how at least with a high degree of probability (given experience) the action to which we are committed will be productive of their objective. We might appropriately call this type of justification “internal,” at least insofar as the reasons we give are produced by our own phenomenal experience which, we might assume (with good reason), more reliably achieves its objectives with more experience, study, and effort. However, there is a point beyond which phenomenal reason cannot “see.”

Kant does not deny the phenomenal aspect of reason. But he does argue that the restriction of reason to phenomenality represents a debasement of reason, and so the debasement of the person. He seems to identify our phenomenal reasons for doing this or that as “coercive” in some sense. On the instrumental understanding of reason, reason is guided ultimately by the non-rational. What is rational is conditioned by the “irrational.”

Reason is derivative. Thus, in some sense, we (as instrumentally rational beings) do not *choose* our ends. Kant does not deny that we act according to phenomenal reasons. He only denies that we act as determinately moral beings where we employ reason exclusively instrumentally, however necessary that it might be to do. If it is true that desire (from the phenomenal point of view) is geared in this way (as inclination), then, Kant must be able (1) to show that there is a different order of reasons accessible by persons, and (2) that these reasons are prior to phenomenal ones in considerations of the rational foundation and regulation of action.

Kant seems to believe (1) that Reason itself is a source of reasons that are primarily *moral* in nature, and (2) that actions are ascribable to persons as *moral agents*, and not merely as things that behave, insofar as they have reasons for acting that are not fully reducible to external considerations. Actions, then, may conform to inclination (*vis a vis* natural desire), or to duty (*vis a vis* the moral content of reason considered only when it reflects upon itself – reasons unconditioned by any further reason). These reasons are pure principles of action. And to the extent that one's actions conform to them, Kant claims, one acts freely. More importantly, perhaps, he believes that he has demonstrated the manner in which a transcendental cause can be a cause nonetheless, *vis a vis* the practical power of reason to produce principles that are synthetic and *a priori*.

The power to produce such principles, of course, can (if it is a possible power at all) only guarantee the correctness of the principles. It cannot guarantee that what they command will be, or can be fulfilled empirically speaking. All sorts of accidents, eventualities, and circumstances thwart our best intentions. Kant does not deny this fact. However, he does not seek to analyze the particular circumstances that “govern” our

intent from the point of view of its “reliability.” Reliability requires the analysis of circumstances external to the nature of the thing. Since these circumstances are not analyzable in any general way, he magnifies “intention” as the key indicator of the nature of one’s will from the purely moral point of view. The moral question is whether or not intention corresponds with duty.

There are two questions we may ask here: (1) given the empirical force of inclination, the ostensible clarity of the reasons derivable from experience, and the tendency of such principles to become stable over time with experience, why should we suppose that the types of reasons derived from pure reason are (a) more powerful than reasons derivable from inclination, or (b) preferable to reasons derivable from inclination? In other words, what is the justification of pure reason’s claim to regulate desire, and how is it possible that it does so? We can it seems accept the rightness of a principle without accepting its causal efficacy in practical experience. The idea of pure principles that are “practical in-themselves” seems like a sheer contradiction. (2) If the key moral concept regarding adherence to duty is so internal as to be conceived as “intention,” then how are we to conceive of intention as public? Is morality, strictly speaking, private? Kant’s own example of the shopkeeper and young client suggests it is private to the extent that “intentions” are private and “observable” only by the agent. This is because only the agent can know whether or not the act as such is ascribable to her (1785, 121). One’s rationalizations of one’s acts cannot

...protect him from the blame and reproach which he casts upon himself. This is also the ground of repentance for a long past action at every recollection of it; a painful feeling produced by them moral sentiment, and which is practically void in so far as it cannot serve to do what has been undone (1785, 121).

Concerning the moral evaluation of an action, everything seems to depend upon the transparency of one's conscience with respect to one's actions. And that transparency depends upon the possibility that the agent can occupy the seat of the lawgiver. To act out of duty means to privilege the form of ascribing actions to one's self as necessary *vis a vis* the concept of duty. To be able to ascribe an action to one's self means to be able to be responsible for an action. To act out of inclination means to privilege what Kant considers the contingent relations of sensibility to the understanding. Only moral work of extreme subtlety could ascribe actions to persons, if at all, since the relationship to the agent can be weakened or strengthened by any number of means external to the agent or the act itself. However, given the internal nature of judgment of moral worth, we are faced with two options: 1) the possibility of moral valuation lies in the hands of the individual conscience alone, or 2) the possibility of the public evaluation of intent, and so of moral value, requires further conditions that are unavoidably empirical – including features that are historical and belonging to custom. Since one of Kant's fundamental claims is that moral evaluation is not dependent upon any empirical features of experience (but on transcendental principles only), it is hard to imagine that he would wish for the second of these alternatives. The interpretation of an action would always be mediate; that is, it would always be given from one's own understanding of the correlations between signs, gestures, and behavior. And these correlations can be sensibly described within the empirical sciences. On this view, the moral value of an action or ultimately a practice (even one's own) is not transparent to or interpretable by conscience except through sets of historically constituted languages, traditions and signs. If we take this view, however, it is difficult to see how criticism could get a hold at all. Where we

aim at theoretically constructing the possibility of moral criticism we are threatened by a kind of moral solipsism. On the other hand, following Kant's thesis, we have yet to determine the objective nature of the moral law. Though Kant's moral philosophy seems to require an interpretation of the law that does not depend upon the self-reflective psychological subject as a member of a particular community, it is difficult to see how this interpretation takes shape except within it.

8. Moral Justifications and Politics

Kant's political writings were produced largely during his later life. There is some sense to this given the fact that they are direct results of his critiques of theoretical and practical reason. The first two critiques attempt (a) to interpret reason as the total synthesis of the conditions for the possibility of experience, and (b) to show that this synthesis is not merely subjective since it (*vis a vis* the transcendental ideas) also constitutes the conditions for the possibility of inquiry as such. If the project is successful on both counts, then it seems possible to derive from reason general ethical principles that are universally binding upon rational beings, regardless of their differentiating sensible features. We thus understand the character of the beings to which we apply moral judgments concerning actions because we understand the nature of the relation between the person and action as one of freedom and responsibility. The system of relations between persons then, as free and equal, must then be a system of laws. These laws constitute the proper realm of politics, and aim (on a moral basis given in the nature of persons themselves) to regulate relations between them. As centers of reason, persons are fundamentally moral agents. A political order is primarily justified insofar as it recognizes the inviolable moral nature of the person. Thus, principles of governance must

aim to meet the requirements of *all* individuals as distinctively moral agents. Political allegiance is rooted primarily, then, in reasoned consent, since it is through reasoned consent that persons recognize the equal moral weight of the other. Given the way Kant interprets reason and its internal relation with freedom, this could only mean that the most fundamental political agreements and form of consent are *a priori*.

Given Kant's claims concerning the nature of morality (specifically as defined in the *Groundwork*), wouldn't it be more natural to think that (private) morality and (public) politics are actually at odds with each other? (In fact, I take it that some version of this view remains influential in the contemporary understanding of their relation.) There is a sense in which morality is an utterly "internal" undertaking. While one's will and its nature is sometimes revealed in action, and is therefore submitted to public judgment, this is not always the case. Thus, morality requires unique relation of the moral agent to herself as self-critic. Why, then, should we think the uniquely private nature of morality and the uniquely public nature of politics can be reconciled? Given the account of morality, how can a system of external laws be consistent with autonomy? And why should politics in fact be shaped by transcendental morals? There is an apparent antinomy between morals and politics that parallels the antinomy between reason and will.

Inasmuch as Kant is a transcendental idealist, he claims also to be an empirical realist. Thus, I assume he believes the transcendental concept of freedom is as effective at regulating and correcting political experience in the empirical realm inasmuch as it is effective at regulating and correcting scientific understanding. Kant understands the principles of right in terms of the moral precepts defined above, in particular freedom.

The hope of freedom is fulfilled in the possibility of reason. And the possibility of reason is accounted for transcendently.

If Kant's understanding of the moral restrictions upon politics is correct, then, the primary task of politics is the institution of laws consistent with the freedom of persons. It is through law that morality and politics can be made consistent with each other.

But the whole concept of an external right is derived entirely from the concept of freedom in the mutual external relationships of human beings, and has nothing to do with the end which all men have by nature (i.e. the aim of achieving happiness) or with the recognized means of attaining this end (1792, 73).

The concept of right presupposes the moral conception outlined above. It is the "restriction of each individual's freedom so that it harmonizes with the freedom of everyone else" (1792, 73). Thus, "*public right* is the distinctive quality of the *external laws* which makes this constant harmony possible" (1792, 73). Since public right concerns the external law, and is naturally coercive, the problem of reconciling morals and politics may be translated into the problem of harmonizing the external law with the concept of freedom, transcendently considered. The means to achieve this harmony is the idea of a civil constitution and its suppositions, the harmonization of reasonable acceptance and obligation *vis a vis* the rational will. Law (considered externally) is not justified primarily according to its instrumental value as calibrated with happiness. It is justified on the basis of the reasonable acceptance of free, moral agents.

Given the moral conception I have tried to define, we should understand the notion of reasonable acceptance as proper to an autonomous subject, not subjects of inclination. Reasonable acceptance given according to inclination is coerced by sensibility, whereas assent from the transcendental point of view is free. The effort to justify a political order grounded in the rational faculty of persons considered as free,

then, is given as a particular kind of moral justification based upon a distinctive interpretation of reason. The idea of consent-based law, then, must be articulated *a priori*, since an empirical articulation suggests coercion, influence and inclination; and therefore no internal (and necessary) relation of obligation between the moral subject and the external law.

Inasmuch as it is not the business of moral duties to promote a particular conception of happiness, it is not the business of political organization to be concerned with the promotion of one view of happiness over another – theses about which (Kant supposes) there is, or perhaps can be, no substantive agreement. Thus, political association can and ought only to address that which concerns lawfulness – that which can hold valid for any subject. “No general valid principle of legislation can be based on happiness” (1792, 80). Thus, everyone is free to “seek his own happiness in whatever way he thinks best, so long as he does not violate the lawful freedom and rights of his fellow subjects at large” (1792, 80). External laws harmonize free subjects with others under the head of a formal political organization not by observing the possibility of common ends empirically considered, but by revealing those duties to which all rational beings are obliged. This “harmonization” involves, of course, coercion. I have tried to account briefly for what Kant considers to be the “internal” moral law. What, then, is the justification for the “external law?” And if this is the realm of politics, how does it harmonize with the moral law?

Kant claims that the external law is the justifiable means of coercion since it is ultimately grounded in “an infallible *a priori* standard, which is the *idea* of an original

contract” (1792, 80). The coercive nature of the external laws is justified on “contractual grounds.” What, then, is the nature of this contract?⁵⁸

Spelling out the “terms” of this contract relative to Kant’s moral theory is complex, but important. This idea underwrites the notion of reasonable acceptance, and links it to the necessity and obligation of obedience to the law or more precisely to the procedures of which it is the product. Clearly, the contract is not empirical in nature. That is, it is not a contract of *actual* agreement between rational persons, though it is suggestive of one manner of relating to others publicly. Moreover, it is not a contract that is based upon the various “external” ends and interests of persons. Yet, it is binding absolutely upon rational beings. Law, both the internal, moral law and the external, coercive law (insofar as it is grounded in the former), is not something that one (*qua* rational being) can simply opt out of. We have established that for Kant, the fact of reason and thought (and possibly speech, narrowly considered at least) carries moral content that is not empirical in nature. The claim to exclude oneself from the obligation of law is a claim to make an exception to the law in one’s own case. One cannot make this claim without presupposing the law. Thus, one engages in a sort of performative contradiction. The law, democratically produced, is the law to which every rational will freely consents insofar as they accept unanimously the procedure that produced it. The obligation to obey, on Kant’s account, takes the form of a *promise* to obey given consent.

⁵⁸ The idea of a social contract can arguably be traced to Socrates’s use of it there to justify to Crito his willingness to remain in prison despite his claim to be innocent of corrupting the youth and worshipping foreign gods. The more appropriate historical predecessor to Kant’s contract theory is likely Rousseau. Rousseau’s epistemic justification will be discussed in the final chapters on this essay.

In this way it is governed by the moral norms governing the making and keeping of promises.⁵⁹

But in what manner is the external law “grounded” in laws *a priori*? This question returns us to the cluster of relationships between law and desire, the “external law” and the “internal law,” legality and morality. Kant specifies this *a priori* ground this way.

It is in fact merely an *idea* of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test of the rightfulness of every public law. For if the law is such that a whole people could not *possibly* agree to it. . .it is unjust (1792, 79).

The operative mode here, once again, is “possibility.” Just laws do not require *actual* consent of all citizens directly, which would after all be difficult to garner. Just laws require “possible consent.” However, the judgment of what could gain possible consent is not warranted by polls or any direct consultation with the public. Rather, it rests with the *judgment of the legislator*. The legislator assumes a special role in law making since she is meant to make a judgment concerning universal possible consent, and since the consequence of that judgment is obedience on the part of subjects. It’s worth noting that Kant does not claim the legislator’s judgment to be infallible. He claims only that the standards of public judgment *a priori* – the civil constitution -- are infallible. However, given a) the possibility of fallible judgment in universal legislation, and b) the difficulty

⁵⁹ This means that if we can show the democratic procedure itself is irrational, then, there would be reasons for rational beings to reject it as a method of law-making. The rationality of the democratic procedure has been explored by Arrow (1951), and Wolff (1998). In general, the voter’s paradox suggests that in the case of some preference orderings, the democratic procedure violates logical rules like transitivity. Thus, it could only be adopted by rational beings as a political method given certain restrictions. There is disagreement about what these restrictions should be and whether or not any of them adequately rationalize the procedure such that it should be adopted by rational beings. I will argue later that even if this problem can be resolved, its solution leaves the paradox of the minority voter unresolved. This paradox strikes me as more deeply problematic for democracy; hence, the attention I have tried to pay to dissent in its lesser and greater extremes.

already cited of interpreting the moral standard as moral solipsism, should we be heartened over Kant's claim that obedience is nevertheless necessary? In other words, by showing the conceptual descent from the first critique to the political writings, I have attempted to demonstrate the effects of this persistent problem of establishing the objectivity of the Ideas of Pure Reason. Where we cannot establish that objectivity, Kant appears to be making a consistency argument, and the objective validity of the principle would be undermined. This interpretation has repercussions for his moral and political theories. It has been noted by many others that absolute adherence to the supreme principle of morality leads, it seems, to results that are morally repugnant by more objective criteria. This is not only true for acts like lying; it is also true for the political acts of rebellion and revolution, what Kant sometimes characterizes as "counter-resistance" against the sovereign or against the ruler. Given the possible counter-examples to the theory, the problem of obedience once again raises its head. If there is no sound justification of "counter-resistance" democratic procedures, the transcendental justification of political legitimacy may remain an impediment to the development of democracy and deliberative political practices.

9. Reason and Political Obedience

Given his moral philosophy, one would think that Kant's theory of political legitimacy would have said more about the construction of political procedures to which rational beings owe their obedience, and not so much about the absolute duty of obedience under any circumstance.

The political subject as a subject of rights is a subject of will. If the political subject is to be ruled by itself, it must be subject only to its own will; and being subject

only to its own will entails meeting consistency conditions upon willing. That is, the political subject is not obliged to obey laws that it did not will, at least indirectly; or laws that are inconsistent with themselves. Willing must be consistent with itself as a condition for obedience. This explains Kant's concern for a comprehensive moral theory as a basis for political justification. Since politics requires obedience to political outcomes (external laws), it is unclear how to justify obedience without such a theory. It is unclear in what the right of the state consists if it is not consistent with the moral nature of willing.

Laws are reasons for coercion. These reasons are justified if they are the product of a procedure whose adoption is justified. So the principle authorizing these procedures must be justified on procedure independent grounds. On Kant's view, the basic condition for their justification depends upon their authorization by those subject to them.

Otherwise, it would not be clear how laws (directly or indirectly) are a function of the will of citizens, and so consistent with it. As I suggested earlier, consent (understood here as willing) is not sufficient to establish political authority independent of features of law-producing procedures. If they are not rational or if they fail objectively in some other respect, they could not be the sorts of thing adopted by rational beings. On the other hand, if we cannot explain how the minority in such a procedure wills the outcome they do not endorse, will or desire based theories of democratic legitimacy face serious challenges.

Recall the liberal criterion of democratic legitimacy, "the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established" (1792, 79). This claim appears to address the consistency conditions on

willing without explaining or justifying the adoption of democratic procedures in the first place. In other words, the suggestion seems to be that once the procedure has been embodied in the form of a contract by the force of reasonable acceptance, the members of the consensus may not renege on their self-determination to abide by the outcomes even when they believe they are wrong. To do so would mean violating the consistency conditions of willing. The adoption of democratic procedures, on this view, has the form of a promise. The duty of obedience is, in this regard, especially strong. It is so strong Kant claims, “even if the power of the state or its agent, the head of state, has violated the original contract by authorizing the government to act tyrannically, and has thereby, in the eyes of the subject, forfeited the right to legislate, the subject is still not entitled to offer counter-resistance” (1792, 81). Though this claim concerns the state, it seems analogous to the puzzle of presented regarding the minority voter. The minority voter, we recall, is not entitled to counter-resistance having consented to the original contract. Having assented to the contract, “the people, under an existing civil constitution, has no longer any right to judge how the constitution should be administered” (1792, 81). If this analogy holds, the minority apparently forfeits its judgment insofar as it cannot reasonably reject the contract. Thus, the puzzle of the minority voter would arise. The moral consequence seems to be that the minority view is incoherent, and thus, eliminated. Wolff (1998) in particular notes that this view seems incoherent. It seems to pull against the autonomy for which the civil constitution was established in the first place. One could not subscribe both to Kant’s moral philosophy rooted in autonomy *and* to his political philosophy which justifies obedience under any circumstance.

On the other hand, there is no actual instance of consent that would justify the outcomes on the basis of the requirements of promise-keeping. Thus, the consistency argument alone which supposes an initial commitment does not capture the normative force of “reasonable acceptance.” If there is a duty to obey democratic outcomes (categorically), something must be said about the epistemic features of democratic procedures – or so I will argue in Chapter 4.

10. Conclusion

Given the conclusion noted above concerning the moral justification of political procedures, one might have reason to think Kant’s concern for a comprehensive moral theory is misplaced. Without such a theory, however, it is unclear how to sustain the *absolute* duty of obedience—particularly in cases where laws are bad or there are deep moral disputes between majorities and minorities. The reasons given above suggest Kant’s effort to base the justification of democracy upon a comprehensive and comprehensive moral theory may be misguided or unnecessary.

From this position, I turn to Rawls’s *political* liberalism. Political liberalism is guided by the thought that a *comprehensive moral theory* as a basis for political justification is not necessary. However, it abstains (in idea at least) from making claims concerning entities or objects that do or do not exist. To this extent, it resists the appeal to minimalism and the transcendental conception.⁶⁰ In particular, political liberalism distinguishes itself as an account of what can or cannot be reasonably rejected. On this view, both minimalist and transcendental metaphysics *can be* reasonably rejected, albeit

⁶⁰ Some civic republicans (Sandel 1982) and some communitarians (MacIntyre 1984) challenge the view of selfhood upon which a liberal justification seems to depend. They do not seem to be claiming simply that it is unnecessary to political justification. Rather, they claim it is false.

for different reasons. Therefore, they do not serve as a suitable basis for the civil constitution.

CHAPTER IV

POLITICAL LIBERALISM, DEMOCRACY AND THE DUTY TO OBEY

1. Democracy without Truth

A comprehensive moral theory, according to John Rawls, is a theory of “what is of value in human life, and the ideas of personal character, as well as ideas of friendship and of familial and associational relationships ...” (2005, 13). Kant’s theory as articulated above as well as the minimalist doctrine articulated in Chapter 2 may, on Rawls’ view, count equally as comprehensive doctrines.⁶¹

As suggested, it is sometimes thought that such a comprehensive doctrine could form the basis for democratic legitimacy. However, as products of the free operation of reason, the various doctrines to which citizens subscribe may be respectively supportable by good reasons, a consistent and determinant scheme of values, etc. The fact these doctrines may be reasonable, yet irreconcilable, introduces the central problem of legitimacy to which political liberalism proposes a solution. How is it possible to justify a duty to obey democratic outputs under conditions in which moral doctrines may be reasonable, but incommensurable with each other?⁶²

About pluralism in democracy, Rawls writes,

The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some

⁶¹ This is less clear in the latter case since it proposes to take discussion of the issues and the values they assume off the public table. The problem with minimalism, however, is that it rests on a *positive* theory of value, which can be reasonably rejected.

⁶² I will understand “commensurable goods” here to be the ordinal ordering of goods or ends. If these goods can be so ordered, they are commensurable. If they cannot, they are not commensurable; or at least, their commensuration is, as political liberalism seems to claim, not always necessary for rational agreement.

of these are perfectly reasonable, and this diversity among reasonable doctrines political liberalism sees as the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions (2005, 4).

Rawls calls this state “reasonable pluralism.”⁶³ Given certain facts about reason in free societies, one could reasonably expect this plurality to be a permanent feature of democracy. On Rawls’ view, the fact of reasonable pluralism offers a solution to a central problem of democratic legitimacy described above.

The subtlety of Rawls’ account of political legitimacy lies partially in the fact that it does not reject either transcendental subjectivity or the minimalist doctrine described as possibly true (whatever their actual status with respect to the truth is). So if one wishes to argue the point, Rawls can grant it from within the view he espouses. He does declare, however, that these doctrines along with any other comprehensive moral doctrine could not be a suitable basis for democratic legitimacy. But he must be able to show that legitimacy is possible, then, without appealing simply to any particular comprehensive moral doctrine – including that of Kant. In fact, for a particular moral reason (viz., the fact of oppression), he claims this is necessarily the case if such a conception can be justified at all.

The key difference between Rawls’ view of justification and the appeal to a comprehensive moral theory, then, does not lie in whether or not the comprehensive moral doctrine is true. The difference is a moral one that derives from the “fact of oppression.” The fact of oppression arises when one reasonable comprehensive doctrine is illegitimately privileged over another one. Thus, Rawls speculates, “A society united

⁶³ I will understand the idea of “reasonableness” here to indicate the equality of these doctrines from the point of view of reason. I do not understand their reasonableness to refer to a point of “agreement,” tacit or explicit. Thus, Krasnoff (1998) seems correct in suggesting that reasonable pluralism as employed in Rawls’ political liberalism is not simply a sociological doctrine, but indicates a conflict internal to reason as such.

on a reasonable form of utilitarianism, or on the reasonable liberalism of Kant or Mill, would likewise require the sanctions of state power to remain so” (2005, 37). In this case, some citizens would be coerced on the basis of principles they could reasonably reject given their reasonable moral doctrine. They would not, as liberalism insists they must, be treated equally in their freedom.

The appeal to particular comprehensive moral doctrines as the basis for a political consensus would apparently require the oppression of otherwise reasonable views. Consequently, Rawls concludes that the political conception must be framed in a way acceptable to any reasonable citizen, from within any reasonable doctrine. At stake, as discovered in Chapter 3, is the establishment of a public sphere rooted in and developed according to reason and independent of particular moral, religious, or philosophical doctrines.⁶⁴ Rawls’ claim, in brief, is that establishing such a sphere is possible among otherwise incommensurable doctrines if there is a set of political principles with normative weight that cannot be reasonably rejected. Rawls believes there is such a set. From such principles a duty to obey would arise even when political outputs are contrary to one of the reasonable doctrines in question. This duty would not arise from the fact of “agreement,” tacit or explicit, but from the fact they could not be reasonably rejected.

Political liberalism takes its view of political legitimacy as morally distinctive since it accounts for the fact of oppression in a way other doctrines do not. A political framework (as opposed to one that appeals to a comprehensive doctrine) is narrowed to address only the “basic structure” of “society’s main political, social, and economic

⁶⁴ Apparently, then, Rawls view “the political” as autonomous roughly the way that Kant views “the ethical” as autonomous. The comparison is limited by the fact Rawls claims it is necessary to construct only political values. Whether moral values generally considered is not a question within the scope of political liberalism (Rawls 2005, 125).

institutions” (2005, 11). This strategy is a reflection of the effort to “apply the principle of toleration to philosophy itself” (2005, 14). A condition of its success seems to lie in its capacity to remain neutral between comprehensive doctrines in the sense that its justification does not include premises reasonably contestable by citizens.

Objections *qua* Muslim, Christian, or other specifiable moral and religious doctrine could not offer a reasonable basis of rejection. A theory of legitimacy based on any one of these comprehensive views would illegitimately privilege it, hence violating the fact of reasonable pluralism. Presumably, this is because it makes the justification unavailable – hence unpublicized – *as reasons* for those who are not Christian, Muslim, et. al. These reasons could not, then, obligate them since there would be no point of view from which they could recognize this obligation as such. It would not be a *public* view of reason. If political justification cannot build a public view of reason on the basis of any particular comprehensive doctrine, it would seem that reasonableness (not truth) must be sufficient for political justification.⁶⁵ The sufficiency of reasonableness may, then, be formulated as the liberal acceptance criterion:

Liberal Acceptance Criterion: A principle or doctrine is admissible into political justification if it is acceptable to *reasonable* citizens (*qua* reasonable citizen), and their reasonable acceptance is all that is required.⁶⁶

Reasonableness, on this view, is sufficient for legitimacy. Truth is not necessary. If it were necessary, it would apparently violate what the fact of oppression demands *vis a vis* freedom and equality. This problem threatens the coherence of political liberalism since, as I have already suggested, it is committed to the sufficiency of the reasonable.

⁶⁵ I am not claiming this has been sufficiently demonstrated. At this point, I am only outlining the direction of the thought.

⁶⁶ The acceptance criterion as stated here should be understood as a formalization of Kant’s conception of the legitimacy criterion in Chapter 3.

In this chapter, I will discuss the role of the liberal acceptance criterion in justifying the duty to obey democratic outcomes, that is, in democratic legitimacy. This discussion will require distinguishing the politically liberal view from other forms of liberalism. Largely, this distinction turns on the possibility of formulating Rawls' position as a kind of constructivism, namely political constructivism. In this way, we may see how the moral and regulative features of politics are constituted.⁶⁷

2. Political *versus* Moral Constructivism⁶⁸

I propose here to view the problem of pluralism as defined by Rawls as a problem of the commensuration of moral and political goods. Rawls' approach to the problem is constructivist.⁶⁹ However, Rawls proposes to use the constructivist approach in a limited way (viz., only for political values not moral ones generally).⁷⁰ Moral constructivism would implicate political liberalism as a comprehensive doctrine and place perhaps insurmountable obstacles to its internal coherence relative to the fact of oppression.

According to constructivism generally something is good if there is a reason to choose it.⁷¹ A non-constructivist view claims instead that one has a reason to choose something if it is good. Consequently one has a moral reason if the thing is morally good. In the latter case, inquiry is oriented by the project of determining whether the thing is

⁶⁷ For some evidence of Rawls' resistance to the thought see *Political Liberalism* (2005, 150). Here Rawls writes that "We try, so far as we can, neither to assert nor to deny any particular religious, philosophical or moral view, or its associated theory of truth and the status of values." He does not seem to add the requirement that citizens committed to political liberalism are *ipso facto* committed to its being true.

⁶⁸ I make no pretense of having a well worked out and sophisticated view of practical reason here. The point is simply to indicate as briefly as possible the very general direction of Rawls's considerations about pluralism in democracy.

⁶⁹ I am relying on a conventional definition here; but do not mean to indicate that constructivism is necessarily incompatible with some realist views.

⁷⁰ This claim itself is controversial to the extent it assumes the possibility of identifying a political domain that is autonomous of the moral one. I am not aiming at a general criticism here. Some have argued, however, that maintaining the distinction between the special domain of the political and the moral generally moral creates a situation in which the utilitarian, for example, must decide between being a utilitarian or being unreasonable. In either, political liberalism eliminates pluralism (Talisso 2005, 60).

⁷¹ This does not entail that one's choice makes it good. I will discuss this crucial point later in the chapter.

good. It is, in this regard, quite clearly a realist view of morality. Constructivist inquiry, on the other hand, is oriented according to the determination of whether one has a moral reason to choose something.⁷²

Disagreements about what is good, and the ordering of goods, are possible in either case. The source of disagreement in the non-constructive case may first arise over the identification of the good, its nature, et. al. Disagreements in this case are resolvable if the various goods proposed are commensurate with each other. If not, they are potentially irresolvable. Constructivist disagreement does not seem to follow this pattern. One's judgment about the good is first a judgment about whether one has a reason to choose X. The goodness of X derives from the quality of one's reasons, not the other way around. So if I have promised to change your tire, and promises have an overriding value, I have an overriding reason to change your tire, even if it prevents me from playing basketball as I had suggested to others I would. On the constructivist view, then, disagreement is first about the reasons there are to choose something.⁷³ If some of these reasons cannot be rejected one has an obligation to do what they require. Consequently, if I have a duty to obey I have a sufficient reason to obey even if it prevents me from performing some other task that would be pleasing.⁷⁴

I assume political constructivism operates in a similar fashion. However, it narrows the determination of political ends to the question of whether or not there are reasons to choose a *political* good. The reason for choosing it will be a *political* one.

⁷² In this regard, political constructivism may be aligned with ethical internalism, despite its distinctively narrow application.

⁷³ Granted, this characterization is an oversimplification. I am only trying to show how political constructivism fits generally within a certain outlook.

⁷⁴ Of course, this will raise a problem about conflicts between duties; but answering these questions will fall beyond the scope of the present inquiry.

However, given the normative requirements on these reasons, its being political does not mean that it is “negotiative,” “strategic,” or the like. According to Rawls, the fact of reasonable pluralism – arising as it does in democratic societies – seems to operate as a reason in a particular way. It operates as a regulative reason (i.e. a norm of political reasoning). It is regulative insofar as it places constraints on political discourse. Thus, it serves to limit or restrict the kinds of reasons available to democratic justification. But the fact of reasonable pluralism is not simply a “cultural” phenomenon. Rather, it is a fact of *reason*, and indicates a conflict that arises from its free use.

From the constructivist point of view, then, political justification does not require a general commensuration of moral goods in order to determine the priority of political goods. Reasons that are assigned priority are so assigned in relation to facts about democracy in relation to facts about reason. If the fact of reasonable pluralism cannot be reasonably rejected, reasonableness is determinant of the political good. On the question of the second order commensurability of goods, political liberalism is mute. On the question of their first order commensurability, it says that the answer to this question is regulated by the political value of reasonableness – in particular the fact of reasonable pluralism. Something is good, then, if “we” have a reason to choose it.⁷⁵

It is important to understand the difference between these approaches for current purposes because of the different ways each understands the role of truth and defines the role of the reasonable in political justification. According to Rawls, “Reasonableness is

⁷⁵ The problem of reasonable pluralism, as understood here, is whether or not there is anything that we do or should collectively choose given reasonable pluralism. The constructivist response is not to assert a substantive account what *is* good, hence what we ought to choose. Rather, it says that X is good if we have a reason to choose it. Yet it still must explain obligation (viz., what cannot be reasonably rejected) assuming plural accounts of value. The way to understand the fact of reasonable pluralism, then, is as a regulative principle not a substantive one. In this chapter and in what follows, I will try to explain this role more fully, in particular whether or not it is simply or moral constraint or also imbues democratic procedures with any epistemic value.

its standard of correctness, and given its political aims, it need not go beyond that” (2005, 127). The duty to obey democratic outcomes arises in response to reasonableness understood as a *political* value under conditions of reasonable pluralism. Given the free operation of reason — at least as a normative idea — it would be unreasonable to reject the fact of reasonable pluralism. I suggested in Chapter 3 that it is imperative not to understand this “agreement” as either being a point of explicit or tacit consent, or as a psychological fact. If we understand reasonableness as a normative expression, it would be both necessary and sufficient to justify a duty to obey under conditions of reasonable pluralism.

Even so, Rawls’ view is not without problems. One problem is whether or not political liberalism is constructivist about truth inasmuch as it is constructivist about *political* values. Utilizing the work of David Estlund, I will show why political liberalism cannot be committed to a constructivist view of truth even it is committed to a constructivist view of political value. From this point of view, we will be in a position to define the meaning of an epistemic conception of democracy, and perhaps to evaluate alternate accounts of the role that epistemic values play in democratic procedures. First, however, I will show how a criticism of Rawls’ political constructivism might be developed by appealing to the work of Michael Sandel.

3. Political Constructivism and Truth

In *Political Liberalism*, Rawls asks, “how is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines” (2005, 47)? Rawls makes clear in the *political* version of liberalism his belief that *A Theory of Justice* left something out.

In particular, it was not sufficiently attentive to the problem of the stability of the conception of justice in light of reasonable pluralism. As Brian Barry writes, “everything distinctive about *Political Liberalism* stems from a concern with the stability of justice” (1995, 875). The problem of establishing a political consensus that is normative is motivated primarily by the concern for the stability (viz., the acceptability) of the conception, not a concern for its truth. If however, acceptability cannot be construed in purely psychological or social terms, it must be a normative concept irreducible to empirical determinations.⁷⁶ The question, then, is how to make it possible to accept a public conception of justice in light of a plurality of reasonable moral and religious doctrines, and perhaps incommensurate schemes of the good, if the principles in question are not in some way taken as true.

From this perspective, we can see the distinctiveness of Rawls’ proposal. The Kantian and Schumpeterian views suppose standards of value that may be reasonably rejected insofar as they are derived from opposing and irreconcilable doctrines. In Chapter 2, I outlined one possible objection to the positivist political doctrine. To see how Kantian transcendentalism might be reasonably rejected consider Sandel’s criticism.

Sandel writes that, according to Kant, one is free as the subject of experience if “one is independent of determination by causes in the sensible world (and this is what reason must always attribute to itself)” (1785, 120). The basis of the moral law, he continues, “is to be found in the subject, not the object of practical reason, a subject capable of an autonomous will” (Sandel 1982, 6). This subject, being given prior to its ends, is the subject of right and may choose freely among its possible ends. Thus, the

⁷⁶ Consequently, “stability” for the political liberal cannot be the empirical concept that it is for the minimalist like Posner or Schumpeter. This concern drives, for the political liberal the distinction between the political and the moral.

right is prior to the good. Sandel believes that the question of the correctness of the Kantian view can be determined, and possibly challenged, by answering this question: “How do we know that there is any such subject, identifiable apart from and prior to the object it seeks” (1982, 7)? On Sandel’s view, the Kantian point of view mischaracterizes the nature and sources of social, political and moral thought and life. Rather than considering them as objects for a *transcendental* subject, they should be conceived along with the subject as having a history, embraced by a tradition, and instantiated in a community. Now, the point here is not to determine whether Sandel’s criticism hits the mark. Rather, the point is to suggest what Rawls might mean when he claims that comprehensive moral theories subject to reasonable objection do not serve as a suitable basis for political justification.⁷⁷ If we cannot assume that these distinctive views are reconcilable in a single conception, or one is necessarily defeated at the hands of the other, we may be led to think that these doctrines are “opposing and irreconcilable.”

This is not an unhappy result for a *political* liberalism. But it is because of this result that political liberalism does not assume any particular substantive doctrine of value upon which to ground the status of persons as free and equal. Doing so would require importing controversial premises (e.g. of the sort identified by Kant or Sandel) into the political consensus, hence, illegitimately privileging one substantive doctrine over another. But as I have suggested, this move does not merely violate fairness. It violates a certain moral principle definitive of moral and political reasoning. Thus, political liberalism interprets the acceptance criterion to mean that citizens justify it *from within their own moral doctrines*. “Since we assume each citizen to affirm some such

⁷⁷ Of course, Sandel’s criticism of Kant is meant to show ultimately that Rawls’s *Theory of Justice* may be challenged as harboring similar assumptions.

view, we hope to make it possible for all to accept the political conception as true or reasonable from the standpoint of their own comprehensive doctrine” (2005, 150). As noted earlier, Rawls claims the doctrine has the capacity to do this if it is reasonable. A doctrine is reasonable if it can generate the fact of reasonable pluralism out of its own set of practical reasons whatever they are. As indicated, this claim makes more sense if we think of it in light of the conflict internal to reason than as an “external,” “cultural” problem.

The consequence of this claim is that “Persons are reasonable [recognize each other as free and equal] in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so” (2005, 49). Apparently, then, their accounts of the fact of reasonable pluralism make it possible to discern a difference between the political and the generally moral in the way Kant suggests one might discern the difference between public and private. This claim stimulates Sandel to further criticism. The public/private distinction can lead one to identify the “private self” as the contingent self of tradition – the self that does not choose its own objects or projects but to whom they are given in some way. The “public self,” on the other hand, is the subject of pure reason unburdened by the contingencies of tradition and community. It represents a type of autonomy not possessed by the “private self.”

Notice that if the political conception is justified from within the various reasonable doctrines it is not obvious that Rawls depends on the sorts of Kantian claims Sandel attributes to his view. In other words, political liberalism is not so obviously committed to the Kantian view of selfhood attributed to it by Sandel. If this is so, Rawls’

claims about freedom and equality must not ultimately be grounded in the way Sandel suggests. Sandel's general criticism seems to revolve around the idea that if Rawls' claims are grounded on transcendental subjectivity, it depends upon the kind of controversial metaphysics it aims to avoid. On the other hand, if it is not grounded in this way, a question may still arise about its justification. Political liberalism, formulated either way, would be in jeopardy as a normative theory.

Linking Rawls' view to Kant's, Sandel claims that each supposes, "So long as they are not unjust, our conceptions of the good carry weight, whatever they are, simply in virtue of our having chosen them. We *are* 'self-originating sources of valid claims'" (1998, 177). Sandel's suggestion, it seems, is that constructivism about the good in Kant and in Rawls necessarily entails constructivism about truth. These claims are valid, Sandel contends, *because they are chosen* by the autonomous subject. This leads to a certain kind of internal problem for political liberalism. If political liberalism does not admit truth (in the form of a standard independent of choice) into its justificatory scheme, there could be no independent grounds on which to validate its claims. If it does, on the other hand, the "political" sphere could not be "free standing" of the more generally moral sphere. It represents an implicit claim about the good and its truth without a scheme of justification that could properly be called epistemic. Sandel writes, "Practical reason finds its advantage over theoretical reason precisely in this voluntarist faculty, in its capacity to generate practical precepts directly, without recourse to cognition" (1998, 176). Consequently, "there is no need for these precepts 'to wait upon intuitions in order to acquire a meaning. This occurs for the noteworthy reason that *they themselves produce the reality of that to which they refer*'" (Sandel 1998, 176). The most obvious way to

reject Sandel's criticism would be to show that political liberalism depends on a standard independent of choice without being itself a comprehensive moral doctrine. One step in this direction is showing that a constructivist view of political value does not entail a constructivist view of truth. So it is not committed to a *doctrine of truth*, even if it is committed to the truth of political liberalism. Indeed, the internal coherence of political liberalism, insofar as it claims to construct only political value, seems to depend on this claim. From here we can show that Rawls must himself maintain this view without sacrificing the essentials of political liberalism.

4. Truth and the Sufficiency of the Reasonable

In "The Insularity of the Reasonable," (1998) Estlund offers a corrective for political liberalism. It is a corrective some political liberals will not want to accept.⁷⁸ Doing so requires an appeal to truth. Some theorists, then, will believe this move violates the "epistemic abstinence" attributed to Rawls' view.⁷⁹ Estlund is sensitive, however, to the moral demand of political liberalism to maintain a framework that is freestanding from comprehensive moral doctrines while addressing critics like Sandel and more traditional liberal theorists (i.e. those who view liberalism as unproblematically rooted in a substantive, comprehensive moral theory). While Estlund contends, then, that something must be said about truth, he agrees that it cannot be too much.

The problem noted above is that political liberalism suggests justification is possible without appealing to a criterion stronger than reasonable acceptance. In particular, Estlund's corrective says that political liberalism must be committed to the

⁷⁸ Some theorists have raised more general objections to the very idea of political liberalism. See Barry (1994); Wenar (1995); Scoccia (2005).

⁷⁹ This expression was taken from Raz's essay of the same name Joseph Raz, 'Facing Diversity: The Case of Epistemic Abstinence' (1994).

truth of the claim that reasonableness is sufficient for political justification. In this way, he points to what political liberals must justify without simply saying that it is justified because it is “what reasonable persons accept.” In this case, it would be the sort of “self-validating” scheme to which Sandel objects, and which raises questions about the grounds of its own legitimacy. Estlund denies, however, political liberalism is committed to any particular metaphysical thesis or substantive moral doctrine. Thus, Estlund’s view aims to retain the fundamental idea of political liberalism while taking issue with Rawls’ formulation of it.

What *can* be said about truth in political liberalism can be stated in a modification of the liberal acceptance criterion.

Modified Acceptance Criterion (MAC): With the exception of this doctrine, no doctrine is admissible or excluded as a premise in political justification on grounds of its truth or falsity, but is admissible just when and because it is acceptable to all reasonable citizens (and no one else’s acceptance matters). The present doctrine must be both acceptable to all reasonable citizens *and true* [my italics] (Estlund 1998, 266).

To be committed to the truth of political liberalism is essentially to believe that the acceptance criterion cannot be reasonably rejected. In addition, Estlund seems to agree that the political consensus is not possible if it includes controversial theses justified only by particular comprehensive moral doctrines. Acceptability to reasonable citizens is sufficient for political justification.⁸⁰

Estlund diverges from Rawls’ account (or at least clarifies it), by adding that this proposal — that reasonableness is sufficient for political justification — must be acceptable and true (i.e. independent of acceptability). So in one small but important way, truth must be admitted necessarily to political justification. Strictly speaking, however,

⁸⁰ Rawls’s principle of toleration limits inquiry as a means for expanding toleration in political justification in the way that Kant’s transcendental philosophy limits reason to make room for faith.

the necessity of the truth predicate arises as a methodological requirement supposing the acceptance requirement must meet its own requirement. Thus, Rawls cannot maintain the political conception if in justifying it by one's own doctrine, one may take it as true, *or as reasonable* (2005, 151). If truth is not necessary, the plurality of doctrines is left intact without explaining the normative force of the public conception of justice. Truth must be a necessary feature in order to establish an independent standard for the evaluation of political principles and claims. The question naturally arises whether this claim introduces the kinds of controversial premises that the political liberal hopes to avoid. In other words, one will wonder whether the truth predicate entails the admission in political liberalism that it tacitly, but illegitimately, privileges itself as a substantive moral doctrine. Estlund's response is negative. But in order to avoid the difficulty, the truth of MAC should only be considered in a *minimal* sense: (for any statement P) "P" is true, if and only if P. Therefore, MAC is true, if and only if MAC. If the truth of MAC is a requirement for its justification, the minimal sense of truth does not *make* it true. It simply identifies what must be shown or justified — that reasonable acceptance is sufficient for political liberalism. And it is the whole point of minimalism to avoid talk about truth makers. Since political goodness is understood in relation to the reasons that citizens may actually have, and we start from the idea of a plurality of irreconcilable but reasonable moral doctrines, there are potentially a number of views about these truth-makers. The problem of justification as an internalist doctrine is addressed by appealing to the substance of the various moral doctrines.

Estlund amplifies his claim to this effect in the following way: "So anyone who can accept that murder is wrong accepts that 'murder is wrong' is true in the minimal

sense needed by political liberalism...” (1998, 270). MAC can be understood as true in the minimal sense if citizens accept the principle roughly in the way they understand the principle “murder is wrong” is true. Their acceptance of the wrongness of murder and their belief it is true that “murder is wrong” is possible regardless of the religious or moral doctrine to which citizens subscribe. So the consensus about the wrongness of murder holds even in the face of pluralism. Thus, one can say with some right that its being true is a reason to accept it; but not that it is true *because* one accepts it. More importantly, one may do so without appealing to anything more than one’s own reasonable moral doctrine as a source of justification. Citizens with distinct doctrines may accept that murder is wrong and believe that it is true without being committed to the same reasons in each case. They may, in addition, dispute the cases to which the principle is applied. However, accepting the principle as true forms the background for these kinds of deliberation. Kantians and utilitarians, if political liberalism is right, may both believe MAC is justified from within their comprehensive doctrines. The fact they each believe it is despite their distinctive doctrines lends epistemic force and quality to it, not just the weight of numbers. The extension of the consensus — following the kind of consensus about murder being wrong – would be very wide indeed, despite relative differences in the supporting justifications. The acceptance criterion, then, can be taken as true independent of citizens’ acceptance of it; and indeed, if Estlund is correct, this must be the case if political liberalism is to be a coherent normative theory.

So far, I have confined the essay to a discussion of Rawls’ view of a public conception of reason assuming the existence of reasonable but incommensurable doctrines. Rawls does not proceed by showing how different modes of valuing may be

commensurate under a single head. Instead, he takes this commensuration to be at least in some cases impossible, unlikely, or unnecessary in order to formulate a public conception of justice. If Estlund is right, Rawls' theory is coherent only if it is consistent with a view in which one can be constructivist about political value but not about truth. That is, not everything can be constructed. However, the fact of reasonable pluralism plays the role of regulating political inference given the plurality of reasons in democratic societies. Having set out the idea of political constructivism, and given some sense to the fact of reasonable pluralism, we may see how this view informs the view of democracy within political liberalism.

5. Democracy in Political Liberalism

The set of principles that could not be reasonably rejected by reasonable citizens, grounds what Rawls refers to as an “overlapping consensus.” An “overlapping consensus” of citizens would consist of “all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less constitutional regime...”(2005, 15). An interpretation of democracy is seen most clearly at earlier stages in its development. Rawls suggests that there are two stages in this development. The first stage ends in “constitutional consensus.” The constitutional consensus “establishes democratic electoral procedures for moderating political rivalry within society” (2005, 158). The constitutional consensus provides a framework within which “political groups must enter the public forum of political discussion and appeal to other groups who do not share their comprehensive doctrine” (2005, 165). In accepting a democratic constitution, one accepts the principle of majority rule (2005, 164). Rawls does not claim here that democratic procedures should

be adopted because they tend to “get things right.” Thus, within the constitutional consensus, democracy is not interpreted epistemically. Rather, it is instrumental for producing stability and civility. Conceived within the politically liberal framework the reason for adopting democratic procedures is the moderation of political rivalry.

In keeping with liberal tradition, Rawls adopts a view of democracy (in this context at least) as limited. It is limited insofar as it is an article of, and constrained by, a civil constitution (Dahl 1989). However, the reason for adopting democratic procedures could not also be the reason for accepting democratic outcomes with which one does not agree. Since the reasons for adopting a procedure do not justify its outcomes, the justification of democratic outcomes must ultimately stem from the overlapping consensus and the public conception of justice. As suggested in Chapter 2, stability and civility tell us nothing about a duty to obey these procedures (or their outcomes categorically).⁸¹ The reason for adopting democratic procedures could not also be — as it seems to be for the minimalist — the justification for obedience.⁸²

If it is true that political liberalism conceives of democratic procedures non-epistemically, it is not surprising that it would generate the idea of legitimacy out of its concept of justice. In fact, this would make a great deal of sense. Without the appeal to justice, democratic procedures generate disagreement instead of agreement without any means to resolve it. Since non-epistemic criteria are sufficient for legitimacy, according to political liberalism, democratic outcomes are legitimate if they are the product of a procedure that is just.

⁸¹ Strictly speaking, the minimalist offers no justification for obedience — just a cocktail of sociological, psychological, and economic theses explaining why it sometimes occurs.

⁸² Of course, this is why Schumpeter seems to appeal to democracy as a political method only, and relatively unrelated to the making of difficult social decisions.

One way to understand the meaning of this claim is discovered in Cheryl Misak's *Truth, Politics, Morality* (2000). There she claims that democratic legitimacy as conceived within political liberalism is shaped by "that upon which we can all agree" (Misak 2000, 28). Her point, however, is critical. Political liberalism, she claims, relies on a substantive view of the good. She adds, however, that Rawls' idea of public reason, insofar as it shaped by the public conception of justice, rejects the notion that any other comprehensive views ought to have, so to speak, a seat at the public table. The trouble is that the politically liberal conception of justice claims to have been evacuated of any substance – the substantive views of the good citizens actually hold. So it may be that the public conception of justice represents a view for everyone that could be acceptable to *no one*. In this case, political liberalism would fail at achieving the goal that fundamentally motivated it – achieving a stable political conception of justice. Such a conception seems unworkable. Indeed, it seems to strip the political sphere of the participation that would render democratic outcomes legitimate. Consequently, Misak is suspicious that political liberalism does not conceal, in fact, a substantive moral doctrine – illegitimately privileging itself. Her criticism, then, is not simply about the internal coherence of political liberalism. It is moral criticism.

The implication is that in order to be efficacious political liberalism must conceal the fact that it is just another comprehensive view — hence, illegitimately assigning itself a privileged status by denying that it is or possesses a comprehensive conception of the good.⁸³ "In light of this problem, we might conclude that Rawls should retract his claim that public reason should exclude appeals to the good" (Misak 2000, 28). Misak's point is not just about the internal structure of political liberalism. Following Sandel, she claims,

⁸³ There may be a favorable comparison between Misak and Sandel on this point.

“The idea that the citizen should bracket her beliefs about the good seems both unrealistic and undesirable” (Misak 2000, 28). It is unrealistic, I assume, because citizens are politically motivated by *their* various views of the good but not by the fact that there are various views of the good. So according to Sandel and Misak, the fact there are various views of the good (even reasonable ones) is vacuous when it comes to motivating democratic participation.

Consequently, the idea that citizens should bracket their beliefs is undesirable. Public, political life becomes a barren landscape since no one in fact occupies such a position. The public square stands relatively empty. As indicated in Chapter 2, this vacuity may produce stability but at the expense of democratic legitimacy. Democracy, then, demands more robust and general political participation; and a theory of democracy demands the norms that will justify it. Liberalism, on this view, runs into problems generated by the lack of political participation introduced for the minimalist justification of democracy in Chapter 2.⁸⁴ Thus, political liberalism represents for Misak “a kind of quashing of moral and political debate as we know it” (2000, 28). Now it is not obvious why political debate as we know it is preferable to or better than political debate as prescribed within political liberalism. So without further argument this particular claim begs the question against political liberalism.

More important, however, is Misak’s contention that political liberalism bases political debate upon that to which we all agree. In both the present and the preceding chapters, I claimed that whatever Kant and Rawls mean by expressions like “agreement,” “consent,” et. al., it could not indicate something to which we all agree and so consent,

⁸⁴ This is one way to understand the criticism of Kant raised at the end of Chapter 3. The theory of democracy aspires to the public use of reason but undermines the conditions that would make it possible.

tacitly or explicitly. If it did, of course, the critiques of Misak and Sandel would be much stronger. Political liberalism, in this case would be a doctrine as any other doctrine, and perhaps stacking the deck in its favor.

So we must see whether there is after all an interpretation of “reasonable agreement” that does not run into this difficulty. If agreement means here something more like “under the authority of ‘principles’ one could not reasonably reject,” then the sense in which Misak suggests liberal deliberation is constrained by principles to which we all agree seems trivial — or, in any case, does not address the actual argument. I will understand the notion of being under some authority in this way as correspondent in some way with a duty to obey. In this event, one might counter that the locution “principles one could not reasonably reject” introduces the idea of a positive set of doctrines, suggesting again that the duty is generated from the fact of explicit or tacit agreement. This criticism will have to be met.

One clue has been provided already in the idea that “reasonableness” reflects a view of reason on which conflict is internal to it. This statement by itself hardly amounts to a doctrine. If this is so, then it is the case that any effort at reason-giving must be sensitive to contrary reasons, evidence and such. To fail to be sensitive in this way is to fail to acknowledge the internal conflicts of one’s own effort to give reasons. This view is available to any first-order reasonable doctrine to the extent one may offer any justification of it at all.

The Rawlsian conception of “reasonableness” is not, according to Misak, an epistemological idea. “Reasonableness is tied, that is, to the ideas of equality, fairness, and cooperation. A person is reasonable if she is prepared to propose principles of fair

terms of cooperation and abide by them” (Misak 2000, 24). A proper view of reasonableness, according to Misak, would be epistemic. So the point of Misak’s critique of political liberalism is to establish the basis for an “epistemic” conception of democratic procedures. Misak argues that an epistemic conception of democracy can be developed through a Peircean conception of inquiry. Political liberalism, *from this perspective*, may not seem like an epistemic view of democracy since it is not aimed at truth but at justice; and it would be morally objectionable since it eliminates various views of the good from public deliberation while tacitly elevating itself as the framework for public deliberation.⁸⁵ As suggested above, Rawls provides fodder for this view in claiming that the virtues of democracy lie in the stability and civility that are its products, at least at the stage of constitutional consensus. If Misak’s claims are true, moreover, political liberalism would seem to fall into a predicament similar to the one discovered in Kant’s view (assuming a particular interpretation of the latter).⁸⁶ In particular, the kind of freedom promised by political liberalism would be rendered meaningless from the public point of view. But the question is not only about what Rawls does or not say or write. Rather, it is about the meaning of political liberalism on this point and whether an epistemic view of democracy can be derived from it or thought as compatible with it. To see how this is possible I will turn to Estlund’s conception of democratic procedures, “Epistemic Proceduralism.” As we will see, Estlund’s understanding of the role of the epistemic in democracy is importantly different from that of the pragmatist. Whether or

⁸⁵ This claim sounds strange. Sandel’s criticism is somewhat illuminating here. Justice as an object is distinct from truth since it seems to be derived directly from practical precepts to preserve autonomy rather than from a particular moral tradition, et. al.

⁸⁶ Recall here that in Chapter 3, I claimed that Kant’s absolutism about obedience seemed to set conditions under which public debate and dissent were rendered benign.

not these views are compatible and in what ways is not an argument I will undertake here.

The sort of criticism against political liberalism lodged by Sandel and Misak may be summed up this way. “Not egoists, but strangers, sometimes benevolent, make for citizens of the deontological republic; justice finds it occasion because we cannot know each other, or our ends, well enough to govern by the common good alone” (Sandel 1998, 183). So he concludes, “we are submerged in a circumstance that ceases to be ours” (Sandel 1998, 183). For all of this rhapsodizing about the alienation of the public sphere, the introduction of what citizens believe about the good into it remains problematic. Misak prizes an epistemic conception of democracy because this reintroduction must be regulated in some way. If we begin with beliefs citizens actually have, and compel their public participation, the analysis of belief, indeed epistemology generally, may play a role more central to politics that Rawls’ political liberalism suggests. However, in the remainder of this chapter, this view will be weighed only against the revisions to political liberalism proposed by Estlund and the view of democracy he develops within a framework where the central idea of political liberalism is maintained excepting constructivism about truth.

7. Two Epistemic Conceptions of Democratic Legitimacy

An epistemic justification of democratic outcomes suggests, as Estlund writes, there is a duty to obey, “only if the agent’s judgment meets some epistemic criteria” (1999, 197). But according to Estlund the necessity of these criteria should be understood within a procedural framework. So, S incurs a duty to obey procedure D, if that procedure has property E. However, the “property” in question is not simply that of

fairness. In addition, it is not conferred by an antecedent, substantive view of justice. Nevertheless, the features of the procedure that justify a duty to obey may still be considered *epistemic*. Estlund calls this view “epistemic proceduralism.” Stating this view is one thing, explaining it another, and justifying it yet another. So I will tackle these tasks in this order.

Any epistemic view of democracy will begin with the idea that, as Estlund writes, “Votes are usually thought to be without cognitive content altogether. The received view of voting is that it is an expression of preference, the manifestation of a disposition to favor or choose one policy over another” (Estlund 1993, 73). So it may make sense to adopt democratic procedures as constitutional articles for purely instrumental reasons. But as I have suggested, these reasons alone do not produce an understanding of the categorical legitimacy of their outcomes.

On the received view of democratic voting it is natural to suppose that underlying democracy is a plurality of interests and preferences. Democratic procedures aggregate these interests and preferences; and the majority rule dictates which preferences legitimately represent the public. But the question is how to justify a duty to obey given differences of preference. An aggregative model of democratic voting might, then, look something like this.

(A)

- (1) X prefers A and that A be enacted.
- (2) Y prefers not-A, and that not-A be enacted.
- (3) If more Xs prefer A than Ys prefers not-A, then the preference of Xs takes precedence to that of Ys.

Of course, what these premises leave out is a justification for why X *should* represent the public determination, hence why Y, though she is in the minority, has a duty to obey.

There is an implicit suggestion here that the preference of X takes precedence because of its greater quantity. But the appeal to quantity remains a description of what X prefers, rather than a justification, and so (as widely recognized) is insufficient for legitimacy.

We may be led to think that some other principle (e.g. fairness) justifies the procedure; and as a consequence, its outputs. So if the procedure is conducted fairly a duty arises.⁸⁷ The value added to the procedure or its outputs on the basis of fairness is little more than the equal recognition of different desires or preferences. But there is nothing authoritative added about the value of such preferences or desires. If one turns to the content of claims about justice as a source of justification, one is then confronted with the problem of assigning priority to one view or the other. But the substance of justice is disputed. We must ask whether there is any basis for one of these views to be privileged above any other.

Whatever the response to this question, it should be clear that once the necessity of the concept of justice is introduced we can no longer assume the aggregative model of democratic procedures. This is because we must consider their outcomes as justified by a procedure independent moral standard (e.g. justice). However, if these standards are formulated in terms of justice, there is (again, given reasonable pluralism) a problem about determining which view has priority. The incommensurability thesis introduced earlier assumes that everyone has some view of justice, but these views differ (in substance and the priority assigned to justice). Consider this view in terms of a non-aggregative model of democratic procedures.

⁸⁷ Rawls seems to have believed this at one point. See “Justice as Fairness” (1962).

(B)

(1) X prefers that A be done, because X believes that A is just (or good).

(2) Y prefers that not-A be done, because Y believes that not-A is just (or good).

There may be grounds to privilege one preference over the other one, if for instance (a) one of their beliefs about justice is true, (b) it is known by someone which one, and (c) there is a consensus of reasonable persons about which one it is. Political liberalism suggests that (a) and (b) may well be the case. But a democratic procedure cannot assume (c). This being so, the fact of reasonable pluralism arises, even if we grant (a) and (b). Thus, political liberalism does not necessarily deny there is some truth about justice, or that some one knows it. It denies only that “the truth about justice” could be entered legitimately into political justification without attending to the constraints imposed by reasonable pluralism.

The cognitive model of democratic procedures does not suggest there is no truth about justice. Nor does it suggest that no one knows it. In fact, both X and Y indicate at least they believe they know what justice is in voting as they do. And there is no reason to rule out the possibility that one of them may be correct. If we think of the underlying dispute about justice in substantive terms, we might reach the conclusion that a duty of X to obey Y or *vice versa* would arise, only if one of these views is substantively correct. Consider the additions of (C3) and (C 4) below.

(C)

(1) X desires that A be done because she believes it is just (or good).

(2) Y desires not-A be done because she believes it is just (or good).

(3) A is just (or good).

(4) X knows A is just (or good).

Assuming that X and Y both desire the good, and that A *is* good; it seems that what Y *really* desires is A. Therefore, if X desires A, and A *is* good (i.e. correct), Y *should* desire A even if she does not. The significant addition here is the contention that X knows what the good is. If democratic procedures are construed along the lines of a correctness theory (where we might understand X as the majority), what Y believes to be good drops out as significant. Her deference to X is justified on the basis of X's knowledge of what is good. However, in this case, we have exited the procedural view. We have done so because we have made the deference of Y to X rely on X's claim to know what the good is; thus on the claim that X, in this case, is the expert.

However, Y voting as she did seems to mean that she also believes X is not the expert. Believing this, she could incur no duty to obey X based upon X's expertise. It would nullify her vote. Not only would this be a contradiction, we would exit the procedural framework which assumes the knowers are not sufficiently known (Estlund 1993, 71). So even if the majority correctly grasps the truth about justice, the duty to obey could not arise from that fact so long as one is committed to the procedural (indeed a constructivist) framework.

The claim "A is good" (C3) does not seem, then, to have a place in the formulation of legitimate democratic outcomes unless it is viewed through the constraint of reasonable pluralism and political constructivism generally. The claim "X knows A is just (or good)" (C4) does have a place. However, its role is clear only when contrasted with Y's view. That is, we cannot include it as part of the procedure without recognizing that it is disputed. The reason is not that A is not or may not be good. It could be. In

addition, someone may know that it is good. It is just that it is not known who it is. Thus, *who knows what it is* can be reasonably disputed. I understand this claim to be reasonable constraint on knowledge claims. The dispute about the “know-ability” of knowers gives rise to the fact of reasonable pluralism. But on this reading, the origin of this fact is neither metaphysical nor skeptical. In this regard, we may view it as an epistemic constraint without being skeptical about the good or its “know-ability.” Now we have to see how this view of the role of epistemological premises in democratic procedures influences the justification of the duty to obey.

The fact of reasonable pluralism is meant to serve as a guide to what cannot be reasonably rejected — hence to the justification of a duty to obey under conditions of pluralism. However, if it can be reasonably rejected, it cannot perform this service. As suggested, we may understand the fact of reasonable pluralism as a political reason with normative weight (*qua* inferential norms) within the scope of the “basic structure.” This is seen most clearly when it is understood as a product of the fact of oppression. Misak and Sandel suggest the fact of reasonable pluralism (as a principle with normative political bearing) can be reasonably rejected on epistemological and moral grounds.⁸⁸ However, on the reading above, the fact of reasonable pluralism may be understood as an epistemological premise. Doing so would add the epistemic criteria required to justify a duty to obey democratic outputs without illegitimately privileging any substantive view of justice.

The duty to obey does not arise directly from a restriction it places on knowers. Rather, it arises because of the restrictions placed on political outputs. These outputs may or may not be correct. Moreover, they may or may not be *known* to be correct. Whatever

⁸⁸ I will discuss these arguments in more detail in the next chapter in the context of democratic deliberation.

the case, their correctness does not provide a reason to obey. If this is so, their incorrectness does not provide a reason to disobey. Thus, the truth of the output is not a sufficient reason to sacrifice one's own judgment when one is in the minority. One could not reasonably object, then, to a procedure formulated on the basis of the fact of reasonable pluralism since one could not reasonably reject the fact of reasonable pluralism. If one could not reasonably object, then, a duty to obey arises for democratic procedures given appropriate epistemic criteria.

This understanding of "epistemic" does not refer to any substantive features of the good. If it referred to substantive features of the good, then, the conception of legitimacy would be based on a doctrine about which there is some dispute. Rather, "epistemic" refers to the quality of certain kinds of reasons in the justification of political procedures. The epistemic content of the fact of reasonable pluralism, then, has to do with the fact of disagreement about who knows what the good is. Again, this is not a dispute about there being a good, since we may assume there is. It is not a dispute about the fact someone knows it since both the majority and minority voters may assume they do. But what it is and who knows it is disputed. So no duty to obey would arise for Y on the basis of X being correct about what justice is.

8. Conclusion

This conclusion is enlightening with respect to the criticisms lodged against political liberalism by both Sandel and Misak. Both criticisms have moral and epistemological motivations. Both seem to view political liberalism as illegitimately privileging itself. Thus, it invites an internal criticism of political liberalism. And both seem to view political liberalism as needing to say more about truth.

Democracy begins with the fact of disagreement regardless of the model used to interpret the nature of its inputs and outputs. Democratic legitimacy, however, is a moral notion; and it cannot avoid introducing the idea of a moral good into its conception of legitimacy. So we may conclude the following: (1) aggregative models are an inadequate basis for a theory of democratic legitimacy; (2) any theory of legitimacy must include epistemic constraints; (3) epistemic constraints do not entail a substantive account of justice; (4) the fact of reasonable disagreement (as an epistemic constraint) is a key normative concept. The epistemic features of democracy, then, may be understood as constraints on the objects that can be pursued by political means. But if Estlund is right, this view is no more a form of skepticism than it is a substantive doctrine of justice. It is more robust than the former, but more modest than the latter.

There is one final point to make. Epistemic Proceduralism seems to generate a duty to obey democratic procedures independently of a concept of democratic deliberation. Thus, deliberation does not seem necessary for political legitimacy even if it is desirable on other grounds. Perhaps this is actually the heart of the critiques of liberalism produced by democrats like Misak and Sandel. If this is so, the criticism will be that liberalism puts the cart before the horse. In accounting for political legitimacy as determined independently of and prior to deliberation, liberalism (including political liberalism) makes the idea of political legitimacy foreign to actual political practice. Actual practices of deliberation should inform our view of what is legitimate, rather than our abstracted view of legitimacy informing the structure of deliberative practice. In any case, there are apparently two distinctive views (at least) of what constitutes epistemic criteria in democratic procedures. In the next and concluding chapter, I will sharpen the

differences between the two epistemic views of democratic justification by addressing the role and structure of deliberation in democracy in relation to legitimacy from each point of view.

CHAPTER V

DEMOCRATIC DELIBERATION AND POLITICAL LEGITIMACY

1. Deliberation and Legitimacy

In general, the question “Why deliberate?” is about what motivates or what should motivate deliberative acts. To this extent, the question supposes an answer to another question, namely about the ends of deliberation. Yet, it is one thing to deliberate as an individual, and another to deliberate in and on behalf of groups. Political deliberation, then, seems fraught with specific complexities and conditions. Pluralism, indeed reasonable pluralism, is one of these. Because of this complexity, the *apparent* fruitlessness of deliberation, and disputes about the appropriate ends of democracy some theorists (e.g. Schumpeter and Posner) have essentially eliminated deliberation as part of any plausible normative theory of democratic legitimacy. Others (e.g. Cohen 1999) have claimed that deliberative democracy, far from being implausible or counter-productive, is a fundamental (non-derivative) political ideal. Articulating the structure of this concept and its normative status remains difficult.

In Chapter 3, I noted that deliberation poses a certain kind of problem for the Kantian account of democratic legitimacy. Kant’s view makes it seem as if a political authority is legitimate whether it is democratic, deliberative or not. That is, he seems to claim that there is a duty to obey in any case. This is because the requirements for obedience do not stem, in his view, from facts about “external” political procedures but instead from moral duties imposed upon political subjects. In this case, the criteria for

legitimacy should be understood as established prior to and independent of any political act.

Two kinds of problems arise for this view. First, if legitimacy is derived prior to and independent of the concept of deliberation (and any substantive theory of justice), it is possible that the concept of the former actually impedes the development of the latter. If the criteria for legitimacy can be established independently of deliberation, then, the relation between deliberation and legitimate outcomes is distorted. Indeed, in some cases, it seems as if the kinds of moral constraints imposed on citizens precludes the establishment of conditions under which reason could operate freely in the way Kant himself believed it should. Chapter 4 showed how it may be possible to extend this kind of criticism to political liberalism, but also how it may be possible to modify political liberalism in a way that meets it.

Another problem might arise even if we grant the possibility of democratic deliberation. This problem centers on the public/private distinction; and *how* public deliberation should be framed. In particular, without some further determination of democratic ends, one may wonder what kinds or quantities of input are necessary for meaningful deliberation. This question does not have to do with the possibility of deliberation so much as its content.

Criticisms about the priority of deliberation in liberal conceptions of democratic legitimacy as well as the content of deliberation may both be viewed as criticisms of the liberal acceptance criterion and its status in political justification. To remind the reader, the liberal acceptance criterion was noted in Kant's writing and a version of it was developed in Chapter 4 in the context of political constructivism:

Liberal Acceptance Criterion: A principle or doctrine is admissible into political justification if it is acceptable to *reasonable* citizens (*qua* reasonable citizen), and their reasonable acceptance is all that is required.

The criticism about the priority and role of deliberation in producing legitimate outcomes focuses on the criterion's apparent lack of epistemic criteria. The criticism about the inputs of deliberation focuses on the standards that this lack does or does not raise for public reason, and the consequences for meaningful democratic deliberation. Each one may be represented clearly:

Criticism 1: The liberal acceptance criterion is a purely procedural criterion. Thus, as a non-substantive principle, it cannot establish political ends except on the basis of the prior agreement or consent of citizens. The "agreement" of citizens is not a sufficient normative standard. Even if we qualify "agreement" as "reasonable agreement," there is nothing about which citizens necessarily agree that could form the basis of a normative political consensus. Political liberalism must assert either a substantive moral theory in which case it would be internally incoherent. Or, it must admit to being a weak normative theory.

Criticism 2: The liberal acceptance criterion erects a strong distinction between the public and private spheres. The distinction requires that citizens forego their substantive moral beliefs in the public sphere and adopt the formal language that all reasonable persons can accept (e.g. the language of rights as opposed to goods). The inadmissibility of the various conceptions of the good impoverishes the public sphere, along with the content of democratic deliberation. The participation on which democratic legitimacy depends will be lost.

If the liberal legitimacy criterion is sufficient as a normative political criterion, each of these objections must be met. In particular, it must be shown that it could justify a duty to obey. To do so, the criterion must have epistemic features.⁸⁹

In this final chapter, I will define two epistemic views of democratic legitimacy. Both views have been introduced already – Epistemic Proceduralism and Pragmatic Deliberativism.⁹⁰ Though, I believe these views are deeply compatible, I will defend the former against the latter on a particular point. This defense does not reduce to the claim that one view is right and one is wrong *simpliciter*. Rather, I will show that one of these offers a superior justification of the duty to obey democratic outcomes. Thus, it better justifies and explains what I have argued all along is an essential feature of the idea of political legitimacy (viz., a duty to obey).

Nevertheless, this view confronts obstacles of its own. Having apparently established criteria for legitimacy prior to and independent of deliberation, it must be explained how democratic deliberation will be motivated and structured as a feature of democratic legitimacy. Otherwise, this approach may be subject to the criticisms that its justification of democracy and its motivation to political participation are both inadequate. I will understand the idea of deliberation here to be appropriate to a political situation defined by the basic problem of reasonable pluralism. To this extent, it is worth pointing out the basic difference between individual and public deliberation.

It is unclear how deep an analogy we can suppose exists between cases of individual deliberation and cases of collective and political deliberation. Because

⁸⁹ Where it is appropriate, I will distinguish between two interpretations of the liberal acceptance criterion (LAC). The non-epistemic reading of the criterion will be rendered, LAC_{ne} while the epistemic reading will be identified as LAC_e. Where there is no point in distinguishing, simply LAC will be used.

⁹⁰ From here until the end, I will refer to the Peircean view developed by Misak and others as “pragmatic deliberativism.” This term is adopted from Talisse (2005, 116).

legitimate political authority grants power to some over others, the outcomes of a legitimate political procedure (unlike one's individual deliberations) must be understood as binding on those who dispute the correctness of the outcome. For this reason, legitimate outcomes (e.g. laws) can be used as reasons for coercion in cases where someone fails to respond appropriately (e.g. obey).⁹¹ In general, then, individual deliberations have to do with the capacity to control oneself, while political deliberation has to do not simply with the capacity to control oneself but with the right to be in a position of authority with respect to others or more or less equal power and political standing.

2. Why Deliberate?

There is a very natural way to answer the question, "Why deliberate?" It is found in Aristotle's *Nicomachean Ethics*. "If, then, having deliberated well is proper to a prudent person, good deliberation will be the type of correctness that accords with what is expedient for promoting the end about which prudence is true supposition" (1142b 33-36). Deliberation, then, is not the "type of correctness" that mathematical reasoning is, even if deliberation is a kind of rational calculation. It is, rather, a way of reasoning practically – reasoning about how expeditiously or perhaps rightly to achieve ends. Thus,

⁹¹ This is not to say that the outcomes of one's individual deliberations are not also normative of choice. One should do what one has good reason to do. However, with respect to political deliberation, the outcomes are binding even when one disputes their correctness or acts contrary to them. In cases of individual deliberation, deliberative outcomes may indeed be normative even if one fails to do what one has better reason to do. I distinguish here between "necessity" and "normativity." That one *should* do something does not mean that one necessarily will do it. "Normativity" must address the problems of the will that would prevent one, for example, from doing what one ought or what one believes one ought (under appropriate conditions). To this extent, one's failures may be classified as *akratic*. However, the failure to act appropriately with respect to political outcomes invites not simply a negative moral evaluation, but the justified use of coercive power against a person or group. So the results of democratic procedures (if they are legitimate) may be said to command the obedience of the minority even if the minority does not believe the outcome is substantively correct. Thus, one might argue that democracy requires the minority to do what it believes to be wrong *simpliciter*. Democracy, according to this view, is not self-consistent and is morally bankrupt.

it is reasoning about what should be done. Consequently, “We deliberate not about ends, but about what promotes ends” (1112b 13). So we deliberate in light of the fact that it is not evident what should be done given various contingencies. Deliberation, then, is about things that could be one way as opposed to another pursuant to ends set by other means; and prudence is the correct understanding of the end of deliberation. So the outputs of deliberation must be evaluated by standards independent of the deliberative act itself. One should deliberate, then, in order to achieve ends determined by other means, provided deliberation is the best way to achieve them.

Under conditions of moral pluralism, the idea of deliberative democracy seems problematic. The problem of pluralism suggests there may be a number of ends that should orient political activity. I have tried to rule out some of these as viable. Stability, I argued, is a worthy political goal; but since it may be achieved by non-democratic as well as democratic means, minimalism does not offer a strong defense of democratic legitimacy.⁹² Legitimacy, then, is a moral and not a positive concept. Consequently, moral goods like “justice” seem to better define democratic ends. However, couching justice substantively in terms of a particular, comprehensive doctrine invites the question (and problem) of which conception of justice affords political legitimacy. This end would for all intents and purposes orient political deliberation.

Democracy imposes hurdles for this solution. As Rawls characterizes the problem of democracy it is that it accommodates a number of reasonable, but “opposing and irreconcilable” doctrines. The fact of reasonable pluralism, on this view, precludes the possibility that these ends could be justified by appealing to an authority as determined within a comprehensive moral doctrine; or that the purported authority specified within

⁹² I am referring here only to the empirical concept of “stability,” not to Rawls’.

such a doctrine deserves special weight or deference. How, then, does democratic deliberation function under conditions of pluralism understood in this way? Many have said that it cannot. Suggesting this problem haunts liberal democracies, MacIntyre writes, “There seems to be no rational way of securing moral agreement in our culture” (1984, 6). Thus, I assume he means there is no way in pluralist societies of a certain type to set the ends that would make sense of deliberative acts. To do so, they must appeal to a particular moral tradition, including perhaps a theological framework. Since liberal democracies eschew these models of authority by definition, they are doomed to collapse under their own weight – if this has not already happened.

Sandel (more moderately) adds that the inability to correctly frame moral and political argument under conditions of pluralism has led to the establishment of the “procedural republic.” But since the earmark of such a republic is the notion that “government should not affirm in law any particular vision of the good life,” public, democratic life has been impoverished of its own goods (Sandel 1996, 4). Echoing MacIntyre, the only way to make sense out of political deliberation would be to do so by a substantive understanding of these shared goods.⁹³ The procedural republic, as a response to pluralism is, on this view, inadequate to answer the question, “Why deliberate?” Asserting no particular good, the procedural republic seems unmotivated to deliberate properly.⁹⁴ From this lack of motivation, we should expect lack of political participation. Lack of political participation threatens democratic legitimacy along with

⁹³ This is not to say that Sandel wholly endorses MacIntyre’s view. If nothing else, Sandel’s view is narrower in its scope.

⁹⁴ I am assuming the complicity of what Sandel calls the procedural republic with the liberal acceptance criterion.

the moral and epistemic goods that flow from it.⁹⁵ A viable conception of political legitimacy, then, must then motivate political participation of particular kinds – not simply voting, but deliberative acts as well.

Two claims can be distinguished in views like Sandel’s and perhaps MacIntyre’s:

(1) Making sense of deliberation as a meaningful activity (political or otherwise) requires supposing a terminus or good at which it aims.

(2) Any terminus will necessarily be defined by its role in a substantive (or comprehensive to use Rawls’s characterization) conception of the good.

The first contention seems a necessary part of any understanding of a deliberative procedure. It says simply that the procedure must be constructed according to some moral values, and consequently epistemic values. The second contention is, however, more controversial. Political liberalism rejects (2) but does not necessarily reject (1). One may claim that the trouble with this stance is that in accepting (1) but rejecting (2), it is not clear what the common good is, and thus where deliberation should aim.⁹⁶

The problem for the view that accepts (1) but not (2) lies in how to authoritatively define the evaluative standards of deliberation without violating the liberal acceptance criterion. Without such standards, deliberative outcomes would have no discernible epistemic value; and could not effectively track the truth about what should be done. Problems about the motivation to deliberate would arise. On the other hand, the deliberative ends could not be established by the same deliberative procedure that tracks them. They may, however, be established by some other procedure.

⁹⁵ Later I will discuss “participation” more technically in terms of “political input.”

⁹⁶ As we will see, this criticism can become more complex when we add the claim that political liberalism covertly asserts a substantive view of the good. This criticism is not simply logical, but moral as well.

This is the point, for instance, of distinguishing between actual and ideal deliberative procedures. An ideal deliberative procedure would, as Cohen writes, clarify “the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens” (1999, 72). But in a sense, the notion of an ideal deliberative procedure pushes the problem back another step. Even though distinguishing between two kinds of procedure may meet a certain logical difficulty in the definition of democratic ends, the ideal deliberative procedure must be justified. Otherwise, democratic deliberation would be indefinitely regressive. Thus, there must be an epistemic constraint imposed on the selection of deliberative ends.

As noted earlier, Sandel criticizes the philosophical foundations of the procedural republic to the extent it assigns the priority of justice on the basis of procedural reasons. But this means the assignment would be non-epistemic. Thus, a defense of the liberal view must see whether or not the liberal legitimacy criterion can meet the demands of epistemic criteria without violating the restriction on the appeal to substantive moral theories. Showing that it has epistemic features is central to its justification.

Deliberativists who interpret the acceptance criterion as LAC_{ne} have seen an advantage in framing political legitimacy in terms of democratic deliberation, not the other way around. Since deliberation is truth-oriented, specifically to the truth about what should be done, and the discovery of truth requires numerous inputs from a variety of sources, it is natural to assume that democracy is a necessary social condition for deliberation. Pragmatic Deliberativism adopts this position. To this extent, the pragmatist must defend an account of deliberation. She must then show that democracy flows best

from it – that democracy comports with deliberative ends better than other possible political procedures. Epistemic Proceduralism, on the other hand, must offer a defense of the liberal acceptance criterion that demonstrates its epistemic features.

3. Two Epistemic Conceptions of Democracy

The idea of a deliberative democracy, Cohen argues, is not a derivative ideal. It is, instead, “a fundamental political ideal,” and is itself normative for democracy (Cohen 1999, 67). Establishing the notion of a deliberative democracy as a normative ideal requires accepting the epistemic requirements of deliberation. In the course of giving such an account, we should be able to explain why democrats should deliberate at all; and to make some headway in answering the question of how they should deliberate *as democrats*.

Both Epistemic Proceduralism (EP) and Pragmatic Deliberativism (PD) view themselves as “epistemic.” That is, each one understands itself to appropriately recognize the epistemic condition on democratic legitimacy. Thus, each one understands deliberation as oriented by a procedure independent moral standard. The pragmatic deliberativist contends, however, that Epistemic Proceduralism begs the question against the non-democrat, jeopardizing itself as a normative theory of democracy. PD bases this claim on the fact that EP restricts the selection of and priority of ends on the basis of the liberal acceptance criterion. But the liberal acceptance criterion is motivated by a presumably un-rejectable moral fact – the fact of reasonable pluralism. If it could be reasonably rejected, then, the liberal criterion would be an unsuitable basis for political legitimacy.

The Pragmatic Deliberativist suggests there is reason to think it could be rejected. This is because it presupposes a moral standard whose justification would require the sort of substantive account the political liberal rejects, or the sort of procedural account that is weak. Thus, it is internally incoherent or weak against non-democratic conceptions of the good. The non-democrat after all

is not moved by Estlund's [understood here as representative of EP] consideration that no philosopher king will be able to win the consent of large populations; the consent of the foolish and ignorant is, on the epistemarchist's view, of course unnecessary for political legitimacy. For the epistemarchist, the sole requirement for legitimacy is knowledge (Talisie 2005, 103).

So the non-democrat is by definition not concerned to meet the requirements of the liberal acceptance criterion. According to EP, certain views will be clearly disallowed in setting the agenda based upon the reasonableness (considered normatively) of the acceptance criterion. According to the Pragmatic Deliberativist, there may be no non-question begging reason available to the political liberal.

Of course, it is not as though Pragmatic Deliberativism admits all moral doctrines into political justification. It is a normative theory that is "epistemic" in the sense that it disqualifies views that undermine truth-oriented, deliberative acts by the imposition of speech or communicative restrictions. Thus, the question for PD is not whether a doctrine meets the standard of LAC. Instead, it is whether or not citizens are willing to subject their views to the requirements of deliberation, hence to the discovery of what is best to believe about what should be done. Citizens who are unwilling to subject their views to deliberation undermine it as a political norm. If EP undermines such acts, EP and PD are (in this respect) mutually exclusive. PD treats EP as a non-epistemic view. The justification of the liberal acceptance criterion requires justifying the normative bearing

of the fact of reasonable pluralism. But in order to address PD, it must show that the liberal acceptance criterion is, at least in one important way, epistemic without requiring the type of consent PD attributes to it. In this vein, consider a possible response by the Epistemic Proceduralist.

Assume for a moment that there is, in fact, a class of citizens who are experts. This claim does not entail that experts are in accord with each other, not at least any more than are the experts in accord with the non-experts. Thus, at every level of political input we may plausibly believe there to be disagreement about the good, hence about what should be done. Given the fact about reasonable disagreement over who knows what is good, the only decision-making procedure for which citizens might have an obligation to obey would be one that incorporated the recognition of this fact. Otherwise, legitimacy would be based on a view of the good that can be reasonably contested and perhaps rejected. This claim is consistent with the view that one has a duty to obey only if the procedure meets some epistemic criteria.

Pragmatic deliberativism assumes that the problem with Epistemic Proceduralism derives from its emphasis upon agreement as opposed to accepting more readily the fact of disagreement. About this assumption, Estlund writes, “The problem about knowing the knowers, is not that no knowers will be *agreed* upon, but that empowering any proposed knower *will leave some people without the reasons they are individually owed*” (1993, 88). The epistemic constraints placed upon democratic procedures are not intended, then, to produce agreement about who the knowers are; but to restrict the conditions under which a duty to obey democratic outcomes can arise. In particular, it restricts the range of citizens to whom reasons are owed — the class of all reasonable citizens when they are

reasonable (Estlund 1993, 87). One should be a democrat, it seems, because it is the only (or at least the best) way to satisfy this criterion of justice – the only way to give each what they are owed without assuming knowledge or agreement about experts, even if such experts exist.⁹⁷ Granted, the liberal acceptance criterion does not say *what* justice is. It says only that whatever it is, it must recognize the epistemic constraint of reasonable pluralism as a fact about reason (or reason-giving) as such. An outcome is legitimate if there is sufficient reason to choose it. We have sufficient reason to choose it, if a majority desires that it be enacted.

The contention that Epistemic Proceduralism begs the question against the non-democratic, then, may be met with the following claim: The non-democrat is owed reasons only if she is reasonable. She is reasonable only if she accepts the fact of reasonable disagreement about who the knowers are. “Acceptance” here cannot be understood as a psychological description, but instead as an account of what one could not reasonably reject. What cannot be reasonably rejected is the constraint on the determination of ends. Still, this could not be a reason for the non-democrat; but according to Epistemic Proceduralism it does not seem that the non-democrat (as unreasonable) is among those who are *owed* reasons. In this light, it is not completely clear that the epistemic criteria for which Epistemic Proceduralism argues justifies democratic authority, even if it does provide some guideline for determining who is a democrat and who is not. To this extent, it would not justify a duty to obey democratic outputs. The justification of the duty to obey depends upon whether or not the liberal legitimacy criterion is justified as a criterion for selecting ends – indeed for prioritizing

⁹⁷ If there is agreement about who the experts are, presumably one would know enough what the expert knows for this agreement to be beside the point.

justice as the most basic evaluative criterion for democratic outputs. It is justified if it is acceptable to all reasonable citizens, and if (as Estlund writes) *it is true*.⁹⁸ The statement of this principle shows what is required for the acceptance criterion to be fully justified. However, since it is not clear LAC is true, it is not clear that it has been justified.⁹⁹

4. Deliberation and Legitimacy

Seizing on this kind of criticism, Misak seems to believe that the LAC is simply LAC_{ne}. Since it impacts negatively on the possibility and motivations for deliberation, it undermines democratic legitimacy. Enlisting Benhabib, she contends that “the Rawlsian restriction would rule out as illegitimate the many struggles against oppression which try to redefine what is considered private into matters of public concern” (2000, 28). So she claims that political liberalism excludes the kinds and quantities of political input that would make outcomes legitimate. LAC_{ne} imposes restrictions that take certain proposals about the good off the table *a priori*. And again, referring to Sandel, she claims that taking the religious and moral controversies off the public agenda results in a society – or at least a political society – that is vacuous and devoid of the general goods these various conceptions or that their inclusion in deliberative practices might afford. Democracy is justified as a social choice procedure if it sets the conditions under which such deliberation might effectively pursue truth about what should be done. Thus, it must observe certain requirements about the kinds and quantities of allowable political input.¹⁰⁰ Pragmatic Deliberativism, she claims, does not beg the question against the non-democrat by restricting her input *a priori*. Rather it binds both democrat and non-

⁹⁸ This is the force of MAC (the Modified Acceptance Criterion) as described in Chapter 4.

⁹⁹ In fact, however, there may be reasons to think that reasonableness is a sufficient normative criterion for political justification. This reason is discovered in the fact of reasonable pluralism under as an epistemic constraint on justification.

¹⁰⁰ I will discuss these requirements in some detail in the final section.

democrat to the same epistemic standards. It is not epistemologically plural, even if it is morally plural. Securing the conditions under which deliberative acts can occur, then, may be understood as one's lot as a citizen whatever one's general moral perspective.

The general problem of democratic legitimacy, as discussed in Chapter 3, is how to make reason operant in (and as constitutive of) the public sphere. If the cognitive functions of persons cannot operate optimally while under the influence various distortions of custom, local political realities, et. al. then something must be said about the conditions under which practical reason can operate. Thus, the public use of reason seems to aim at achieving sound practical judgments, through eliminating or mitigating various cognitive distortions.¹⁰¹ In "What is Enlightenment?" Kant writes that citizens should have the "freedom to make *public use* of one's reason in all matters" (1784, 55). He adds, "The *public* use of man's reason must always be free, and it alone can bring about enlightenment among men ..." (1784, 55). Kant is making a plea for the public use of practical reason, and determining the conditions under which it is possible, as a means to reaching correct conclusions. On the other hand, if certain critics are correct, the formal treatment of practical reason has consequences that are, as Misak claims, unrealistic and undesirable.

The central impediment to deliberation and its legitimating properties, according to Misak, is the public/private distinction that seems to follow from the legitimacy criterion. As conceived within liberalism, the claim goes, it renders the public square relatively empty of citizens. Consider Kant's effort to articulate this distinction.

In view of this, he is not and cannot be free as priest, since he is acting on a commission imposed from outside. Conversely, as a scholar addressing the real public (i.e. the world at large) through his writings, the clergyman making *public*

¹⁰¹ These distortions may derive from social and political institutions and practices inasmuch as individuals.

use of his reason enjoys unlimited freedom to use his own reason and to speak his own person” (1784, 57).

Kant suggests the “priest” may check his cross at the public door. However, it is not clear whether this is a *requirement*, or merely a possibility. If it is merely a possibility, it says only that when speaking publicly one is not constrained by the traditional trappings of one’s vocation, employment, or belief. One may speak freely.¹⁰² In itself, this does not seem to preclude one from speaking publicly *as a priest*, or other type of civic and religious leader. The private sphere can impose obligations upon persons as members of an historical community that the public sphere cannot impose upon citizens as members of a democratic polity.

Kant admits that at some point there could be confrontation between public and private may producing a kind of ethical conflict in which the clergy or other traditional authority must decide for whom she speaks. But I would assume based on the views of Misak and Sandel that the interpenetration and possible confrontation between the public and private spheres is actually what they are after. Again, referring to Benhabib’s writings, Misak claims, “any space where people act together and where freedom can appear is public space. Such space needn’t be institutionalized. Any demonstration, secret meeting of dissidents, etc., counts as public on this account” (2000, 121).

However, at least some articulations of the acceptance criterion seem compatible with this possibility. In particular, it is not obvious that various views of the good are taken off the public agenda *a priori*. Rather, the restriction of public reason is upon traditional forms of authority, not upon persons who have been formed in one way or

¹⁰² To speak “freely” is not to speak arbitrarily or without appealing to standards of reason. Rather, the existence of the public sphere is predicated, as suggested already, upon the possibility of eliminating cognitive distortions, limiting the role of habituation, et. al.

another by them. More importantly, the justification for these restrictions is epistemic, since it aims to correct for various kinds of cognitive distortion that impede the function of reason aimed at correctness.¹⁰³ This reading of the public/private distinction suggests what it claims (or needs to claim) is weaker than many current criticisms suppose. The weaker claim is only that the point of the public sphere is to offer the opportunity for one to speak “freely” as a rational citizen even when one is a *de facto* practitioner of a historical practice. Whether or not this raises further ethical questions for the practitioner is a contingent matter, and will depend upon many features internal to those practices, but not upon any features of the public sphere as such. There is, then, no hard and fast line between public and private here either.¹⁰⁴ Since it seems to grant most of what the pragmatic (Misak) or civic republican (Sandel) deliberativist wants, it is more difficult to frame a criticism in these terms. Thus, *Criticism 1* and *Criticism 2* of LAC can be handled by the same reason. That is, if the liberal acceptance criterion has epistemic features (in the form of constraints) it can handle the claim that deliberation must aim at a procedure-independent moral standard. In addition, it can handle the requirements for participation imposed by deliberative procedures.

I have not yet justified LAC_e directly. I have discussed only the kinds of responses that could meet challenges sure to arise regarding the relation of LAC and democratic deliberation. In the next section, I will turn to a more direct justification.

¹⁰³ This much was suggested in Chapter 3 with specific regard for Kant’s theory.

¹⁰⁴ Estlund seems to claim this, too, when he writes, “Marking off a category of issues that are controversial and outside of public reason will not establish that *assertions* of such views are precluded by public reason, since such assertions introduce the public reason that certain putative experts believe them” (1993, 91).

5. The Epistemic Role of the Liberal Acceptance Criterion

Deliberation pursues a good. Moral pluralism supposes the possibility of numerous substantive accounts of the moral good. Thus, deliberation seems to be a meaningful activity only if we can determine which good(s) it should pursue. As already discussed, the pursuit of a non-moral good (e.g. stability) produces no justification for democratic deliberation. This means that deliberation must aim at a moral good (e.g. justice). But if deliberation aims at some moral good, it also seems necessarily to require epistemic criteria. The problem in this case is the plurality of accounts, including the apparently incommensurable priority assignments for justice as a moral good. So if LAC can be read as LAC_e, not simply LAC_{ne} it must address the problem of this incommensurability without renegeing on the epistemic requirement.

Consequently, it must steer between two avenues of criticism: If the political liberal avoids asserting substantive conceptions of the good in the name of legitimacy, she strips deliberation of its content. In this case, she de-populates the public sphere and its goods and eliminates the sense of deliberation in democracy. On the other hand, if she asserts a substantive conception of the good, she violates her own criteria for legitimacy (Wenar 1995).

Whatever procedure to which we appeal in setting deliberative ends for the purposes of evaluating legitimate outcomes it is necessarily constrained by epistemic criteria. Otherwise, the case for deliberation would be weak. This being so, the case for democratic legitimacy would be, too. If these claims are on target, then theory of legitimacy must articulate its epistemic features. I have suggested there is more than one way to approach the problem.

A corrected view of political liberalism claims that LAC is formulated on the basis of the fact of reasonable pluralism. But it understands LAC as LAC_e. It could be justified in claiming this only if the fact of reasonable pluralism has epistemic features. In Chapter 4, I claimed that it does. These epistemic features are evident (as constraints) upon recognition that a substantive claim “A is good” cannot be entered into political justification unless it can be entered without controversy. This is not because of the controversy is over its truth. Rather, the controversy is about who knows what the good is. More importantly, the fact of reasonable pluralism could not, as an epistemic constraint, be reasonably rejected.¹⁰⁵ Thus, only a procedure constrained by this principle would produce a duty to obey. The key, however, is that the duty to obey is generated under conditions of pluralism – conditions in which there is a variety of reasonable but “opposing and irreconcilable” doctrines.

The epistemic import of the fact of reasonable pluralism has to do with the determination of *political ends* – what they should be formally, but not what they are substantively. In short, it operates as a guideline to help identify the correct *political* target under conditions of reasonable pluralism. Identify the correct target would, after all, be a part of “getting things right” (Estlund 1993, 80). Thus, the fact of reasonable pluralism operates as an epistemic constraint on any claim to base legitimate outcomes on a disputed comprehensive view. As suggested earlier, this view does not entail the claim that there is no political truth, or that there is no one who knows. So it does not endorse the idea that democratic deliberation can be unhinged from epistemic criteria. The role of epistemic criteria has to do with setting the correct political ends (under conditions of

¹⁰⁵ Admittedly this claim is sustainable only if the political constructivist point of view is sustainable.

reasonable pluralism) in order to construct the conditions under which intelligence may be applied to cognitive moral problems at hand.

Is there any way to sort out which epistemic view most nearly hits the mark with respect to democratic legitimacy? I think there is; and it revolves around the justification of a duty to obey democratic outcomes which I have understood all along as necessary to their legitimacy. According to Misak, her Peircean pragmatist deliberative view of democratic legitimacy is “meta-ethical.” That is, “It is an exploration of how morality and politics fit into our world-view. It is an argument about why our substantial debates in morals and politics have the shape they do” (Misak 2000, 7). However, it seems we might agree with everything Misak writes about deliberation – and largely, I do – but still not have justified a duty to obey democratic procedures or their outcomes as a category of legitimate commands. The political deliberation, it seems, could still have a sufficiently good reason to reject outcomes a legitimate when they do not satisfy her conception of the good. I believe this is because the meta-ethical analysis blots out the kinds of ethical differences under conditions of reasonable pluralism that sustain the *sense* of a *duty* to obey as part of the idea of legitimacy.¹⁰⁶ The problem of establishing a duty to obey is not simply the meta-ethical problem of understanding generally how political and moral deliberation fits into our lives. Rather, it is the ethical problem of how to treat different ends under these conditions.

Central to the concept of legitimacy is the justification of the duty to obey under conditions of moral pluralism. Any failure to justify this duty, then, diminishes the idea of legitimacy. Thus, when Rawls writes that democratic societies are marked by a

¹⁰⁶ Misak herself notes this kind of criticism raised by Korsgaard that such views “make sense of the complexity of morality at the expense of depriving morality itself of sense” (1997, 320).

diversity of “opposing and irreconcilable” doctrines, he is not pointing simply to a fact about democratic society. He is pointing to a fact about reason under democratic conditions. Pluralism is not, then, only a “cultural” problem. It is a problem internal to reason – including practices of reason-giving and evaluation. It is the problem of not being able to commensurate all goods under a single head as a basis for rational choice. The idea of political constructivism restricts the appeal to justice in this regard. The justification of a duty to obey, then, should be viewed as an ethical problem, rather than a meta-ethical one. Justice, then, is the prior normative ideal for evaluating deliberative outcomes if the fact of reasonable pluralism cannot be reasonably rejected. This need not mean that it is the only one. There may be a range of deliberative outcomes that are possibly correct in a substantive sense. Thus, the principle of justice first determines which of these are legitimate.

The reason to deliberate is to reach outcomes that are substantively better than they would be without having deliberated. Surely, any epistemic view must accept this. However, the reason for adopting a procedure is not necessarily also the reason that makes its outcomes legitimate. One adopts a screwdriver in order to tighten screws. One could also stab someone with it. However, the stabbing of a person is legitimate only if there are other reasons – reasons that are independent of those for which one initially adopted the pointy instrument. Thus, to say that the reason to deliberate is to achieve good outcomes says nothing about why the outcomes of deliberation are justified. To do so, would make nonsense of the appeal to a procedure independent moral standard. For this reason, political liberalism rules out privileging the moral standard of particular comprehensive doctrines as legitimating political outcomes. Thus, it faces the problem of

constructing such a procedure independent standard without constructing “the truth.” The difficulty for an epistemic view of deliberation, then, lies in how to talk about the substantive quality of deliberative outcomes without again inviting the charge that it illegitimately (and perhaps covertly) privileges a substantive conception of the good, or that deliberation is irrelevant to legitimacy. In their views of democratic deliberation, I will argue that PD and EP generally converge.

6. Equality *versus* Quality

No deliberative procedure could have good outcomes unless it is one that tries to account for all the relevant facts. And the only way to do that is by insisting upon “the inclusion of those who are or might be excluded in deliberation” (Misak 2000, 7). If this principle is observed as a *methodological principle*, we will not suppose that the “outcomes of a deliberative democratic process are true, but it will suggest that such outcomes are legitimate” (2000, 7). The reason for their legitimacy, however, has to do not only with the content of deliberation but also with the quality of its outcomes given a breadth of input. Since Misak claims this principle is “methodological,” I assume she does not mean that legitimacy depends upon the substantive equality of political input. Indeed, she means only that a greater quantity of input is epistemically better than less.

Misak contends that EP – if it adopts the outlook of political liberalism – restricts inputs without justification. Consequently, it fails as an epistemic justification of democracy. I have suggested that the LAC_e entails no such restriction. However, an epistemic conception may still call for inequalities of input, even if it does in principle assert that more input is epistemically better than less. It must be shown, then, why these inequalities of input are justified.

Whatever the specific differences over the role played by epistemic criteria with respect to legitimacy, Pragmatic Deliberativism and Epistemic Proceduralism share similar views of democratic deliberation. In particular, they tend to share the view that democratic equality may be viewed as a principle with epistemic, not simply moral, dimensions. This is because it governs democratic input as conditions under which the outcomes could be sound. However, the principle of equality and the conditions for producing good decisions stand in tension with each other. The liberal acceptance criterion, as discussed in Chapter 4, says that democratic legitimacy supposes the possibility of reasons that cannot be rejected by any reasonable citizen. This criterion functions as a basis for democratic equality. If the achievement of good decisions requires inequality, these inequalities must be justified. That is, we must be able to justify these deviations from equality if equality (here considered as the equality of input) is at least sometimes mutually exclusive with the quality of political outcomes.

Some views assume the relevant justification cannot be made. Dahl, for instance, makes no appeal to the necessary epistemic features of democratic procedures or the quality of their outcomes as relevant to their legitimacy. Instead, he suggests that democratic processes are *themselves* a “rich bundle of substantive goods” (1989, 175). One of these goods is equality. This rich bundle points to a theory of legitimate outcomes. Outcomes are legitimate if they are produced by procedures in which these goods are reflected in some way. An outcome could not be inconsistent with these goods without being illegitimate. So, roughly, outcomes that are not the products of procedures for which substantive equality of influence is not the norm could not be legitimate.¹⁰⁷

¹⁰⁷ As I have suggested all along, then, the standard test for the legitimacy of democratic outcomes appeals to their consistency with the values expressed in or implied by the procedures.

Dahl's view, then, is not epistemic. That is, it does not claim that legitimacy depends on the epistemic value of democratic procedures. Rather, it depends upon the consistency of the outcomes with certain substantive moral features these procedures themselves possess. Since the central good is equality, Dahl's view of legitimacy and those like it outline a broad avenue for debate and deliberation about outcomes relative to their tendency to secure or undermine equality as a basic democratic value. There are many positions one may take up within this outline. This is particularly evident in debates about wealth distribution and political influence. Indeed, some have argued that there can be no democratic legitimacy unless there is substantive economic equality or substantive equality of political influence (Christiano 1996, Johnson and Knight 1999). Call the latter view egalitarianism about political influence.

Other positions, however, are formalist. Formalism about political equality, according to Estlund, is the view that "accepts equal formal political rights and liberties, but rejects the goal of equalizing substantive political influence" (2002, 177). In part, this is because there are number of different kinds and levels of political influence – different ways of influencing political outcomes with different degrees of importance and different kinds of currency. We cannot assume that every form of input should be subject to precisely the same constraints – not at least if we are interested in the quality of political outcomes.

The immediate concern about this view is that including the epistemic quality of the procedure in a conception of political legitimacy requires the neglect of equality. Estlund suggests as much when he writes, "proper attention to the quality of democratic procedures and their outcomes requires that we accept substantive inequalities of political

input ...” (2002, 175). So the pursuit of quality outcomes depends upon the acceptance of substantive inequality. This thought raises the specter of a justification that appeals to expertise. In this case, EP formulated on the basis of LAC_e, violates its own requirements.

Estlund claims these inequalities are justified, however, if it is “in the interest of increasing input overall” (2002, 175).¹⁰⁸ If he is correct, we may reject the claim that attention to the quality of political outcomes necessarily entails the neglect of equality or that it appeals to experts in any way that violates LAC_e. An epistemic view holds, then, that substantive equality of input is not necessary to produce legitimate outcomes. Indeed, it may stymie what is required for meaningful deliberation – that is, political deliberation in which the practices and principles involved improve the output.

An epistemic view of democratic procedures may be characterized by these tenets:

- (1) The substantive quality of political outcomes is relevant or necessary to political legitimacy.¹⁰⁹
- (2) Substantive equality is neither sufficient nor necessary for political quality.
- (3) Substantive inequality *is* (often) necessary for political quality.¹¹⁰

The point of the epistemic view is not to disregard equality. The point is to suggest the *quality* of political outcomes cannot be ignored since this, too, may effectively negate the legitimacy of democratic procedures. The “equality of input,” however, “may come at the cost of quantity,” and “both are important to the quality of the process and its outcomes”

¹⁰⁸ This claim assumes we may make a meaningful distinction between substantive equality and the concern for equality overall where the latter does not require the former. Wolff (1977) critique the general approach of the difference principle as a justificatory principle or as justified.

¹⁰⁹ I believe Estlund takes up the slightly stronger but still moderate position that quality is necessary to legitimacy. I will discuss this point in subsequent paragraphs.

¹¹⁰ By “substantive inequality,” I mean simply the inequalities of wealth, political influence, and the like that exists and persists between citizens.

(Estlund 2002, 177). So the emphasis on one does not entail or require the neglect of the other. I will conclude with a brief argument showing why this is so.

A political input, as defined here, represents an opportunity for political participation. Voting, then, is a kind of political input. But so is making campaign contributions, writing one's representative, or deliberating in the various forms available.¹¹¹ Voting is a "lower level" input in which we can expect an equality of available input represented by the allotment of one vote per eligible voter. Since everyone has the same quantity of input, there is a substantive equality of political influence over the outcome among participants. Suppose now that we increase the amount of available input, and re-distribute it according to whoever has the most education; and that there is one citizen with the most where all other citizens have an equal amount.¹¹² If we allow the principle, the super-educated citizen may be allotted 3 votes in comparison to every other citizen's single vote. In this case, the super-educated citizen has correspondingly more influence over the political outcome. The general worry of egalitarianism is that where smaller groups of citizens have more influence, this influence will distort the outcomes in their own favor. But the problem from the egalitarian point of view does not arise over the substantive quality of the outcome. The complaint is that it unfairly privileges the interests of some citizens over others, violating democratic equality.

An apparent solution to this problem would be to make the substantive equality of influence normative for all democratic procedures. Following the voting model described above, this would apparent mean equalizing influence by equalizing the possibilities for

¹¹¹ Notice, too, the *informality* of these kinds of inputs.

¹¹² I am not here asserting or defending any such principle; only using it to illustrate the lines along which votes may be re-distributed. In fact, distributing input on the basis of education seems to violate LAC since it can be reasonably disputed that the educated are the knowers.

input. Thus, if (given a form of input) some have more to contribute thereby potentially increasing their influence over the outcome they would be prohibited from doing so. One cannot be legitimately guaranteed greater influence over outcomes according to principles like wealth, greater education, and the like. But as noted, this view does not seem to depend in any way upon the epistemic criteria that I have argued are necessary for political legitimacy.

This is especially evident when considering the demands of deliberation. Voting is not the only form of political participation, nor is it the only way in which a participant may influence outcomes. To the extent deliberation is regarded as vital to good decisions, and good decisions are relevant or necessary to democratic legitimacy, political deliberation is also a necessary form of political input. Thus, votes are not the only form of political currency. Reasons may be thought of as a type of political currency, too.

This kind of input, however, is more complex than voting. Reasons are not evaluated according to who in particular has them. A reason is a good one, for instance, if it is true, or if there is ample evidence supporting it. Since reasons are the inputs of deliberation, the egalitarian goal of equalizing the quantity of input in order to equalize influence works against the ideal of deliberative democracy. It is not the quantity of reasons that matters so much to deliberation. It is their quality; and their quality is an epistemic determination. Consequently, we cannot assume as the egalitarian does that the inputs of various procedures are enough the same that we could formulate general rules to apply to each case with the goal of equalizing substantive influence. The consequence would be a stagnation of the quantity of input. Egalitarianism of influence assumes that more participation is better than less. Assuming on the participatory model that more

input is better, it would be self-defeating to hold to the goal of a substantive equality of influence. So while the concern over granting more influence to some according to principles like wealth and education is well-placed, the solution to the problem cannot lie in aiming at the substantive equality of influence.

If the deviation from strict, substantive equality makes increases the amount of available influence, it is something like a financial market increasing the amount of *available* wealth. The substantive inequalities of influence offset the deviation from equality by providing the opportunity for those with less proportional input to acquire more of it. Thus, the quality-based reasons for legitimate differentials of influence are justified when they result in the increased quantity of input. They could do this only if they make more input available. This increased input will have further epistemic benefits for political outcomes. In this respect, EP does not ignore problems of the equality of influence. But instead of approaching them by placing restrictions on the distribution of input, it focuses on the conditions for making more input available. Restrictions aimed at an equality of influence would disable democratic deliberation by making political input less available.

7. Utopianism and Practicability

Ethical theories are evaluated, in part, according to their capacity to satisfy certain practical conditions such that they could be workable by persons given what we may assume are limitations imposed by nature, lack of information and the like. The “practicability condition,” then, imposes certain standards of realism on ethical theories. Theories that cannot satisfy the named conditions would be unrealistic, unworkable, and so unacceptable. This rule is typically recognized in the form, “ought implies can.” A

moral outlook that cannot be practiced in some way cannot be a *moral* outlook – not for us anyway.

Having arrived at the end of this dissertation, one may object that the thesis is overly complex and overly idealistic – that it fails to account sufficiently for the items limiting persons as political agents. No complete defense can be articulated here.

However, there are several points worth considering in this vein. Kant writes,

In the practical...the power of judgment first begins to show itself to advantage when ordinary understanding excludes all sensuous incentives from practical laws. Such understanding then becomes even subtle, whether in quibbling with its own conscience or with other claims regarding what is to be called right.... And the most extraordinary thing is that ordinary understanding in this practical case may have just as good a hope of hitting the mark as that which any philosopher may promise himself (1785, 16).

Kant places a great deal of weight upon the potential for ordinary (here, philosophically untutored) understanding to determine the correct principles according to which one should act. He does not advocate the “science” of morals, then, in order to *correct* ordinary understanding. Rather, he does so in order to sharpen it, such that “wisdom’s precepts may gain acceptance and permanence” (1785, 16). Practical reason is compelled to go beyond itself, only for the sake of its own cultivation and clear understanding of its correct moral principles.

The brief account of constructivist practical reason in Chapter 4 is meant to suggest above all that political theory should be seen in roughly this way. That is, political theory should be viewed as contiguous with practical reason in some way. To this extent, it is not necessary to view it separately as if it were an object of speculation. Most especially, the step into theory is made only on the basis of that of which persons are already capable *vis a vis* reason. To this extent, a view predicated on this

understanding of practical reason satisfies the “ought implies can” rule. It is predicated on powers persons already possess. Even if such a view is “idealistic” in one sense, it is not so in any way that violates its practicability. The justification of such a view may be complex, even if it is quite natural in practice.

8. Conclusion

I began this dissertation with a brief discussion of the religious fanatic as a recognizable instance within which the problem of democratic justification might arise. Such a case is an extreme instance of pluralism and its effects. Given pluralism, I have tried to outline an idea of democratic legitimacy. The reasons that ultimately justify democratic outcomes – that produce a duty to obey – do not require acceptability to the fanatic in a psychological sense or from the point of view of her own doctrine. They do require, on the other hand, an appeal to epistemic criteria.

Pluralism, in particular reasonable pluralism, is demanding in the formulation of such constraints. This “demandingness” has to do with the apparent incommensurability of reasonable doctrines. Yet since the moral ends of democracy are disputed, the idea of legitimacy must accommodate the disagreement about these ends. This standard, then, if successfully articulated does not simply indicate a form of life or a comprehensive doctrine. Reasonable pluralism, after all, is not simply a social or cultural phenomenon. It is a fact about reason and its operation. As such, it must be available to any reasonable first order doctrine, inasmuch as it is true. If this kind of defense is successful, this fact is normative with respect to all democratic procedures including deliberative ones. While it offers a political basis for equality, political equality does not require a substantive equality of political influence. The reason is that substantive equality would diminish the

epistemic value of the outcomes that democratic deliberative procedures are designed – when designed rightly – to produce. Nevertheless, it remains the case that the reason for adopting a procedure is not also the reason upon which the legitimacy (hence the authority) of its outcomes can be established. Thus, the legitimacy of actual deliberative outcomes still depends upon some other procedure (perhaps an ideal deliberative procedure); and this procedure must meet some epistemic criteria. One may claim that a duty to obey is not essential to a concept of political legitimacy. However, in this case, one would be hard pressed to say why moral pluralism is a problem for democracy or what the sense of a normative theory is anyway.

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