Political Equality, Democratic Authority, and Legal Interpretation

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Declaration

I, Cosmin Petru Vraciu, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Does equality justify majority rule as a mechanism for collective decision-making? And are decisions made by majoritarian procedures (or by democratic procedures more broadly) morally authoritative?

In the first 5 chapters of this thesis, I will pursue these two questions in turn. In this vein, in chapters 2 and 3, I examine two distinct principles of equality – one, which I call equality of opportunity for negative control, and which is derived from a claim to not being subordinated to others, and the other, which I call arbitral equality, and which is violated when A's moral judgments are treated as moral judgments, while B's moral judgments are treated as preferences. I argue that the conjunction of these two principles entails the requirement of majority rule.

In chapters 4 and 5, I turn to the question of whether decisions made by democratic procedures are morally authoritative. I first consider authority in its content-independent aspect, and then in its preemptive aspect. In chapter 4, I argue that, while equality of opportunity for negative control is not able to vindicate authority in its content-independent aspect, arbitral equality is able to do so. Nevertheless, I argue that neither of them can fully vindicate authority in its preemptive sense. In order to defend this kind of authority, I turn in chapter 5 to a set of non-egalitarian considerations, namely considerations related to moral fallibility.

In chapter 6, I turn to a third question: Are there any interesting claims regarding the manner in which judges ought to interpret and apply statutes that follow from a specific account of democratic authority? I argue that my account of democratic preemptive authority from chapter 5 entails some interesting claims about how judges ought to apply statutes.

Impact Statement

Following the relevant UCL regulations, this statement gives an account of the impact inside and outside academia that this thesis, and the arguments of this thesis, can have.

Regarding the impact within academia, this thesis seeks to make at least the following contributions to the literature: (i) it gives a novel philosophical justification of majority rule; (ii) it clarifies the nature of equality that is normatively relevant in the political context; (iii) it clarifies the concept of authority, especially that of preemptive authority; (iv) it contributes to understanding the difficulties of taking equality as a premise in the justification of democratic authority; (v) it sheds a new light on controversies in statutory interpretation.

Regarding the impact outside academia, this thesis is primarily a philosophical investigation, which pursues a subject-matter for its intrinsic interest and value. As such, its impact outside academia is more difficult to discern. Nevertheless, I think it is possible to say that this thesis can contribute to a clarification of the values and reasons that justify democratic procedures, and thus it can make a contribution to public reflection and deliberation, broadly speaking, especially the public reflection and deliberation – which has been more prominent recently – on what, if anything, justifies democracy. In addition, my thesis can have an impact on the field of statutory interpretation. It provides a philosophical rationale for enforcing the public meaning (assertive content) of the text of the statute, and, in addition, it provides a rationale for a rule of statutory interpretation (that used to be applied in the past in the British legal system) that requires judges, when the public meaning bears multiple interpretations, to enforce that interpretation that is closer to justice.

Research Paper Declaration

I confirm that the thesis reproduces material that is about to be published elsewhere:

(i) section 1 of chapter 4 reproduces the paper "Equality and Democratic Authority", which is forthcoming in *Analysis* (Oxford University Press)

(ii) chapters 5 and 6 reproduce the paper "Authority, Democracy, and Legislative Intent", which is forthcoming in *Law and Philosophy* (Springer)

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Introduction

What if, anything, justifies democratic procedures for collective decision-making? And are decisions made by such procedures morally binding in virtue of being democratically made?

These two questions are distinct and can be given different answers. It is possible, for instance, to claim that democratic procedures are justified as mechanisms for collective choice, but that they are nevertheless not morally binding or authoritative on officials or ordinary individuals, or, at least, that, if the decisions they adopt are binding, their bindingness is not justified by the democratic nature of the procedures.[1] And, symmetrically, it is at least conceptually possible to claim that decisions that are democratically made are morally binding in virtue of being democratically made, but that they are nevertheless not justified. There may be no reasons for democratic procedures to be employed as the mechanism for collective choice, but, once they are employed, the fact that they are democratic may give officials (and ordinary citizens) a reason to follow the decision adopted by them.[2] (By analogy, there may be no reason for someone to make a

[1] Consider, by analogy, Alexander's and Sherwin's argument for what they call the Gap, which consists in the fact that there are moral reasons for there to be a law, but no moral reasons to obey that law or treat it as authoritative. See Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Authority* (Duke University Press, 2001), pp. 53-95. For a similar argument, see Niko Kolodny, "Political Rule and Its Discontents", in D. Sobel, P. Vallentyne, and S. Wall, eds., *Oxford Studies in Political Philosophy*, vol. 2 (Oxford: Oxford University Press, 2016), pp. 34-70, at pp. 49-50. See also Scott Shapiro, "Judicial Can't", *Philosophical Issues*, 35 (1), 2001, pp. 530-557.

[2] I take 'justified' here to mean 'required and/or favoured by at least one *pro tanto* reason'. On this understanding, some things may be permissible, even if they lack justification. (It is permissible to make a pointless promise, for instance, even if you lack justification for doing so.)

pointless promise, but, once they have made the promise, the fact that they have done so gives them a reason to do as promised.)

Moreover, the notion of 'moral authority' is ambiguous, and, correspondingly, the question of whether the democratically made law has moral authority can be read in multiple ways. One way in which it can be read is to ask whether the democratic provenance of the law gives a *content-independent* reason to obey the law – i.e., a reason to obey it simply because it is a democratically made law. (I will clarify this notion in greater depth in chapter 4.) Another way in which the question can be read is whether is whether the democratically made law gives a protected reason to comply with the law, understood as a first-order reason to obey the law, coupled with a *preemptive reason* that preempts or excludes countervailing reasons.[3] (I will clarify this notion in greater depth in chapter 5.)

In this thesis, I will pursue the question of justification and the question of authority in turn. In the first part of the thesis (chapters 1 to 4), I will explore whether there can be an *egalitarian* answer to these two questions, and then (in chapter 5), I will explore a non-egalitarian argument.

Nevertheless, if we understand 'justified' in a more capacious manner, as 'either permitted or required', then Estlund's 'normative consent' argument for democratic authority seems to allow for the conceptual possibility of laws that are not justified, but that are nevertheless binding. On his argument, in some cases, it may be wrong to refuse to consent to a command, and this wrongness shows that, once the command is made, you are under a duty to comply, but this is compatible with the issuing of the command not being permissible. See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2007), p. 127.

[3] In a similar vein, Viehoff divides the question of authority into a question of whether law gives content-independent reasons and a question of whether it gives preemptive reasons. See Daniel Viehoff, "Democratic Equality and Political Authority", *Philosophy and Public Affairs*, 42 (4), 2014, pp. 337-375, at pp. 340-342.

In the first part – which considers whether the two questions can be answered from within an *egalitarian* perspective – I will not consider whether *all* possible democratic procedures are justified. (This is a task beyond my abilities.) I will consider, however, only the narrower question of whether one specific – albeit important – democratic procedure is justified, namely majority rule,[4] and whether such procedure can be justified. Then, in chap. 4, I turn to the problem of democratic authority, and whether egalitarian considerations entail democratic authority.

I answer the questions of justification and authority in the affirmative, but I do so for not entirely the same reasons. I argue that there are two *pro tanto* principles of equality whose conjunction requires, and thus, justifies, majority rule. But I argue that only one of these two principles of equality is able to warrant the claim that the democratic provenance of the law is able to make the law morally binding.

In the second part (chap. 5), I also consider a non-egalitarian candidate ground for the justification of democratic procedures and for the moral authority of democratically made law. I argue that considerations of moral fallibility justify democratic procedures and that they give in turn officials a reason (to be defined in due course) to enforce the democratically made law.

Having considered the question of what justifies democratic procedures, and the question of what makes democratically made law morally authoritative, I turn (in the third part of the thesis) to a third question: What follows from the answers to these questions for the way in which officials should apply and interpret the democratically made law? More specifically, is there anything – and if yes, what – *interesting* about

[4] I want to leave open what 'democratic' means, or what makes a procedure 'democratic'. On any account of these matters, however, majority rule must be counted as democratic.

statutory interpretation that follows from the argument(s) that I give for the moral authority of democratically made law?

I argue that there is. In particular, I argue (in chap. 6) that the argument from moral fallibility for the moral authority of democratically made law (given in chap. 5) supports an interesting set of claims about how judges (and, officials, more broadly) ought to apply and interpret the law: my arguments for democratic authority support the claim that what judges (and officials, more broadly) ought to enforce is not the intention (of whatever sort) of the of the majority, even if such an intention were discernible; rather, what they ought to enforce is the assertive content of the statute (to be defined in the relevant chapter), when this content is clear, and that interpretation of the assertive content that is closest to the balance of moral reasons, when this content is unclear. Or so I will argue.

Overview of the Thesis

In the first part (chapters 1 to 4), I will consider the question of what justifies majority rule, and then, the question of democratic authority, from an *egalitarian* perspective. Does equality justify majority rule, and does it entail democratic authority?

Chapter 1 briefly examines the main arguments from the literature for majority rule and concludes that they fall short of justifying majority rule, and that, in addition, the proposed egalitarian justifications of majority rule fail.

My aim is to fill this gap from the literature: to give an egalitarian argument for why majority rule is required. My argument, which is developed in chapter 3, is that there are two distinct principles of equality, whose conjunction entails the requirement of majority rule. Before the argument in this chapter is developed, however, we need to take a detour in chapter 2 to consider what, following Kolodny, I call the Subordination Complaint.

So, chapter 2 introduces the reader to the Subordination Complaint. The chapter seeks to delineate this complaint from neighbouring, but nevertheless distinct, complaints of social inequality, and, in addition, it seeks to clarify the relationship between this complaint and complaints of rights-based justice. On the basis of the work done in chapter 2, I then argue in chapter 3 that the Subordination Complaint entails what I will call a principle of equality of opportunity for negative control.

Chapter 3 provides the egalitarian justification for majority rule. I argue that, in addition to equality of opportunity for negative control, there is another principle of equality, which I call arbitral equality, and which is violated when A's moral judgment is treated as a moral judgment, but B's moral judgment is treated as a mere preference. I argue that arbitral equality, in conjunction with equality of opportunity for negative control, entails two further principles, namely Pareto and Substitutability, and that the conjunction of these two principles requires in turn majority rule.

Chapter 4 turns to the question of democratic authority. More specifically, it considers the argument, proposed by Kolodny, that social-egalitarian considerations of the sort captured by the Subordination Complaint entail that the democratic provenance of the law provides officials (and ordinary citizens) a reason to comply with the law. I argue that, even if we accept all the premises of this social-egalitarian argument, the conclusion still does not follow. As an alternative, I argue that arbitral equality (which, recall, captures a dimension of equality that is distinct from the one captured by the Subordination Complaint) is able to provide an argument for the claim that the democratic provenance of the law provides a reason to comply with the law.

In the second part (chapter 5), I explore a non-egalitarian ground that could provide an argument for democratic authority. I argue that considerations of moral fallibility and the wrong of imposing a moral risk – which I call the Wrong of Neglecting

Fallibility – provides the starting point for such an argument. I argue, more specifically, that such considerations – for reasons elaborated in chapter 5 – give judges and other officials a first-order reason to follow the democratically made law, and a special kind of preemptive reason, which I call non-invalidating preemptive reason, and which, unlike other preemptive reasons, preempts a first-order reason without denying its validity or relevance as a ground for a decision.

Then, in the third part (chapter 6), I turn to the question of whether there is anything interesting that follows from all the preceding discussion about the moral authority of democratically made law for the problem of statutory interpretation. I argue that the argument for democratic authority given in chapter 5 supports the claim that what is morally authoritative, more specifically, is the assertive content of the statute (to be defined in chap. 6). This entails in turn that what the judges ought to enforce is the assertive content. At the same time, however, from the preemptive nature of authority that is supported by the argument of chap. 5, it follows – as I argue in chap. 6 – that, when the assertive content is unclear, judges ought to enforce that interpretation of the assertive content that is closest to the balance of moral reasons.

In addition, in chap. 6, I argue that this set of conclusions is compatible with – even if not entailed by – the egalitarian argument for democratic authority that I give in chap. 4, and, moreover, that is compatible with – even if not entailed by – some other arguments from the literature for democratic authority.

A clarification before we go. In this thesis, I operate under the assumption that there are multiple and sometimes conflicting values and reasons.[5] (For instance, the reason to maximize welfare is distinct from and may conflict with the reason to give

[5] For a defence of this assumption, see G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2008), chap. 6 and 7.

priority to or to help those in need, which is, in turn, distinct from and may conflict with the reason to respect rights-based justice, and so on.) As such, the moral reasons that I will consider in this thesis – such as the Subordination Complaint or the arbitral equality – are only one among many, potentially conflicting, reasons. They have only a *pro tanto* force and may not be conclusive on balance.[6]

So, the fact that I concentrate on such reasons should not be read as precluding the possibility that there are other values and reasons out there that may dictate different results – just as it should not be read as precluding the possibility that there are other reasons out there that may entail the same results, but from distinct starting points. In this vein, it is important at the outset to point out that, with the exceptions in which I criticise the existing arguments from the literature that purport to justify majority rule or to vindicate democratic authority, I leave it open that both the justification of majority rule and democratic authority could be vindicated on the basis of some other moral reasons, that I do not consider in this thesis.

[6] I make a partial exception to this claim in chap. 5 and 6, where I seek to give an argument that democratic law possesses *preemptive* authority.

Chapter 1

The Problem of Majority Rule

Is majority rule a requirement of equality? There is a growing consensus in the literature that majority rule it is not.[7]

Majority rule has been usually defended on the grounds that it satisfies neutrality (it is not biased toward any alternative), anonymity (the outcome does not change if we change the identity of voters), and positive responsiveness (adding one vote, while keeping everything else constant, tilts the outcome in the direction favoured by that vote).[8] Neutrality rules out supermajority rules (which are biased in favour of the status quo),[9]

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[7] See, e.g., Peter Jones, "Political Equality and Majority Rule", in David Miller and Larry Siedentop (eds.), *The Nature of Political Theory* (Oxford: Clarendon Press, 1983), pp. 155-182; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2007), chap. 4; Ben Saunders, "Democracy, Political Equality, and Majority Rule", *Ethics* 121 (1), 2010, pp. 148-177; Ben Saunders, "Why Majority Rule Cannot Be Based Only on Procedural Equality", *Ratio Juris* 23 (1), 2010, pp. 113-122; Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy", *Philosophy and Public Affairs* 42 (4), 2014, pp. 287-336; Daniel Viehoff, "Democratic Equality and Political Authority", *Philosophy and Public Affairs* 42 (4), 2014, pp. 337-375; Richard Tuck, *The Sleeping Sovereign* (Cambridge: Cambridge University Press, 2016), p. 261; Arash Abizadeh, "Counter-Majoritarian Democracy: Persistent Minorities, Federalism, and the Power of Numbers", *American Political Science Review* 115 (3), 2021, pp. 742-756.

[8] See Kenneth May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision" *Econometrica* 20 (4), 1952, pp. 680-684; Amartya Sen, *Collective Choice and Social Welfare* (Amsterdam: North-Holland, 1979), pp. 71-73.

[9] For defences of majority rule that place special emphasis on neutrality, see Brian Barry, *Political Argument* (London: Routledge, 1965), pp. 312-3; Thomas Christiano, "Political Equality", in John Chapman and Alan Wertheimer (eds.), *NOMOS XXXII: Majorities and Minorities* (New York: New York University Press, 1990), pp. 151-183; Thomas Christiano, *The Rule of the Many* (Boulder, Co.: Westview Press), p. 88 ; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008), p. 290; Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* (Cambridge: Cambridge University Press, 2013), chap. 5.

anonymity rules out systems in which some people's votes count more than others', and positive responsiveness rules out tossing a coin. But many people claim that this still does not provide an egalitarian defence of majority rule. While neutrality can perhaps be seen as a requirement of equality,[10],[11] it is more difficult to see positive responsiveness as an egalitarian condition. (Equality between individuals could be satisfied equally well by levelling down, and thus by a procedure which is equally non-responsive.) Moreover, something very close to these requirements is also satisfied by lottery voting (which gives each alternative a chance of being adopted that is proportional with the number of people that vote for each alternative).[12] Lottery voting does not satisfy positive responsiveness, but it satisfies something close (adding one vote, while keeping everything else constant, tips the chances towards the alternative favoured by that vote).[13] And it is unclear what moral reasons we have to prefer the former kind of responsiveness to the latter.

Thomas Christiano gives an argument against decision-procedures that rely on chances, such as lottery voting. If successful, this argument could potentially provide an argument for why chances are not morally relevant in the political case, and thus, for why the positive responsiveness that is satisfied by majority rule should be preferred to the

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[10] For a defence of neutrality and anonymity as requirements of equality, see Anthony McGann, *The Logic of Democracy* (Ann Arbor: University of Michigan Press, 2006), p. 16; Christiano, "Political Equality", pp. 155-6.

[11] Kolodny, however, argues that neutrality is not an egalitarian requirement. See Kolodny, "Rule Over None II", pp. 323-25; Niko Kolodny, "What, If Anything, Is Wrong with Gerrymandering?", *San Diego Law Review*, 56 (4), 2019, pp. 1013-1038, at p. 1028.

[12] Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), pp. 285-289; Saunders, "Democracy, Political Equality", p. 168; Saunders, "Why Majority Rule", pp. 118-9.

[13] Moreover, lottery voting also satisfies nonnegative responsiveness, which is the requirement that adding one vote (while keeping everything else constant) does not tilt the result in the opposite direction. Some argue that we have no reason to prefer positive over nonnegative responsiveness. See, e.g., Jules Coleman and John Ferejohn, "Democracy and Social Choice", *Ethics* 97 (1), 1986, pp. 6-25, at p. 18.

positive responsiveness that is satisfied by lottery voting. His argument is that considerations of fairness do not support a chances-based procedure. In making this argument, he relies on an analogy with three "equally deserving" workers, who instead of each receiving a wage for their work, they are instead given (equal) chances for receiving a quantum of money that is equal with the sum of the three wages. He argues that it is fair that they each receive their wages rather than the chances for the triple-wage.[14] It is, unclear, however, what is the moral relevance of this example. If people have divergent moral judgments, in what sense is each entitled or "deserving" that political procedures be positively responsive (in the strong sense required for majority rule) to their judgments? If their moral judgments are wrong, for instance, it is unclear why they 'deserve' that political decisions that are imposed upon others be positively responsive to their judgments.[15] Moreover, even if we grant that the analogy is on the correct path, it could still be objected that, on the long run, by the law of large numbers, a chance-based procedure will compensate all three workers – or, in the political case, it will give each voter their 'fair' share of political decisions. But if that is so, then Christiano's argument seems unable to vindicate the sort of positive responsiveness that is required for majority rule.

Jeremy Waldron provides an intriguing argument for majority rule as a procedure in which the individuals' judgments in favour and against a proposal cancel each other out, and the remaining uncancelled judgment becomes the decision.[16] Waldron argues that this procedure is fair because, since individuals are "one another's equals", "one's

[14] Christiano, *The Constitution of Equality*, p. 109.

[15] See Niko Kolodny, "Rule Over None I: What Justifies Democracy?", *Philosophy and Public Affairs* 42 (3), 2014, pp. 195-229, at pp. 216-218.

[16] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), pp. 148-150.

consent is as good as another".[17] A problem with this argument, however, is that, even assuming *arguendo* that equality implies that one's judgment is as good as another's,[18] it is unclear why the equality in weight between judgments should manifest itself in one-to-one pairwise mutual cancellations (in which one judgment cancels, and is cancelled in turn by, *only* one other opposing judgment), rather than in one-to-many pairwise mutual cancellations (in which one judgment cancels, and is cancelled in turn, by *all* opposing judgments). If we have the latter kind of cancellations, however, than there is no 'surviving' judgment that is not uncancelled. And that undermines the whole argument. Waldron might say that there is a pragmatic need for a decision. But that need alone does not imply that fairness requires one-to-one, rather than one-to-many, pairwise cancellations. The pragmatic need for a decision can be satisfied equally well by tossing a fair coin between the judgments that have been cancelled in one-to-many pairs.[19]

Another argument for majority rule is that this is the decision-making rule that would be selected behind a Veil of Ignorance. Brian Barry and Nicholas Miller argue that, under either the assumption that the policy issues in a society are continuous, and the preferences of voters are not correlated across issues, from the standpoint of someone placed behind a Veil of Ignorance (where this veil deprives one of information regarding the specific policy preference one has, but not also regarding the nature of policy issues and the general distribution of preferences in society), the position that not only minimizes the expected loss in policy-preference-satisfaction (which is relevant on a Harsanyian picture of the Veil of Ignorance), but also minimizes the maximum level of

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[17] *Ibid*., p. 149.

[18] But see Niko Kolodny, "Rule Over None I: What Justifies Democracy?", *Philosophy and Public Affairs* 42 (3), 2014, pp. 195-229, at pp. 219-220, for an argument against the claim that equal respect for judgments entails giving judgments an equal weight in the decision-making procedure.

[19] For a different criticism of Waldron's argument, see Mathias Risse, "Arguing for Majority Rule", *Journal of Political Philosophy* 12 (1), 2004, 41-64.

the expected loss in policy-preference-satisfaction (which is relevant on a Rawlsian picture of the Veil of Ignorance) is the median position. Given that the median position is picked out by majority rule, it follows that majority rule would be chosen behind the veil.[20] A problem with this argument, however, is that many policy issues (either continuous or dichotomous) are moral issues. And it is inappropriate to view such issues as subject to policy-satisfaction-maximization (or rather expected dissatisfaction-minimization or -minimaxization). When people argue that a certain decision would be unjust, for instance, they do not simply register a preference; rather, they make a moral judgment. And it is a wrong kind of response to someone making a moral judgment to treat her as simply expressing a preference that needs to be satisfied by society.[21]

In this thesis, I will provide a different argument for majority rule – and for why majority rule is an egalitarian requirement. According to this argument – which will be

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[20] See Brian Barry, "Is Democracy Special?", in Peter Laslett and James Fishkin (eds.), *Philosophy, Politics, and Society* (Oxford: Basil Blackwell, 1979), pp. 155-196; Nicholas Miller, "Majority Rule and Minority Interests", in Ian Shapiro and Russell Hardin (eds.), *NOMOS XXXVIII: Political Order* (New York: New York University Press, 1996), pp. 207-250. For a similar argument, see also Hugh Ward and Albert Weale, "Is Rule by Majorities Special?", *Political Studies* 58 (1), 2010, 26-46.

[21] Another argument for majority rule is provided by Sean Ingham. His argument rests on an intriguing notion of control. According to this notion, an individual (or a group) has *control* over whether x or $\sim x$ obtains just in case, if the individual (or the group) cared enough that x rather than $\sim x$ obtains, then $\sim x$ does not obtain, and an individual has *more* control over whether x or $\sim x$ obtains than another individual just in case the first individual does not need to care that $\sim x$ does not obtain as much as the second individual in order to make it the case that $\sim x$ does not obtain. This notion of control is then used as an argument for majority rule – majority rule provides an equality of control among multiple and partially overlapping majority groups, since, in order to be able to prevent an outcome that they do not prefer, each such group does not need to care that their less preferred outcome does not obtain more than any other group needs to care that their own less preferred outcome does not obtain. The problem, however, is that it is obscure what is the normative significance of this kind of abstract groups having this kind of control.
See Sean Ingham, *Rule by Multiple Majorities* (Cambridge: Cambridge University Press, 2019), pp. 62, 73-4, 95-110, 153-164.

developed in chap. 3 – majority rule is required by the conjunction of two distinct principles of equality, namely (a reconstructed version of) Kolodny's equality of opportunity for influence, and what I will call arbitral equality.

Before we go to that argument, however, we need to take a detour. In the following chapter, I will introduce, following Kolodny's argument, the Subordination Complaint, and I will clarify its nature and distinguish it from other sorts of complaints with which it has been conflated in the recent literature.

In chapter 3, I will return to the question of what justifies majority rule. I will argue that the considerations of equality captured by the Subordination Complaint entail what I will call equality of opportunity for negative control. I then argue that this principle of equality, in conjunction with the principle of arbitral equality – to be introduced in chapter 3 – provides the basis for an argument for majority rule.

Chapter 2

The Subordination Complaint

The Subordination Complaint is the complaint than an individual has against another individual. It is the complaint that the first individual has against the second when the second is in a position of power relative to the first, can dictate or impose an outcome on the first *against* the will, judgment, or preference of the first, and is more or less ready or willing to use such power, and the first is unable to exit this relationship. The Subordination Complaint is a complaint against the social inequality between these two individuals. This social inequality can be characterised by saying that the first individual, simply in virtue of being a subordinate to the second, stands as a social inferior to the second.[22]

The lord and the servant, for instance, stand in a relationship of social inequality against which the servant has a Subordination Complaint: the servant is the social inferior of the lord. The lord is in a position to determine or dictate how the servant is to behave, and the servant has no ability to exit this relationship.[23]

In this chapter, I investigate the nature of the Subordination Complaint. In this vein, in the first section, I clarify the sense in which the Subordination Complaint is a

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[22] For the careful delineation of the Subordination Complaint, see Niko Kolodny, *The Pecking Order: Social Hierarchy as a Philosophical Problem* (Cambridge, Mass.: Harvard University Press, 2023), chap. 5; Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy", *Philosophy and Public Affairs*, 42 (4), 2014, pp. 287-336, at pp. 292-93, 295-96; Niko Kolodny, "Political Rule and Its Discontents", in D. Sobel, P. Vallentyne, and S. Wall, eds., *Oxford Studies in Political Philosophy*, vol. 2 (Oxford: Oxford University Press, 2016), pp. 34-70, at pp. 63-67.

[23] See Kolodny, "Rule Over None II", p. 292; "Political Rule and Its Discontents", p. 63.

complaint against social inequality by contrasting it with other kinds of complaints against social inequality. In the second section, I consider whether and to what extent the Subordination Complaint can be distinguished from complaints of rights-based justice.

1. The Subordination Complaint and Social Inequality

To clarify the sense in which the Subordination Complaint is a complaint against social inequality, it would be helpful to contrast it with some distinct complaints to social inequality, with which it has sometimes been conflated. The aspect of social inequality that the Subordination Complaint takes to be objectionable – which just is the non-exitable relationship of subordination – is distinct from other possible aspects of social inequality to which individuals might have complaints.

To begin with, the Subordination Complaint is not a complaint about inequality of social esteem. Before we see why that is so, it is helpful to clarify the notion of inequality of social esteem. This notion is ambiguous between two readings, corresponding to whether the 'social' in 'social esteem' is meant to capture individuals who stand in the relationship of inequality or not. So, on one reading, it denotes the esteem that the parties standing in the relationship of inequality have for each other (the esteem of the servant for the lord, and vice versa), while on another reading, it denotes the esteem that third parties have for either the lord or the servant. Let us call the first sense the internal sense, and the second sense the external sense.[24] If social esteem is taken in the internal sense, then the inequality at issue between lord and servant would consist in the fact that the servant esteems the lord more than the lord esteems the servant. If social esteem is taken

[24] Inequality of esteem in the internal sense seems to correspond with Lippert-Rasmussen's notion of inequality of social standing. See Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (Cambridge: Cambridge University Press, 2018), pp. 65-67.

in the external sense, then the inequality consists in the fact that third parties esteem the lord more than they esteem the servant.

The Subordination Complaint is not a complaint about inequality of social esteem, in either its internal or its external sense.

It is not a complaint about inequality of social esteem in the internal sense, because the concern about subordination is not diffused if we imagine that the servant holds the master in contempt and actively refuses to form attitudes towards the lord that count as esteeming the master, in a way that would achieve equality of social esteem (in the internal sense) between them.[25] If the servant must still defer to the lord's choices regarding what he (the servant) is to do – if he remains, in other words, a subordinate to the lord – then he still has the Subordination Complaint. The Subordination Complaint is simply the complaint against being a subordinate. And being a subordinate is conceptually distinguishable from standing in a relationship of inequality of esteem.[26]

And the Subordination Complaint is not a complaint about inequality of social esteem in the external sense, because we might imagine a society in which the lords are fewer than the servants, and in which all the servants lack esteem for the lords (and the lords lack esteem for the peasants). In such a case, we cannot say that third parties esteem the lord more than they esteem the servant. Indeed, if we could aggregate the esteem, it is the other way around: the servant attracts an aggregate amount of esteem that is higher

[25] This actually seems to be a characteristic of real relations of subordination. As James C. Scott presents the evidence, inferiors throughout history usually held their superiors in contempt and did not accept the narratives that accorded the superiors a higher esteem. See James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990), pp. 33-35, 77-82; James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985).

[26] For the point about the conceptual distinguishability of subordination from inequality of esteem, see also Kolodny, *The Pecking Order*, pp. 96, 417, n. 11.

than the amount of esteem attracted by the lord. (It could be argued that it matters who is that third party that esteems. There is a difference if one is being esteemed by another lord or by another peasant. But this line of argument cannot be pushed here. We could imagine that not only do peasants lack esteem for the lords, but also that – and this is something that could count as a natural extension of the scenario in which they lack esteem for the lords – they do not care about whether they are being esteemed by lords. In the absence of a concern to be esteemed by lords, it is unclear how simply being esteemed by a lord counts for more in the quantum of esteem that one enjoys than being esteemed by a peasant.) And, yet, despite the fact that the servant is not esteemed less than the lord, we could still say that the servant has a Subordination Complaint against the lord.[27]

Now, it might be the case that the servant needs to hide their lack of esteem for the lord and needs – for strategic reasons – to act in a servile and deferential manner and to display an outward form of respect towards the lord. Given that the lord is not needed to reciprocate, there could be an inequality between servant and lord here, consisting in the fact that the servant displays more outward (non-sincere) respect towards the lord than the lord displays towards the servant.[28] If there is such an inequality, the Subordination Complaint could account, at least in part, for why such inequality might

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[27] For the distinction between subordination and equality of esteem, see also Kolodny, *The Pecking Order*, pp. 95-97; Elizabeth Anderson, "Equality", in David Estlund, *The Oxford Handbook of Political Philosophy* (Oxford: Oxford University Press, 2012), pp. 40-57, at p. 43.

[28] We could imagine, however, cases in which the lord reciprocates the outward respect. But this fact does not seem to obliterate the Subordination Complaint of the servant. In early modern England, many in the upper ranks believed that they should show politeness and deference to their inferiors – and some even believed that, partially for strategic reasons, they should show more respect and deference toward their inferiors than toward their equals. See Keith Thomas, *The Pursuit of Civility: Manners and Civilization in Early Modern England* (New Haven: Yale University Press, 2018), pp. 66-74.

seem objectionable, without the Subordination Complaint collapsing onto the complaint (if there is any) against inequality of outward forms of respect.

In other words, the complaint against inequality of outward respect, if there is such a complaint, could be accounted for at least in part by the Subordination Complaint. What seems wrong – or, at least, part of what seems wrong – with such inequality is that the servant *needs* or is *forced* to engage in some degrading acts, such as being servile, while the lord is not similarly needed or forced. But the servant needs or is forced to do so only because the servant is a *subordinate*, subject to the lord's retaliatory power. The servant needs to do so because he lives in the fear of what the lord could do to him. Our intuitions are different in a case in which someone voluntarily engages in servile or deferential behaviour or in forms of outward respect towards someone who does not reciprocate, where this deferential behaviour is not explained by the fear of being on the receiving end of the counterparty's punishment. In this case, it is not clear what sort of complaint of social inequality the person engaging in the deferential behaviour has. Even if there is perhaps an impersonal disvalue in social inequality in this case, this is intuitively distinct from the kind of complaint that the servant has when he needs or is forced to engage in outward forms of respect towards the lord. He could naturally complain: 'I am sick of being needed to show this excessive servility and respect to the lord, and to pretend that I admire him.'

The force of his complaint derives in part from the fact that he is in a position which *forces* him to show this outward respect. But since this position just is the position of being a *subordinate*, then the force of his complaint derives, at least in part, from the fact of being a subordinate. And it is plausible that, since the complaint against being forced to show outward respect derives (at least in part) from the position of being a subordinate, it also derives (at least in part) from the fact that the subordinate has a *complaint* against being a subordinate. After all, if there had been no complaint against

being a subordinate, it is unclear why the subordinate would have had a complaint against something that he is forced to do as a result of being a subordinate. So, when the servant is needed to engage in (unreciprocated) outward forms of respect towards the lord, it is plausible that, at least part of the force of the complaint that the servant has against the lord derives from the force of the Subordination Complaint.

Note that the claim that the servant's complaint against being forced to engage in (unreciprocated) outward respect towards the lord derives at least in part from the Subordination Complaint is consistent with the claim that the objectionability of being a subordinate as such, as picked out by the Subordination Complaint, is increased or magnified by the fact that the position of subordinate entails that the servant needs to engage in unreciprocated outward forms of respect. The fact that the objectionability of being a subordinate is increased or magnified in this way does not negate that being a subordinate is objectionable, just as such, independently of whether this objectionability is increased or magnified in the way just mentioned. (By analogy, the wrong of stealing, or perhaps more accurately, the severity of the wrong of stealing, may be magnified or amplified by the amount of goods that one steals. But this fact does not deny that there is a wrong in stealing just as such, regardless of how much one steals.)

We could see that subordination is objectionable just as such, *in*dependently of any (unreciprocated) outward forms of respect that it might force the subordinate to engage in, if we imagine, for instance a case in which the lord correctly takes the servant's public lack of esteem towards him not to imply his insubordination. (The servant executes all of the lord's orders, even if expressing at the same time expressing lack of esteem for the lord.) We might imagine that the servant knows the lord's dispositions, and that, as a result, he has no incentive to strategically deceive the lord about his true feelings. In other words, the servant's position of subordinate does not force him to engage in any outward forms of respect towards the lord. (So, we might imagine that there is equality of outward

respect, in the sense that both the lord and the servant reciprocally show their lack of esteem for each other.) Nevertheless, it seems intuitively plausible that in such a case, the servant still has a complaint for being a subordinate to the lord. So, the Subordination Complaint is still valid, even when there is equality of outward respect.[29]

So, we have seen so far that the Subordination Complaint is distinct from, and its validity does not depend upon, a complaint against either inequality of esteem or inequality in outward forms of respect.[30] I want to argue, in addition, that – for reasons similar to those already considered – it is also distinct from, and its validity does not depend upon, a complaint (if there is any) to what Motchoulski calls 'inequality of public social status' or 'social hierarchy'.

By these terms, Motchoulski understands an inequality that obtains just in case all (or nearly all) relevant individuals (superiors or inferiors) have second-order beliefs that the first-order beliefs of everyone else are beliefs that some individuals (the Superiors) are more esteemed than others (the Inferiors), where this esteem (that is believed to be believed) is based on characteristics of those individuals that are (believed

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[29] Ryan Cox argues that mere subordination as such does not give rise to a complaint, and it is not by itself objectionable, unless the superior uses the inferior's subordination to extract consideration from the inferior, where this consideration is accompanied by a feeling of inferiority on the part of the inferior. See Ryan Cox, "Democracy and Social Equality", *Journal of Ethics and Social Philosophy*, 23 (1), 2022, pp. 86-114, at pp. 100-101, 107-109. The consideration that the superior extracts from the inferior consists in responses such as "deferential respect, fawning and toadying, bowing and scraping, other forms of deference, and efforts to ingratiate or curry favor." *Ibid*., p. 100. But the argument that we have considered so far shows that this is wrong: the Subordination Complaint is a complaint whose validity does not depend on the fact that subordination may force the subordinates to display the sort of attitudes that Cox classifies under the heading of 'consideration'.

[30] For another argument for the distinction between the Subordination Complaint and the complaint against inequality of social status, see also Daniel Sharp, "Relational Equality and Immigration", *Ethics*, 132 (3), 2022, pp. 644-679, at pp. 656-57.

to be believed to be) esteemed that they have on the basis simply of membership in a particular group.[31] Thus, even if there is no one who believes that the lord is more esteemed than the servant, it suffices for the existence of social hierarchy between lord and servant if everyone in society believes that everyone else believes that the lord is more esteemed than the servant simply in virtue of him belonging to a certain group, such as being born a noble.

The Subordination Complaint is distinct from, and its validity does not depend upon, any complaint against social hierarchy in this sense. (This is, of course, compatible with claiming that the sort of inequality that Motchoulski identifies social hierarchy with is intrinsically objectionable.)[32] To see this, we could imagine that everybody in society knows that no servant esteems any lord, and, moreover that everyone knows that all the servants lack esteem for the lord. It seems that this fact – even if might be welcome from the perspective of some aspect of social equality – has no relevance for whether the servant can have a Subordination Complaint. It seems intuitive that the servant can still validly complain about being a subordinate to the lord.[33]

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[31] Alexander Motchoulski, "Relational Egalitarianism and Democracy", *Journal of Moral Philosophy*, 18 (6), 2021, pp. 620-649, at pp. 625, 630-631.

[32] Motchoulski makes, however, the stronger and more implausible claim that what he defines as social hierarchy provides a general account of objectionable social inequality. *Ibid*., pp. 628-29. But this is wrong simply because the Subordination Complaint, which is intuitively a complaint of social inequality, is distinct, as I show here, from the kind of inequality that Motchoulski takes to constitute social hierarchy, and that shows, in turn, that Motchouski's characterisation of social hierarchy cannot identify *as a whole* the social inequality that is objectionable.

[33] This feature might actually be more realistic. Consider, for instance, the medieval and early modern carnival, which was used by the servants to communicate, among others, their lack of esteem for the superiors. See Scott, *Domination and the Arts of Resistance*, pp. 128-135; Peter Burke, *Popular Culture in Early Modern Europe* (Farnham: Ashgate, 2009), pp. 279, 284-286. For a more general discussion of the ways in which the servants communicated their lack of esteem to superiors, see Scott, *Domination and the Arts of Resistance*, chap. 6. See also Scott, *Weapons of the Weak*, pp. 287, fn. 88, 288-89.

The Subordination Complaint is also distinct from – and its validity does not depend upon – a complaint (if there is any) to the kind of inequality that Hans van Wietmarschen thinks can best characterise social hierarchy. On this account, A stands in a position of social superiority to B just in case, and because, there is a social norm followed by A and B, and the relevant others in A's and B's social network, which prescribes that everyone display a pattern of attitudes and behaviours in such a way that should make the case that A is valued more than B.[34] But we could imagine that there is no social norm that prescribes the servant, or anyone else around the medieval farm, to display complexes of attitudes and behaviours that would indicate the lord being more valued than the servant. Or, at least, we could imagine that, even if there is such a norm, the servants do not follow it. To see this possibility, let us start by noting that, if people engage in a certain action because they are following a social norm, then they are not engaging in it strategically. They are doing *x* because *x* is required by the social norm (or because others expect them that they do so), not because they think that, given the way they expect others to act, *x* best promote their interests in a given instance. If *x* is required by the social norm, or it is something that most others expect one to do, but it is not something that best promotes one's interest, at least in that instance, then doing *x* is norm-following, rather than strategic, behaviour.[35] But it is possible to imagine that the servants do not engage in outward patterns of behaviours displaying respect, admiration, or other ways of valuing, the lord, except when this is strategically convenient (e.g., to

[34] Hans van Wietmarschen, "What is social hierarchy?", *Noûs*, 56 (4), 2022, pp. 921-939, at pp. 923, 925-27.

[35] For the distinction between norm-following behaviour and strategic behaviour more broadly, see Joseph Heath, *Following the Rules: Practical Reasoning and Deontic Constraint* (Oxford: Oxford University Press, 2008); Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989).

curry favour with the lord and preempt more exacting burdens).[36] This suggests in turn that they are not followers of a social norm requiring them to show that they valued the lord more than the servant. Nevertheless, despite this, it seems that we can still say that the servants had a Subordination Complaint against the lord for being subordinated to him.[37] So, the Subordination Complaint is distinct from a complaint (if there is any) to the inequality that characterises social hierarchy on van Wiertmarschen's account.

Now, it might be argued that we could simply drop the 'social norm' component from van Hiertmarschen's analysis of social hierarchy, and still be left with something substantive – namely, the idea that persons engage in practices that amount to valuing some more than others. And, it could be argued further, this practice still picks out an objectionable inequality – and that is so regardless of whether the persons who engage in this practice do so by following a social norm, or instead simply out of a strategic calculus. I do not deny (or need to deny) that this is true. The only thing that is important for our purposes is that a complaint against an inequality of this sort (if it is justified) is distinct from the Subordination Complaint. And this is simply because an inequality consisting in practices in which some are valued more than others simply reduces to either an inequality of esteem, or to an inequality in outward forms of respect, or to an inequality of the sort that characterises Motchoulski's notion of social hierarchy, or to an inequality that combines or aggregates any of the inequalities mentioned above. And since we have already seen that the Subordination Complaint is distinct from a complaint against any of these inequalities, it is safe to conclude that it is also distinct from a complaint against

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[36] For historical evidence for this claim, see Scott, *Domination and the Arts of Resistance*, pp. 25-26, 89-107. See also Keith Wrightson, "The Social Order of Early Modern England", in L. Bonfield, R. Smith, and K. Wrightson, eds., *The World We Have Gained* (Oxford: Blackwell, 1986), pp. 177-202, at pp. 193-195.

[37] See also Kolodny's argument that social hierarchy is objectionable even when it is maintained by sheer force. Kolodny, *The Pecking Order*, p. 418, n. 6.

an inequality characterised by a mere practice in which some are valued more than others.[38],[39]

2. The Subordination Complaint and the Deontic Domain

Despite the fact that the Subordination Complaint is intelligible independently of other forms of social inequality, a challenge is that it seems to be accounted for in terms of a more basic moral claim, namely a deontic claim to the control of one's body and property.

On this line of thought, we could reinterpret the paradigm cases that seem *prima facie* to support the Subordination Complaint to better support simply a claim of justice that others not interfere with one's body and actions. This claim is not a claim of social equality as such, but rather a claim of *right of justice*. For instance, what is really objectionable, on this line of thought, to the lord-servant relationship is that the lord violates the servant's moral right to dispose of her body at will. It is in virtue of this

[38] The Subordination Complaint is also distinct from the complaint against what Kolodny calls 'inequality of consideration', which he distinguishes from inequality of esteem. Inequality of consideration is the inequality that is usually involved in cases of wrongful discrimination. See Kolodny, *The Pecking Order*, pp. 108-114.

[39] Note in addition that the Subordination Complaint is not best captured as a complaint about the failure of the superior to recognise one's moral equality. Jake Zuehl, "Equality, Democracy, and the Nature of Status", *Journal of Moral Philosophy*, 2023, pp. 1-20, at pp. 16-18, argues that the equality of social status that matters morally is an equality of *de facto* moral standing, which consists in the recognition of the moral claims of individuals. (It is de facto because it concerns the social practice in which the moral claims are being recognised.) But we can extend the spirit of the examples considered above to see that the Subordination Complaint is distinct from a complaint against an inequality of de facto moral standing. We could imagine that the servant, out of contempt for the lord, fails to recognise his moral claims. Nevertheless, it seems that we could still say that the servant is a subordinate to the lord, and thus the ground for the Subordination Complaint does not disappear. For historical examples in this vein, see Scott, *Domination and the Arts of Resistance*, pp. 41-44.

violation, and not in virtue of subordination *per se*, that the lord-servant relationship is morally objectionable. In other words, for all that the argument above is able to show, it might still be that what is doing all the moral work in the paradigmatic lord-servant example is simply the fact that the servant's *right to bodily control* is violated, and not the fact that his claim (if there is any) not to be a subordinate is violated. And, if that is so, then that casts doubt in turn on the proposition that there is a *sui generis* Subordination Complaint.

There are two (mutually exclusive) ways to answer this concern – between which I wish to remain neutral. If either one of these two ways succeeds, however, that would be sufficient to vindicate the claim that there is a *sui generis* Subordination Complaint.

The first way to answer the above-stated concern is non-deflationary: it does not seek the deflate the moral entities that explain the moral objectionability of the lord-servant relationship. Thus, this argumentative move allows that, independent of the Subordination Complaint, the servant has a complaint against the fact that the lord-servant relationship violates her right to bodily control. It is possible to claim that *both* the Subordination Complaint *and* the violation of the servant's right contribute to explaining the moral objectionability of the relation of servitude in this case. The only point would then simply be that the Subordination Complaint is a complaint in its own right, independent of the complaint against violations of rights of justice.[40]

The claim that the Subordination Complaint is a complaint in its own right is supported by the fact that in cases in which there is moral disagreement and the parties are fallible, but in which one of the parties (A) has the ability to impose an outcome on

[40] Note that the claim that the Subordination Complaint is independent from the complaint against rights-violations is consistent with the claim that the Subordination Complaint is not operative, or is pre-empted or nullified, when the inferior violates the rights of the superior.

the others, the imposees have intuitively a Subordination Complaint against the imposer. We might imagine that the outcome that A imposes on others is *objectively* the just one. Nevertheless, assuming that there is reasonable disagreement about what justice requires, and that A is fallible, it seems that – even if the imposees lack a claim of justice against the imposition – they have a claim not to stand as subordinates to A. Note that this claim is not simply a claim against the moral risk that, given A's fallibility, A inflicts on the imposees. Rather, it is intuitively simply a claim to social equality with A. It is a claim not to stand as a subordinate to A. It is the claim that is given voice in the question, "Who made you the boss?", which seems to be an intuitively well-placed question in this context. This seems intuitively to be the same kind of (or, at least, a very close neighbour to) the claim of non-subordination that the servant has against the lord. Since this claim does not depend upon any claim of justice (since, *ex hypothesi*, the outcome imposed by A is objectively just), this shows that the claim of non-subordination is not a claim of justice, and (supposing that claims of justice form a mutually consistent set) this shows in turn that, in the servant-lord relationship, the claim of non-subordination is distinct from any possible claim *of justice* of the servant not to have the right to bodily control violated. This would show, in its turn, that the Subordination Complaint is *sui generis*.

The second way to answer the concern that the Subordination Complaint is not *sui generis* is deflationary: it seeks to deflate the moral entities that explain the objectionability of the lord-servant relationship, by claiming that, if the servant has a claim against the violation of his right to bodily control by the lord, that is not simply independent of the claim of social equality to non-subordination, but it is rather something that it is explained by, or else, something that is simply identical with, the claim to non-subordination.[41] This thesis is supported by the relationality of the right to bodily control.

[41] The same could be said, *mutatis mutandis*, about claims to autonomy. (A right to bodily control is not necessarily the same as a right to autonomy. The former seems to be only a negative right,

The right is against individuals. It could not be violated, for instance, by non-human forces of nature that prevent the servant from having control over their body. The right to bodily control just is a right not to have *other human beings* decide what to do with one's body. It is a right against the mastery of *other* individuals over *one*'s body. In this regard, this right just is a claim not to be subordinated to *others* (with respect to one's body). So, this seems to support the view that the servant's right to the control of her own body is either identical with the claim to non-subordination, or else, it is something that is explained by, or is expressive of, the more fundamental concern of not being a subordinate to someone else.

On this view, rights or claims of justice do not necessarily form a consistent set. Even if A, who is morally fallible, could impose by force on B an outcome that enforces what is objectively just, that would violate a right or claim *of justice* of B's not to be subordinated to A.

This sort of situation seems to characterise the Kantian state of nature. For Kant, everyone has a right of *justice* to independence, which is the condition of being one's own master, or of not being subordinated to the private choices of anyone else.[42] In the state of

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while the latter may be parsed as a positive right.) Nevertheless, there may be cases in which autonomy itself seems to depend upon an explanatorily prior lack of subordination. Consider, in this regard, Garnett's argument that what explains why a deferential wife, who voluntarily chooses to defer all the decisions and judgments she makes, to her husband, lacks (second-order) autonomy is simply that she is under the rule of, or subordinated to, her husband. See Michael Garnett, "Ghostwritten Lives: Autonomy, Deference, and Self-Authorship", *Ethics* 133 (2), 2023, pp. 189-215.

[42] This condition is expressed, according to Kant, in the first two Ulpian precepts (*honeste vive* and *neminem laede*), which together constitute the basic injunction of the *private right* that characterises the state of nature. The first Ulpian precept gives one a duty to oneself not to let oneself be subordinated to others. (This duty to oneself seems to have an affinity with the duty to oneself that Muñoz argues that deontology is committed to, as a way of explaining moral prerogatives. See Daniel Muñoz, "From rights to prerogatives", *Philosophy and Phenomenological*

nature, this condition cannot be realised in a set of consistent rights. On the one hand, independence requires, according to Kant, that one have acquired rights of property over external objects.[43] On the other hand, acquiring such rights violates the others' right to independence, because it subjects others to one's private choice ("unilateral will") of acquiring a right of property.[44]

The civil condition represents a solution to this problem, because it allows the acquisition, possession, and transfer of rights to external things, without subjecting some to the private choices of others. In cases of conflict, rights are adjudicated and assigned by an impartial judge,[45] and their acquisition, possession, and transfer are done in

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Research, 102 (3), 2021, pp. 608-623.) And the second Ulpian precept gives a right against others not to subject one to their private choices. See Immanuel Kant, *The Metaphysics of Morals*, in Kant, *Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 392-93 [6: 236-6:238].

[43] This is entailed by what Kant calls the Postulate of Practical Reason with Regard to Rights. See Kant, *The Metaphysics of Morals*, pp. 404-406 [6: 250-6: 251].

[44] See Kant, *The Metaphysics of Morals*, pp. 394-95, 409, 452, 456 [6: 237-6: 238, 6: 255-6: 256, 6: 307, 6: 312]. For discussion of the problem of unilateral choice, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009), pp. 14-16, 33-36, 103-104, 153-157, 178-179; Arthur Ripstein, *Kant and the Law of War* (Oxford: Oxford University Press, 2021), pp. 19-21, 84-88; Louis-Philippe Hodgson, "Kant on Property Rights and the State", *Kantian Review*, 15(1), 2010, pp. 57-87; Japa Pallikkathayil, "Deriving Morality from Politics: Rethinking the Formula of Humanity", *Ethics*, 121 (1), 2010, pp. 116-147, at pp. 137-139; Kyla Ebels-Duggan, "Moral Community: Escaping the Ethical State of Nature", *Philosophers' Imprint*, 9(8), 2009, pp. 1-19; Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy", in D. Sobel et al., eds., *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018), pp. 28-52, at pp. 31-32, 41; Rafeeq Hasan, "The Provisionality of Property Rights in Kant's Doctrine of Right", *Canadian Journal of Philosophy*, 48(5), 2018, pp. 850-876; Chiara Cordelli, *The Privatized State* (Princeton: Princeton University Press, 2020), pp. 55-61.

[45] See Kant, *The Metaphysics of Morals*, p. 456 [6: 312]

conformity with an external law, which is no one's private choice.[46] In the civil condition, therefore, individuals are under the rule of law, and not the rule of men, and thus, they are not subordinated to others. This satisfies their claim of justice to non-subordination.

Note, however, that, even if the civil condition generally makes individuals' rights of independence consistent with each other, in the way just outlined, Kant argues that it cannot always do so. Sometimes they necessarily diverge. The right to independence, for instance, implies that what A is entitled to from others, and what others are entitled to from A, is determined by agreements that A has freely consented to, but sometimes, what A has consented to has not been given public expression in the public terms of the contract.[47] Nevertheless, the requirement of the rule of law – which is entailed by the claim of non-subordination – requires the public officials to avoid enforcing their own private choices, and thus it requires them to enforce only the public and certain terms of

[46] For this reason, Kant argues that justice requires a civil condition. He takes this requirement to be expressed in the third Ulpian precept (*suum cui tribue* – give each their due). Unlike the first two Ulpian precepts, which express the injunctions of private right that characterise the state of nature, the third Ulpian precept expresses the injunction of *public right* or of *distributive justice*. Giving each their due, which is required by this precept, is the job of the impartial arbitrator or the judge, which is a public institution. So, an injunction on individuals to give each other their due just is an injunction to submit to an impartial umpire. See Kant, *The Metaphysics of Morals*, p. 452 [6: 307]. See also B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), pp. 38-39, 58-67, 71-76, 216-218.

[47] See Kant, *The Metaphysics of Morals*, pp. 391, 446 [6: 234-6: 235, 6: 297]

a contract, even if doing so violates another claim of non-subordination, namely A's claim not to be subject to terms A has not truly consented to.[48],[49]

So, according to the position just outlined, claims of justice are simply claims of non-subordination, and these claims may sometimes conflict with each other.[50] The fact that these claims may conflict with each other is able to vindicate the claim that, in the example considered above in which A, who is fallible, but imposes an outcome on others that is objectively just, the question, "Who made you the boss?" – which gives voice to the Subordination Complaint – is well-placed. Even if the Subordination Complaint, that is given voice here, is a complaint of justice, it does not lose validity simply because the outcome that is imposed is *also* just. Claims of justice or of non-subordination may simply conflict with each other, without losing their respective validity.

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[48] Kant expresses this conflict in terms of a conflict between the requirement of objective right (or private right) and the requirement of subjective right (or public right). The latter requires *impartiality* in adjudication, but this cannot be achieved, in cases of *uncertainty*, by giving force to the rights individuals objectively have. See Kant, *The Metaphysics of Morals*, pp. 446-448 [6:297-6:303]. See also Byrd and Hruschka, *Kant's Doctrine of Right*, pp. 219-223.

[49] Martin Stone and Rafeeq Hasan, "What is Provisional Right?", *Philosophical Review*, 131 (2), 2022, pp. 51-98, at p. 86, interpret Kant to make here the argument that public authorities should ignore objective right for the sake of "expediency". But it is unclear where this reason comes from. An interpretation more consistent with Kant's argument is simply the one just mentioned above: the claim of not being subordinated to others' private choices requires judges to give expression only to what is *public* and *certain*. This interpretation makes sense of all four examples that Kant gives as an illustration of the conflict between subjective right and objective right, as well as of the two examples that he takes to illustrate the conflict between equity and justice. See Kant, *The Metaphysics of Morals*, pp. 390-391, 446-448 [6:234-6:235, 6:297-6:303].

[50] Note that for Kant, the conflict is not one between full-blown or *conclusive* rights of justice or between full-blown obligations. The full-blown or *conclusive* rights or obligations of justice are only those given by a public institution. The conflict for him is one between the different *grounds* for a (conclusive) obligation or right of justice. In order to make the presentation simpler, however, I have stated the conflict to be one of different claims. This makes no difference to the substance of the argument. See Kant, *The Metaphysics of Morals*, pp. 378-379 [6: 224]

And the fact that claims of justice are simply claims of non-subordination could vindicate the thesis that the Subordination Complaint is *sui generis*. If the servant gives voice to the complaint that his right to bodily control is violated by the lord, he is just giving voice to the Subordination Complaint.

So, to conclude, regardless of whether one takes the Subordination Complaint to be a complaint that is distinct from complaints of rights-based justice, or if one takes instead this complaint to be identical with a complaint of rights-based justice, the thesis that I set out to defend remains true: the Subordination Complaint is a *sui generis* complaint. It can explain in its own right what is objectionable in the lord-servant relationship.

Before we go any further, we must consider an objection. Daniel Viehoff argues that subordination is not by itself something objectionable. To show this, he imagines a case in which an egalitarian tribe cannot plan or foresee meeting another tribe, but in which the two tribes need to make a treaty solving some dispute. A member of this egalitarian tribe meets by chance a member of the other tribe, and she takes the opportunity to make a treaty, in this way unilaterally imposing on her own tribe a treaty (her tribe needs to accept it for reasons of coordination with the other tribe). She has therefore more influence than the others in making a political decision, but intuitively she is not an objectionable superior.[51] A way to respond to this case, however, is to point out that part of what makes inequality of opportunity for influence objectionable is that some impose their judgment over others.[52] This makes it plausible in turn to claim that 'the inequality of opportunity for influence' applies mainly to cases where the parties over

[51] See Daniel Viehoff, "Power and Equality", in David Sobel, Peter Vallentyne, and Steven Wall (eds.), *Oxford Studies in Political Philosophy*, vol. 5 (Oxford: Oxford University Press, 2019), pp. 3-38, at pp. 20-21.

[52] See Kolodny, "Rule Over None II", pp. 312-13, fn. 28.

whom a decision is imposed have an independent claim that the would-be imposer take into account the fact that they have a different judgment regarding the matter at issue, and that the would-be imposer's decision be constrained by this fact. (Thus, children are not the inferiors of parents who impose their judgments on them, but adults in dictatorship are the inferiors of the dictator, since the latter, but not the former have this kind of claim). Now, in the 'treaty between tribes' case, if the treaty is needed right *now* for coordination, and *once* someone has already made a treaty that is *impossible* to renegotiate in the short term, then it is plausible to claim that the urgency of the situation makes it the case that no one has an independent claim to constrain the treaty-maker's decision by their different judgment on the matter at issue (assuming, of course, that the benefits of coordination outweigh the costs for each individual member). This can explain why, in imposing the treaty over the tribe, the treaty-maker does not stand in a relation of objectionable inequality with her fellow tribe-members. (And note, moreover, that if we introduce the stipulation that the treaty is difficult, but *not* impossible, to renegotiate, and that the tribe could live for now without a treaty, it is intuitive that the treaty-maker would stand in a relation of objectionable superiority with the others if she were able to simply neglect their objections to the treaty and impose the treaty over them as the law of the tribe – and this is because in such a case, since there is no urgency, her fellow tribe-members have an independent claim to have their different judgment regarding the matter at issue taken into account.)[53]

So, it is safe to conclude that there is such a thing as the Subordination Complaint, and that this complaint is *sui generis*.

[53] For different responses to Viehoff's argument, see Sean Ingham, "Representative Democracy and Social Equality", *American Political Science Review* 116 (2), 2022, 689-701, at pp. 696-7; and Alexander Motchoulski, "Relational Egalitarianism and Democracy".

Chapter 3

Equality and Majority Rule

Having examined the Subordination Complaint, let us now turn back to the question we left pending at the end of chapter 1: does equality justify majority rule?

In this chapter, I want to give an affirmative answer. I argue that there are two principles of equality, namely equality of opportunity for negative control (*EONC*), which, as we shall see, is entailed by the Subordination Complaint, and arbitral equality (*AE*). The conjunction of these two principles entails in turn – for reasons that will be examined in this chapter – the requirement of majority rule.

This chapter proceeds as follows. In section 2, I argue that the Subordination Complaint entails the principle of equality of opportunity for negative control (*EONC*). In section 3, I introduce the notion of arbitral equality (*AE*), and I will show what reasons we have to care about it. In section 4, I argue that *AE* and *EONC* are compossible, and I argue in addition for a notion of political equality understood as the conjunction of *AE* and *EONC*. In section 5, I argue that the conjunction of these two kinds of equality entails majority rule. Finally, in section 6, I respond to a possible objection.

Three clarifications before we begin. First, the principles of equality that, according to my argument, imply majority rule, have only a *pro tanto* force. This implies that my argument shows only that majority rule is *pro tanto* justified.

Second, my argument for majority rule is limited to those decisions which have a moral valence – in the sense that people support or reject their adoption *on the basis of some moral judgments*. Thus, my argument is consistent with the use of procedures *other* than majority rule (such as Borda, stakes-based voting, lottery voting, etc.) for issues

which are morally neutral and on which people vote *only* on the basis of their preferences.[54],[55]

Third, my concern is with majority rule as a procedure for enacting political decisions, such as legislative acts (rather than as a procedure for selecting officials). My argument is that majority rule is required by the need to achieve equality between some relevant individuals (such as the citizens of a state). My argument leaves open, however, the more specific way in which majority rule is to be implemented. My argument does make a *pro tanto* case for the procedure of majority rule in a direct democracy, or in a referendum, but I want to leave open what are the implications of my argument for the choice between direct and representative democracy, as well as for organising the institutions of representative democracy, *if* we are to have representative democracy. Whether my argument supports, for instance, a *pro tanto* case for organising these institutions such that the policy outcomes correspond with the opinion of a majority of

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[54] David Miller suggests that majority rule is appropriate to adjudicate moral disagreements, while Borda is preferrable on issues for which the individuals' preferences (and their intensity) are relevant, such as distributing public goods. See David Miller, "Deliberative Democracy and Social Choice", in David Held (ed.), *Prospects for Democracy* (Cambridge: Polity Press, 1993), pp. 74-92, at pp. 87-88.

[55] It might be argued that any rule that is selected for this kind of issue must adequately deal with the intensity of preferences. And here Borda might be relevant, given that some argue that ranking options is a good indicator of the intensity of preferences. See Gerry Mackie, *Democracy Defended* (Cambridge: Cambridge University Press, 2003), pp. 61, 78, 133-35. Or it might be argued that what is relevant here is not the intensity of preferences *per se*, but rather the objective moral importance that satisfying one's preference has (regardless of its intensity). If that is the case, that would support something like weighting the vote by a measure proportional to one's stake in the decision. See Harry Brighouse and Marc Fleurbaey, "Democracy and Proportionality", *Journal of Political Philosophy* 18 (2), 2010, pp. 137-155. Note, however, that if there are moral disagreements over whether this moral claim is true, or over the application of this moral claim, then my argument will imply that there is a *pro tanto* case for using majority rule. (This is of course consistent with there being a *pro tanto* case – on prioritarian grounds – for stakes-based voting.)

citizens, or whether it supports some other representative arrangements – these are questions beyond the scope of this thesis.

1. Equality of Opportunity for Influence and Equality of Opportunity for Negative Control

In the previous chapter we have met the Subordination Complaint. Now, I want to go further and argue that the egalitarian considerations picked out by this concern are best interpreted in terms of what I will call equality of *opportunity for negative control*.

Kolodny argues that the Subordination Complaint should be best interpreted in terms of what he calls *equality of opportunity for influence*. Kolodny starts by noting that, in paradigmatic cases where the Subordination Complaint is operative, such as the case of feudal relations, one reason why such relations are morally objectionable is that one party has more opportunity to influence decisions than the other party has. Subtract the unequal opportunity to influence decisions, and some of the moral objection to the relationship is gone.[56] If we imagine, for instance, that the servant and the master have equal opportunity to influence their relationship of power (for instance, they freely agree by contract in each year how the master is to dispose of the servant's labour), that moderates (even if it may not entirely extinguish) the concern about inequality between them.[57]

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[56] Kolodny's argument starts with the notion that where parties have equal opportunity to exit the relationship, there is no moral objection to inequality in power between them (as is the case, for instance, with church membership). In those cases, however, where the inequality of power cannot be escaped at will (as is the case with the state decisions which, once made, cannot be escaped at will), the objectionable inequality is moderated by equal opportunity for influencing the decisions. See Kolodny, "Rule Over None II", pp. 304-6.

[57] It is equal opportunity to influence decisions, rather than equal influence directly, since, even if the servant, for instance, does not exercise the opportunity, the fact that he was granted this opportunity seems to moderate the objectionable inequality between servant and master. See Kolodny, "Rule Over None II", pp. 309-10

Kolodny then goes on to argue that 'equality of opportunity for influence' is best interpreted as equality in *a priori* chances for decisiveness. The chances are *a priori* in the sense that these are the chances individuals have when we abstract from all relevant individuals' views or judgments on a given proposal. Equality in *a priori* chances for influence does not require majority rule – a supermajority rule could satisfy this sort of equality just as well as a majority rule.[58]

In what follows, I will take, for the reasons that Kolodny gives, equal opportunity to influence decisions to be a faithful interpretation of the social-egalitarian considerations picked out by the Subordination Complaint. I want to remain agnostic, however, whether it entails equality in *a priori* chances for decisiveness (this will be immaterial for the overall argument of this chapter). I want, however, to argue that, regardless of whether it entails equal *a priori* chances for influence, equal opportunity for influence should be understood as equal opportunity for negative control.

The argument for this claim is simple. When we decry the fact that servant does not have as much opportunity to influence decisions as the master, the concern does not seem to be that the servant does not have an opportunity to impose his own judgments over the master, just as the master has. Rather, the concern seems to be that the servant lacks control over the master's imposition. He is the master's inferior because he cannot veto the master's imposition – it is not up to him whether the master imposes the judgment on him.

It could be argued that 'equality of opportunity for negative control' may capture the ideal of equality only when the relationship is escapable – when the 'servant' can exit the master-servant relationship. But it seems to be able to do so even when, as in Kolodny's example, the servant cannot escape being a servant – in which case, as Kolodny argues, the objectionability of the social inequality can be moderated if the servant is able

[58] Kolodny, "Rule Over None II", pp. 321-25.

to influence the terms of the master-relationship agreement.[59] Such influence can be seen in terms of negative control. When the master and the servant negotiate the terms, we can imagine them as selecting between multiple possible arrangements. The influence exercised by the servant can be rendered as a conditional negative control over any possible arrangement: it is 'negative control', because, for any possible arrangement, the servant can control whether the master is able to impose that arrangement (it is up to the servant whether the imposition of *that* arrangement occurs). And it is 'conditional', because the servant can veto any possible arrangement only on condition that there is at least one other possible arrangement to which he would consent.[60]

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[59] See Kolodny, "Rule Over None II", pp. 305-6.

[60] The notion of 'negative control' is distinct from the notions of control used by Philip Pettit in his republican account of democratic control. On Pettit's account, there are two kinds of democratic control: on the one hand, what he calls 'authorial control', which has a positive (as opposed to negative) dimension, and which consists in the popular influence giving direction to the state's policies. The second kind of control is what he calls 'editorial control', which has a negative dimension, and which consists in the people's capacity to contest and scrutinize the policies. See Philip Pettit, "Republican freedom and contestatory democratization", in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Value* (Cambridge: Cambridge University Press, 1999), pp. 163-190; Philip Pettit, "Democracy, Electoral and Contestatory", in Ian Shapiro and Stephen Macedo (eds.), *NOMOS XLII: Designing Democratic Institutions* (New York: New York University Press, 2000), pp. 105-144. In later work, Pettit develops a 'condominium model of control', under which the people's decisions are controlled by a public framework of reasons (embedded either in a constitution or in the public sphere), which serves as constraints on the scope of decisions (the decisions must be ones justifiable by reference to reasons everyone can accept), as well as on the procedures by which such decisions are adopted and contested. See Philip Pettit, "Three Conceptions of Democratic Control", *Constellations* 15 (1), 2008, 46-55, at pp. 52-53; Philip Pettit, "The Power of a Democratic Public", in Reiko Gotoh and Paul Dumouchel (eds.), *Against Injustice: The New Economics of Amartya Sen* (Cambridge: Cambridge University Press, 2009), pp. 73-93, at pp. 88-90.

(Note that in *On the People's Terms: A Republican Theory and Model of Democracy* [Cambridge: Cambridge University Press, 2012], he uses the notion of 'popular control' to refer to something that corresponds with what he used to call 'authorial control' [see the definition of 'control' in 'popular control' at *ibid*., pp. 153-157]; what he used to call 'editorial control' is now

So, we can conclude that the kind of equality of opportunity for influence that is entailed by the Subordination Complaint should be understood in terms of equality of opportunity for negative control (*EONC*). So, the Subordination Complaint entails *EONC*.

2. One Further Principle of Equality

I want to defend the claim that equality entails majority rule in the following way: *equality in opportunity for negative control*, when conjoined with another principle of equality – namely, what I will call *arbitral equality* – entails majority rule. I will refer to the conjunction of these two principles of equality as *political equality*. My claim will then simply be the claim that political equality entails majority rule.

So let us see what arbitral equality is and why we should care about it. Disagreement about what decisions or policies should be adopted is oftentimes a

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rendered as a condition on the exercise of 'popular control': namely, the condition that popular control be equally shared – where this means not only equal chance of being on the side of the people that succeed in exercising a directed influence [*ibid.*, pp. 209-211], but also (and here is the part that corresponds with 'editorial control') the capacity to contest the directed influence [*ibid.*, pp. 203, 213-215]; and, finally, what he used to call 'the condominium model of control' is now rendered as another condition on the exercise of popular control, namely that that the direction imposed by the exercise of popular control be justified by reference to a framework of reasons that everybody can accept [*ibid.*, pp. 252-279].)

My notion of 'negative control' is distinct from Pettit's 'authorial control'. It is merely negative, rather than positive (it concerns not the influence to impose a direction, but only the control over whether someone else can impose a direction to which one is subject). It is also distinct from Pettit's 'editorial control'. Though it is similar with 'editorial control' in that they are both a form of negative control, it is distinct in that it denotes the control an individual has in relation with the imposition of *an*other individual. Unlike Pettit's 'editorial control', it is not meant to be a control that an individual has with regard to a majority's decisions – and this is simply because a majority decision by itself is not an agent that stands in relations of social inferiority or superiority with individuals. See also Niko Kolodny, "Being Under the Power of Others", in Yiftah Elazar and Geneviève Rousselière (eds.), *Republicanism and the Future of Democracy* (Cambridge: Cambridge University Press, 2019), pp. 94-114, at pp. 109, 111-12.

disagreement that involves moral issues such as justice, fairness, welfare maximization, etc. My claim is that, when individuals disagree with each other on such matters, the decision-making procedure must satisfy arbitral equality – it must treat all individuals equally with the respect that is due to individuals qua moral agents.

To see what this means more specifically, let us see start by considering what it means to have a fitting response to moral disagreement. Consider that A and B have a dispute about what justice requires in a particular context. In making a claim about what justice requires, A implicitly makes a claim that it is not her mere preference, or her mere will that such and such should be the case. If B were to respond to such a claim of justice by invoking his preferences, such a response seems ill-fitting and disrespectful to A. Such a response is ill-fitting because it does not address the nature of the claim made by A – A's claim is about what justice requires, not about his own will or his preferences. By extension, an umpire that seeks to adjudicate the dispute between A and B would not give a fitting response to the nature of their claims if she were to treat the disputants' judgments as mere preferences.

I will call 'moral-agent-respect' the respect that the arbitrator owes to persons *qua* moral agents. In order to give an individual this kind of respect, the arbitrator must treat individuals' moral judgments *as moral judgments, and not as mere preferences*. Treating an individual's moral judgment *as* a moral judgment requires treating it as true or false, or as valid or invalid, or as something that could be in principle be deemed to be either true or false (or either valid or invalid).

Note that a requirement of treating one's judgment as a moral judgment, rather than as a preference, is not satisfied by a mere verbal acknowledgement that one's judgment is a judgment. If A and B have a disagreement about what they ought collectively to do, and if A responds to B's moral judgment by acknowledging that B's judgment is a moral judgment, but then simply moves on to state, as a response, his own

preferences about the issue under dispute, without engaging that judgment on the merits, that does not fully treat B's judgment as a moral judgment. A treats in effect B's judgment as if it were no more than a preference – something that, for the practical purposes to which that judgment was meant to apply (namely, what A and B should collectively do), can simply be ignored or dismissed, or can simply be responded to by the expression of a rival preference. What A needs to do here in order to properly treat B's moral judgment as a moral judgment is to make a response regarding its validity or its correctness. For the purposes of this chapter, I will call such a response 'a treatment on the merits' or 'an assessment' of the judgment's validity.

Note in addition that, assuming A is in a position of power and can determine what gets done, the requirement that A treat B's moral judgment as a moral judgment, rather than as a preference, requires not merely assessing the validity of this judgment, just as such (e.g., simply making a statement regarding its correctness as a pure intellectual exercise), but assessing its validity with a view to its possible implementation in practice. This means, for instance, that if A finds B's moral judgment to be correct, but then, without any reason, ignores that judgment, and makes a practical decision at odds with that judgment, A will have failed to adequately treat B's judgment as a moral judgment. A will have failed to take B's judgment seriously as a judgment *about* what should be done. A will have treated B's judgment as something that we may engage with just for fun, but not sufficiently worth taking seriously as a basis for action. In this regard, A's decision reflects a kind of response that is more appropriate as a response to preferences, rather than to moral judgments. The same point must apply, by parity of reasoning, if we consider a third party empowered to coordinate A and B, in the context of A's and B's disagreement about what should be done. The third party in effect treats B's judgment as a preference, rather than as a moral judgment, if they declare it to be correct, but then for no reason they simply ignore it, and make a practical decision on some other basis.

We have so far seen that there is a requirement to give moral-agent-respect, or a requirement to treat one's moral judgment as a judgment, and not as a preference. Now, the argument that I have given so far for this kind of requirement seems to support the claim that individuals have an entitlement – correlative to the aforementioned requirement – that they be treated with moral-agent-respect. But it does not necessarily show that they also have a claim of *equality* that they be treated with this kind of respect. (Recall that our search is for a principle of equality.)

For all that my argument shows, it might be possible that every individual has a claim to be treated with moral-agent-respect, but no claim of equality to be so treated. (That is, it might be possible that every individual has a non-comparative claim to be treated with moral-agent-respect, but no comparative claim to be so treated.)[61] If so, an umpire adjudicating a moral dispute would be only under a requirement to satisfy the (non-comparative) claims of respect of every single person, but under no requirement to distribute this respect *equally* among the parties. In such a case, if the umpire ends up treating all parties concerned with agent-moral-respect, the equality that would result between the parties – all being treated in the same way – would be merely a side-effect of the fact that the umpire gives every single person what every single person is (non-comparatively) entitled to, rather than the effect of applying a genuine principle of equality.[62]

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[61] By 'comparative claim to φ' I mean a claim that φ be distributed equally, and by 'non-comparative claim to φ', I mean a claim that φ be given to the claimholder, regardless of whether giving φ to the claim-holder results in an equal or unequal distribution.

[62] See Harry Frankfurt, "Equality and Respect", in *Necessity, Volition, and Love* (Cambridge: Cambridge University Press, 1999), pp. 146-154, at 149.

But now I want to argue that there is a principle of equality, which I call Arbitral Equality, and which requires the decision-making procedures to render a decision in a way that distributes *equally* the moral-agent-respect. Note that, by claiming that there is a principle of equality like this, I do not deny (or need to deny) that each individual has a non-comparative entitlement to be treated with moral-agent-respect. Arbitral Equality can be thought of as simply picking out a reason of equality that an arbitrator has in addition to (and, sometimes, in conflict with) the positive reason of satisfying each person's non-comparative entitlement to be treated with moral-agent-respect.

The argument for Arbitral Equality rests on the intuition that treating A's moral judgment as a moral judgment, while at the same time treating B's moral judgment as a mere preference seems to amount to treating B as a being of a low*er* moral standing than A.[63] To see this with a more vivid example, consider a feudal

[63] The fact that unequal giving of respect is objectionable on grounds of *equality* itself, rather than or in addition to, being objectionable on grounds of denying an entitlement to individual respect, is a fact that has been argued for – in different ways – in the literature on the wrong of discrimination. See especially in this regard, Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, Mass.: Harvard University Press, 2008), pp. 47-48; Hanoch Sheinman, "Two Faces of Discrimination", in Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 28-50; Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015), chap. 4; Jeremy Waldron, *One Another's Equals* (Cambridge, Mass.: Harvard University Press, 2017), pp. 73-75; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020), pp. 8-9. Note that the claim that the unequal giving of respect is objectionable on grounds of equality itself may (but need not) be parsed as the claim that individuals have an entitlement to *equal* respect. This entitlement is violated not merely because one is denied respect, but because one is denied the respect that one accords *others*. This is different from an (individual) entitlement to *individual* respect, which is violated regardless of how one treats others. For a discussion of the conceptual possibilities here, see Sophia Moreau, "In Defense of a

court that seriously engages only the judgments of justice made by the lord, but which disregards the judgments of justice made by the servant as mere self-interested preferences. It is intuitive that the court has not *only* a positive reason to respect the entitlement of the servant to be given the respect they are owed qua moral agent, but *also* a reason of *equality* to do so, since by doing so, it would avoid treating the servant as a being of a lower moral standing. Treating the lord's judgment of justice as a judgement of justice, but the servant's judgment of justice as a mere preference seems to be an offense to equality as such, that goes over and beyond the offense consisting in not satisfying the servant's (non-comparative) entitlement to be treated with moral-agent-respect. (Of course, the court could comply with *this* reason of equality also by levelling *down*, even if, in doing so, it would violate the positive reason to give moral-agent-respect; if we assume, however, that the court is to give moral-agent-respect to the lord, and if we hold this fact fixed, the court will have a reason of *equality* to level *up* by extending this treatment to the servant, as well.)[64]

So, this suggests that there is a requirement of Arbitral Equality, which requires the *equal* distribution of moral-agent-respect. This requirement is violated when A's moral judgment is treated as a moral judgment, while B's moral judgment is treated as a mere preference.

Liberty-based Account of Discrimination", in Hellman and Moreau (eds.), *Philosophical Foundations*, pp. 71-86, at pp. 73-76.

[64] Compare with Waldron's suggestion that democratization involved an extension to commoners of the dignifying right of the noble to have his voice taken into consideration. See Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012), pp. 35-36.

Note that Arbitral Equality (*AE*) is a principle of equality *between individuals*, not between judgments. It can be violated even when the lord and the servant have the same moral judgment: if the lord and the servant have the same moral judgment, it seems that the feudal court still violates *AE* when the court considers as a moral judgment only the lord's moral judgment but dismisses the (same) moral judgment as made by the servant as a mere preference.

To make the terminology more precise to capture this aspect of *AE*, let us denote by 'tracking an individual's judgment' treating that individual's judgment as a judgment (rather than as a preference), because, or in virtue of the fact that *that* individual held or made that judgment. To track B's judgment *x* is thus to treat that judgment as a judgment (rather than as a preference) *because*, or *in virtue of* the fact that *B* individual makes or holds judgment *x*.

Thus, what it takes for the feudal court to track the servant's judgment *J* is for the feudal court to treat the servant's judgment *J* as a judgment (rather than as a preference) *because*, or *in virtue* of the fact that *the servant* makes that judgment. As such, when the feudal court tracks the lord's judgment *J* (i.e., when it treats the lord's judgment of justice *J* as a judgment of justice, rather than as a preference, *because* or *in virtue of* the fact that the lord made that judgment), the court does not thereby also track the servant's judgment *J*.

We could thus say that *AE* requires the equal tracking of individuals' judgments. It requires that, if the court tracks the lord's moral judgment, it also track the servant's moral judgment.

3. Political Equality Requires Majority Rule

We have seen so far that we have reasons to care both about equality in opportunity for negative control (EONC) and about arbitral equality (AE). This entails

that we also have reasons to care about their conjunction, too. I will refer to their conjunction as *political equality*. I think this is an appropriate term, since political equality must refer to the equality that individuals have when they make political decisions, and, as we have seen, both *EONC* and *AE* capture one dimension of equality in decision-making: *EONC* captures the equality that individuals have in the opportunity to control or check each other's impositions, while *AE* captures the equality they are owed qua moral agents in the context of the moral disagreement about the policies that a state should adopt. This understanding of political equality is, moreover, supported by the kind of moral claims for political inclusion that the politically marginalised typically made throughout history, which were claims to have their moral judgments treated as moral judgments, rather than as mere preferences.[65]

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[65] For instance, a core component in the workers' agitation for the extension of the franchise in the lead-up to the enactment of the British Reform Act 1867 was the fight for the recognition of the fact that they were not driven by selfish motivations, as conservatives claimed, but by intrinsic moral concerns. See E.F. Biagini, *Liberty and Retrenchment. Popular Liberalism in the Age of Gladstone, 1860-1880* (Cambridge: Cambridge University Press, 1992), pp. 258-64. Likewise, the Chartists fighting for the extension of the suffrage wanted the recognition of the fact that they were fighting not for "class interests", but for "the rights of man". See Peter Gurney, "The Democratic Idiom: Languages of Democracy in the Chartist Movement", *The Journal of Modern History* 86 (3), 2014, pp. 566-602, at 587-88. The workers who agitated for the extension of the franchise at the beginning of the 19th century wanted to have their "just rights and interests" represented. See Nancy LePatin, *Political Unions, Popular Politics, and the Great Reform Act of 1832* (New York: St Martin's Press, 1999), pp. 21, 59. Women who fought for the extension of the suffrage did not necessarily challenge a system where their vote was not counted at all; rather, they challenged a system that counted their vote only when that vote was needed to ascertain their *private* interest or preference, but that refused to take that vote when it came to *public* issues, on which women were deemed not to be able to form moral judgments. See Jonah Miller, "Suffrage and the Secret Ballot in Eighteenth-Century London Parishes", *Historical Journal*, 2023 (Online First), p. 9. In a similar fashion, Blacks who militated for extension of the suffrage in the US in the 19th century wanted recognition of their moral capacity to form judgments about public affairs. See Philip Phoner, ed., *The Life and Writings of Frederick Douglass* (New York: International Publishers, 1955), vol. IV, p. 159. This involved a fight for the

(Note, however, that nothing substantive hangs on this terminological point: since we have reason to care about both *AE* and *EONC*, we have reasons to care about their conjunction, too, whatever the label that we place on that conjunction.)[66]

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recognition that they were driven by moral concerns, rather than selfishness. See Laura Free, *Suffrage Reconstructed: Gender, Race, and Voting Rights in the Civil War Era* (Ithaca: Cornell University Press, 2015), pp. 20-21, 24. All this suggests that the concern of political equality was a concern to have one's moral judgment recognised as a moral judgment, rather than as a mere preference. This suggests that the concern for political equality contained a concern for *AE*. The concern captured by *EONC* also played a role. For instance, the artisans of New York at the beginning of the 19th century understood "political equality" to apply only between those that had higher concerns than the mere personal interest (which suggests a concern for *AE*), and to consist in being free from the interference of those of higher status (which suggests a concern for *EONC*). See Sean Wilentz, *Chants Democratic. New York City and the Rise of the American Working Class, 1788-1850* (Oxford: Oxford University Press, 1984), pp. 92-93.

[66] The notion of political equality used here is distinct from the notions employed by Beitz, Dahl, Dworkin, and Jones. Beitz understands political equality as a requirement of fairness that the terms of participation in political structures be such that no individual could reasonably refuse to accept them, where these terms may, but need not, require equality in opportunity to influence political decisions. See Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1989), pp. 23-24, 99-117. Dworkin understands by political equality horizontal equality of impact (though he restricts this notion to "choice-sensitive" issues, which involves mere preferences and no moral judgments, as he argues that for other issues, political equality is contingent upon its capacity of achieving just outcomes). See Ronald Dworkin, "Political Equality", in *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000), pp. 184-210, at pp. 204-5. Dahl employs the notion of political equality to mean equality in the weights of each individual's preferences. See Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), p. 37; Robert Dahl, "Procedural Democracy", in Peter Laslett and James Fishkin (eds.), *Philosophy, Politics, and Society* (Oxford: Basil Blackwell, 1979), pp. 97-133, at p. 101. Peter Jones argues that political equality requires that the decision-making procedure be such that decisions satisfy people's preferences to a degree equal with the proportion of how many people hold them ("Political Equality and Majority Rule", pp. 168-175) and that people's moral judgments be reflected in the state's policies in proportion to how many people hold them (*ibid.*, pp. 179-80).

A further advantage of viewing *AE* as a component of political equality is that it captures the main intuition – that a claim for political equality (or for the extension of the franchise) is in some ways connected with a claim of respect for the judgments of the excluded – that supports some rival accounts of political equality, according to which all individuals' judgments are entitled to equal respect and (because they are entitled to equal respect) to an equal weight in political decision-making, without incurring the main difficulty facing these rival accounts, namely that it is unclear why the mistaken judgments of some individuals are entitled to the same level of respect (or to the same weight in decision-making) as the correct judgments of other individuals. *AE* does not incur this difficulty because it does not posit an equivalence between mistaken and correct judgments. Treating a moral judgment as a moral judgment, rather than as a preference, does not necessitate treating it as correct; nor does it necessitate treating it as having the same weight as any other moral judgment. All else equal, an umpire could satisfy *AE* by declaring that a judgment is mistaken, and by refusing on this ground to implement it. (As we shall see, however, when we place AE *in conjunction with* EONC, the umpire may be prohibited from doing this. But this specific prohibition follows, as we will see, from *EONC*, and not from *AE*.)

In what follows (in this section and the next one), I will argue that political equality understood as the conjunction of *AE* and *EONC* requires majority rule. In this section, I argue that making *AE* and *EONC* compossible requires a specific kind of arbitral procedure. In the next section, I argue that this procedure just is the procedure of majority rule.

Two clarifications before we go. First, in what follows, I will use 'arbitral procedure' to refer simply to a procedure that satisfies *AE*, i.e., that treats the judgments of individuals as judgments that can be true or false, rather than as mere preferences.

Second, in order for majority rule to qualify as an arbitral procedure in the relevant sense, it is not necessary that, when the majority rule is applied, there be some human agent (such as, e.g., the clerk who registers the votes) who actually treats judgments as judgments, rather than as preferences. Judgments can be treated as judgments rather than as preferences by a procedure, independently of how, for instance, the actors overseeing or administering that procedure think about the judgments at issue.[67]

This does not mean that there is no human agent involved at all in the picture. It is society (or the members of human society jointly considered) that treats each individual's judgments as judgments, rather than as preferences. Given moral disagreement about the correct course of action, society (or its members jointly considered) have a reason to erect political institutions that are able to coordinate everyone on a unique course of action. But, in discharging this duty of coordination, society is also bound by *AE* to treat the moral disagreement (about the actions that should be pursued) as a moral disagreement, rather than a mere clash of preferences, and this is just to say that society is bound by *AE* to employ political (or coordinative) institutions that have an arbitral function: by means of these institutions, society treats individuals' moral judgments as moral judgments, rather than as preferences.[68]

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[67] If an AI machine is, by analogy, employed for legal adjudication, it does not seem that it is a necessary condition of the AI machine discharging its arbitral function (treating legal judgments *as* legal judgments *rather than* as preferences) for it to be the case that the actors that take care that the machine works properly know that the machine discharges this arbitral function, or even care or be interested that justice be done (as opposed to caring or being interested that the machine work according to the technical instructions).

[68] Compare with Gaus' argument that the existence of a *moral* disagreement places constraints on the way in which the coordination (aimed at breaking that disagreement) could take shape: "[A and B] conceive of themselves as disagreeing about what *to do* because they disagree about *what is right*; to resolve the latter independently of the former treats their moral dispute as if it

4.1. The Compossibility of AE *and* EONC

Society is bound by *AE*, when choosing which policies are to coordinate everyone, to treat individuals' moral judgments (about the candidate policies) as moral judgments, rather than as preferences. The most straightforward way for society of satisfying this requirement seems to be by having political institutions in the form of courts of justice where some individuals act as arbiters of moral disputes. But this conflicts with the requirement of *non-subordination* (or *EONC*). The existence of such a political arbitral procedure gives rise to a *subordination* between those individuals acting as moral arbiters and the parties to the moral dispute.[69]

But it is possible for society's political institutions to satisfy *AE*, without thereby violating *EONC*. This is because it is conceptually possible to have a procedure that treats individuals' moral judgments as moral judgments (rather than as preferences), but which

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were no more than a conflict of preferences". See Gerald Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996), p. 187.

[69] It could be argued that society could satisfy *AE* by having an arbitral institution without any decision-making function. In that case, there would be no problematic subordination between any umpire and the parties to the moral dispute. But in such a case *AE* is not actually satisfied: society would treat individuals' moral judgments more as preferences, that is, as something that we could engage with just for fun, but not worth taking seriously when it comes to the very object of those moral judgments, namely the policies that should actually govern society. Note that treating a judgment as worth taking seriously in this sense does not entail treating it as something that merits being implemented in legislation, simply in virtue of being a moral judgment. Rather, it only entails that, *if* society is to find a judgment to be correct, then society has a reason, all else being equal, to put that judgment in practice. If society employs an arbitral procedure without a decision-making function, then society does not satisfy this condition. By analogy, a court of law that finds the plaintiff's judgment that defendant should pay damages to be correct and then, for no reason, simply fails to rule accordingly seems to treat that judgment more as a preference: as something that we only engage with for fun, but not worth taking seriously when it comes to the court's actual decisions. A society with courts of law of this sort would fail to satisfy *AE*.

does not subordinate individuals to the judgment of some umpire. To see this, consider *Constrained Umpire*. In this case, we imagine an umpire that adjudicates a moral dispute between two parties, but who is bound by a procedural rule (which is not her own creation) that requires her to set aside any grounds, other than those already given by the judgments of the parties to the disputes themselves, that might have inclined her to rule in favour of one party or the other. Call this rule the Rule of Substantive Non-Interference. Now, the umpire, following this procedural rule, finds the moral judgments to be of equal weight and consequently declares deadlock. In this case, it seems that we can say *both* that (i) the umpire treats the judgments as judgments, rather than as preferences (taking a judgment to have an equal weight with another judgment counts as a way of treating that judgment as a judgment, rather than as a mere preference); and *that* (ii) the umpire does not stand in a subordinating position relative to the disputing parties.

As an (imperfect) legal analogy for the Rule of Substantive Non-Interference from *Constrained Umpire*, consider a procedural rule that requires her a judge in a legal case to set aside any evidence with property P, where this kind of evidence requires fallible interpretation, such that admitting this evidence would give too much weight to the judge's own controversial autonomous judgment.[70] The Rule of Substantive Non-Interference is in effect just like this rule in that it seeks to remove the possibility of the umpire exercising her controversial autonomous judgment. The evidence with property P is an analogue of the moral reasons or arguments that are not explicitly made by the parties to the dispute: the possibility of engaging with and deciding (for one of the parties) on the basis of such moral reasons and arguments would give too much weight to the umpire's own controversial autonomous judgment.

[70] The exercise would be controversial in the sense that either the specific reasoning or its conclusion or both would be met with disagreement.

Because subordination (between the judge/umpire and the parties to the dispute) seems to come from the judge or the umpire deciding on the basis of her own controversial autonomous judgment,[71] both the Rule of Substantive and the legal rule excluding evidence with property P remove the possibility of subordination on this front.

Now, to continue the analogy with the legal case, we might imagine that in the legal case, the only evidence that remains are two contradictory eyewitness accounts, each speaking for the plaintiff and defendant, respectively. By following the rule that requires her to set aside evidence with property P, the judge remains with no grounds for ruling either in favour or against the defendant. As a result, the judge is bound to rule that the plaintiff's and defendant's legal judgments have equal weight. It seems that we can say (just as we can say in *Constrained Umpire*) that the judge, in so doing, (i) treats the plaintiff's judgments as (legal) judgments, and not as preferences, and that (ii) she avoids standing in a relationship of problematic subordination.

Constrained Umpire shows that reconciling AE and the claim of non-subordination is conceptually possible. But the model from *Constrained Umpire* is still deficient as a model for how society can reconcile *AE* with the claim of non-subordination in practice, since the umpire from *Constrained Umpire* declares deadlock, but the political institutions cannot afford to declare deadlock; rather they must coordinate individuals on some course of action or another.

Let us imagine an extension of *Constrained Umpire*. (Let us call it *Constrained Umpire**). In order to avoid standing in any subordinating relationship, the umpire here, just as in the previous case, follows a rule that requires her to set aside any grounds that might incline her to rule in favour of one party or another. Let us imagine, however, that in this case, the umpire needs to rule in favour of one party or another.

[71] See Kolodny, "Rule Over None II", pp. 312-13, fn. 28.

One possibility here for the umpire would be to break the deadlock by flipping a coin. This, however, seems to conflict with *AE*: the individuals' moral judgments would be treated more like preferences, rather than like moral judgments. Flipping a coin is a choice more appropriate for conflicts of mere preferences, rather than for conflicts of moral judgments. (It could be argued that, since *AE* is a genuine principle of equality, as I have been arguing, *AE* can be satisfied equally well by levelling down, in which case the mistreatment of all individuals' judgment would satisfy *AE*. I argue, below, however, when discussing Pareto, that *AE* cannot require levelling down in this context. For now, I ask the reader to grant this assumption.)

There is another possibility, however. Imagine that in *Constrained Umpire**, the umpire is bound, in addition to the Rule of Substantive Non-Interference, by a procedural rule – let us call it the Rule of Exclusion – that requires the umpire to exclude one of the disputing judgments from consideration. That leaves only one judgment in place, and that makes it possible for the umpire to make a decision other than deadlock.[72] In the context of the dispute between B, C, and E, who support x, and A and D, who supports $\sim x$, let us say, the Rule of Exclusion requires the umpire to set one of these judgments aside (i.e., to set aside either x or $\sim x$). Let us say that the Rule of Exclusion requires setting aside judgment $\sim x$. (I will come back to the question of what justifies the Rule of Exclusion to require the setting aside of one judgment, rather than another. For now, let us just assume that the Rule of Exclusion requires setting aside judgment $\sim x$.) In that case, assuming judgment $\sim x$ is set aside, judgment x is left standing.

Now, in line with our assumptions granted earlier, namely, that in *Constrained Umpire**, the umpire also follows the Rule of Substantive Non-Interference, it seems that

[72] I will assume throughout that the Rule of Exclusion, just as the Rule of Substantive Non-Interference, is not the umpire's own creation, but it is simply a pre-existent rule that the umpire blindly follows. This ensures that, in applying this rule, the umpire avoids standing in a relationship of objectionable subordination with any of the disputing parties.

the umpire has no reason not to rule in favour of *x*. (If the umpire did not follow the Rule of Substantive Non-Interference, then the umpire had been allowed to consider grounds that could have inclined them to rule against *x*. But assuming they are not allowed to do this, there is no reason not to rule in favour of *x*.)

So, in this way, the umpire from *Constrained Umpire**, following the Rule of Substantive Non-Interference and the Rule of Exclusion, can avoid deadlock.

Consider, by analogy, a legal case in which (i) the judge, following an analogue of the **Rule of Substantive Non-Interference**, sets aside a class of evidence which is susceptible to fallible interpretation, such that, if allowed, this kind of evidence would have given too much weight to the judge's own controversial autonomous judgment;[73] and in which (ii) the judge, following an analogue of the **Rule of Exclusion**, sets aside, for some procedural or technical reasons, the (otherwise credible) eyewitness account of the plaintiff, which, besides the evidence ruled out by the Rule of Substantive Non-Interference, is the only evidence supporting the plaintiff's case. In this situation, the only evidence left standing is the (conflicting) eyewitness account of the defendant. Assuming the defendant's eyewitness account left standing crosses a threshold of credibility,[74] the judge is left with no reason but to rule in favour of the defendant.

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[73] Or imagine instead that the judge sets aside any other kind of evidence such that, if admitted, would have required to judge to exercise her autonomous judgment in a way that could give rise intuitively to a problem of subordination.

[74] We can, of course, make an analogous assumption regarding the moral judgments adjudicated in *Constrained Umpire**. Just as the eyewitness account needs to cross a threshold of credibility (to warrant imposition, absent any evidence to the contrary), so we may assume that the moral judgment in dispute must cross a threshold of weight, even if it is objectively false, to warrant imposition. I want to leave open what that threshold is, but it is plausible that it corresponds with the threshold that differentiates a moral judgment made by someone (sincerely) committed to that moral judgment from a moral judgment that is not sincerely expressed. (It is possible that the requirements of *AE* apply only to the former category of moral judgments.) Just as an eyewitness account by a person who is sincerely committed to telling the truth would have a procedural weight *W* (in the courtroom) simply in virtue of that person being committed to telling

Just as in this legal case, where the defendant's eyewitness account is the only evidence left standing, leaving the judge with no reason but to rule for defendant, so in *Constrained Umpire**, the moral judgment in support of *x* is the only judgment left standing, leaving the umpire with no choice but to rule in favour of *x*.

And, just in the analogous legal case, so in *Constrained Umpire**, it seems plausible that the only way the umpire can treat the individual's judgment (which has been left standing) as a judgment, rather than as a preference, is to rule in its favour. If the judgment crosses some threshold of weight that warrants imposition,[75] and if there is no

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the truth, so a moral judgment of a person committed, in making that very judgment, to saying what she sees as morally correct has a procedural weight *W** simply in virtue of that judgment being made by a person committed to express through her moral judgment something that she sincerely believes to be morally the case. And, just as in the former case, *when we exclude all other evidence*, the procedural weight *W* of the eyewitness account *may* suffice for ruling in favour of the defendant, so in the latter case, the procedural weight *W** of the moral judgment *may* suffice for ruling for the outcome supported by that judgment. (Of course, this is consistent with saying that, when we allow conflicting evidence or arguments, the weights *W* and *W** may be outweighed or defeated.) Note that I said, 'may suffice'. Whether *W* or *W** *actually* suffices for (or warrants) imposition of an outcome depends on further (external) moral reasons. See the next footnote.

[75] It might be wondered what justifies this claim: that there is a threshold of weight *that warrants imposition*. Someone could recognise that some judgments may have some weight (in line with the argument from the preceding footnote), but still wonder how such weight by itself *warrants imposition* on others. Reply: it is plausible to say that there are moral reasons external to the parties' judgments that warrant imposition of those judgments. As we will see below, in the discussion of what I will call moral-patient-respect (see *infra*, sect. 5.1) there is a requirement that the political institutions impose decisions for some moral reasons, rather than for no moral reason at all. This requirement, in conjunction with the claim of non-subordination (which forbids the umpire to impose their own judgment), and in conjunction with the claim that there is a pragmatic need for a decision either way, entails (as we will see below) the requirement that the umpire impose one of the disputing parties' moral judgments. And since imposing a moral judgment that some of the disputing parties (e.g., the majority) sincerely believed to be true (or to be closer to truth than the alternative) seems to suffice for making a decision on the basis of a moral judgment rather than for no basis at all (and thus for satisfying the requirement of giving moral-patient-respect), it follows that the weight that warrants imposition is (at least) weight *W**

competing consideration counting against it (since any such consideration has been ruled out by the Rules of Exclusion and of Substantive Non-Interference), then the umpire has a positive reason (given by the weight of the judgment itself as a moral judgment)[76] to rule in favour of the judgment and no reason not to do so. Given this configuration of reasons, it seems that treating that judgment as a judgment (rather than as a preference) requires ruling in its favour. If a court which is bound to recognise this configuration of reasons simply dismisses the judgment (not ruling in its favour), that seems to treat the judgment more like a preference, rather than like a judgment.

So, it seems that the procedure from *Constrained Umpire** provides just what we were looking for: it does not leave deadlock, it satisfies the claim of non-subordination, and it treats individuals' judgments as judgments, rather than as preferences.

Below, I will argue that *AE* implies that the Rule of Exclusion must exclude the judgment of the minority (and must thus leave standing only the judgment of the majority), but before that, I need to consider one possible worry about the decision-making model from *Constrained Umpire**.

4.2. A Possible Worry

It could be argued that the decision-making from *Constrained Umpire** violates *AE*, for the following reason. The judgments against *x* supported by A and D are excluded by the Rule of Exclusion, and so A's and D's judgments, unlike B', C's, and E's judgments, are not treated as judgments, as opposed to mere preferences. And this violates *AE*: A and D, each taken individually, do not stand in a relationship of equality (at the bar of *AE*) with B, C, and E, each taken individually.

(see the previous footnote), that is, the weight a moral judgment has that comes from its being made by a person who sincerely believed it.

[76] See the two preceding footnotes.

But this objection fails. Excluding an individual's judgment from consideration, as the Rule of Exclusion dictates, does not mean treating that judgment as a preference, rather than as a judgment. If the umpire is pressed for time, for instance, and has no time to consider the judgments of all parties, and if, in this context, the umpire uses a pre-existent rule to decide whose judgment to track, it does not seem that the individuals whose judgments have been excluded by the application of this rule had their judgments treated as a preference, rather than as a judgment. (Their judgments are not considered at all, and so there is no sense in which they are treated either as judgments or as preferences.) But if this is true in the 'pressed-for-time' case, it seems that it must also be true in the *Constrained Umpire** case, since in both cases, the exclusion is pursuant to an impersonal rule that is justified on grounds that have nothing to do with *AE*, as such. (And, in both cases, we can say that, since judgments are not considered at all, there is no sense in which they are treated either as judgments or as preferences.)[77]

[77] Note that this line of reasoning does not threaten my own argument that the political institutions are required to treat individuals' moral judgments as moral judgments, rather than as preferences. It might be argued that political institutions could simply ignore, for some impersonal reasons unrelated to *AE*, the individuals' moral judgments. (For instance, they may be organised to maximize welfare, regardless of what individuals' moral judgments are.) By ignoring the individuals' moral judgments, political institutions – it could be argued – do not consider these judgments at all, such that there is no sense in which judgments are treated either as judgments or as preferences. And so, just as in 'pressed-for-time' case, we could not say that dismissal of these judgments constitutes a violation of *AE*. Reply: it is independently plausible that individuals have a *pro tanto* claim that political institutions not pursue goals generally in disregard of their own moral judgments about what goals those political institutions should pursue. (This claim may be connected, at a deeper level, with the claim of non-subordination, rather than with *AE*: a political institution that ignores individuals' moral judgments may give rise to a complaint of subordination. See the response to Viehoff's argument at the end of chap. 2.) Now, satisfying this *pro tanto* claim requires political institutions that they not disregard individuals' moral judgments. But then *AE* kicks in: because political institutions will need to consider individuals' moral judgments (as they must do in order to satisfy the above-stated *pro tanto* claim), there will be then a reason to treat those judgments as judgments rather

If we think that there is a problem with *AE* here, it is, I submit, only because we confuse a claim to *AE* with a different kind of claim, like the claim that the judgment that one favours be given a weight (at least) equal with the weight given to other competing judgments. (This latter claim is violated in *Constrained Umpire**, when, pursuant to the Rule of Exclusion, the umpire excludes judgment ~*x* from consideration. By excluding judgment ~*x*, the umpire does not give as much weight to this judgment as they give to competing judgment *x*.)

But the claim to *AE* is not a claim that the judgment that one favours be given at least as much weight as the weight given to other competing judgments. The claim of the servant that the feudal court treat his judgment of justice as a judgment of justice rather than as a preference cannot be understood in this way. If the servant and the lord have the same judgment *J*, but the feudal court (who rules in favour of *J*, rather than in favour of the competing judgment *J**) treats only the lord's judgment *J* as a judgment of justice, and dismisses the servant's judgment *J* as a mere preference, then the servant's claim to *AE* is violated, but his claim (*if* he has such a claim) that the judgment that he favours be given a weight (at least) equal to the weight given to competing judgments is fully satisfied.

4.3. Conclusion

Let us take stock of the discussion in this section. We have seen that political equality can be understood as the conjunction of *AE* and *EONC*, and we have also seen

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than as preferences (as *AE* requires). Now, the *pro tanto* claim that political institutions not disregard individuals' judgments has either no force or it is outweighed in some circumstances, such as in the 'pressed-for-time' case: in that case, it is justified for the political institution to disregard some judgments (provided the procedure of deciding which judgments to disregard is impartial). And if the political institution disregards a judgment (as it is permissible for it to do), then there is *no* reason for *AE* to apply.

that the way to make *AE* and *EONC* compossible is through a political procedure like the one from *Constrained Umpire**. As we have seen, this procedure is an arbitral procedure (it treats individuals' judgments as judgments rather than as preferences), and it is in addition one that avoids the complaint of non-subordination. Society jointly satisfies the individuals' claims to *AE* and to *EONC* if, in the context of the need for coordination in the face of moral disagreement, it employs such a procedure for making decisions.

Now, a question remains. We have seen that this arbitral procedure must employ a Rule of Exclusion that requires the exclusion of a judgment from debate. (As we have seen, this allows making a decision other than deadlock without compromising either *AE* or the claim of non-subordination.) But what judgment should be excluded and on what grounds?

In what follows, I will argue that *AE* implies that the Rule of Exclusion requires the exclusion of the judgment of the minority (and thus the consideration only of the judgment of the majority).

If this argument is correct, then this implies that society has egalitarian reasons (given by the conjunction of *AE* and *EONC*) to take decisions by majority rule.

5. Political Equality Requires Majority Rule

We have seen that society jointly satisfies the individuals' claims to *AE* and *EONC* if, in the context of the need for coordination in the face of moral disagreement, it employs a decision-making institution on the model of the arbitral procedure from *Constrained Umpire**. This procedure operates under the constraints of the Rule of Exclusion, which requires the umpire to set aside one of the two judgments that are in dispute.

Now, I want to argue that *AE* implies that the Rule of Exclusion dictates excluding the judgment held by the minority, and thus it dictates considering only the judgment of the majority. (This implies that the judgment left standing is the judgment of the

majority. And given that the arbitral procedure is, as we have seen, bound by the Rule of Substantive Non-Interference to rule in favour of the judgment left standing, the fact that the judgment left standing is the judgment of the majority implies that the arbitral procedure is required to rule in favour of the judgment held by the majority.)

AE implies that the Exclusion Rule dictates excluding the judgment of the minority (and considering only the judgment of the majority) because – as I am now going to argue – this is what is required by the conjunction of two principles that *AE* implies: Pareto and Substitutability.

5.1. Pareto and Substitutability

The argument that I want to make in this sub-section is that *AE* implies two principles, Pareto and Substitutability. The conjunction of these two principles offers guidance to an umpire who cannot consider all individuals' judgments and must select whose judgment to consider. These two principles are:

Pareto: If the procedure can bring about an outcome in which it tracks the judgment of one further individual, without thereby failing to track the judgment of any other individual, it ought to bring about that outcome.

Substitutability: Individuals can be substituted for one another.

Let us take these two principles in turn.

Pareto. Pareto is the idea that, if the arbitral procedure can select an outcome in which it tracks the judgment of one further individual, without thereby failing to track the judgment of any other individual, it ought to select that outcome. (Recall that by 'tracking an individual's judgment' I mean treating that individual's moral judgment as a moral judgment [rather than as a preference] because or in virtue of the fact that *that* individual holds or makes that judgment.)

Pareto is entailed by *AE*. If an arbiter judges a dispute between A and B, for instance, and if the arbiter already treats A's judgment as a judgment (rather than as a preference), then *AE* requires the arbiter to treat B's judgment as a judgment (rather than as a preference0 as well, at least in that case in which doing so does not come at the expense of failing to treat A's judgment as a judgment (rather than as a preference).[78]

Pareto can, of course, be justified by the positive reason the arbiter has to respect individuals as moral agents. But – and this is crucial for our purposes – it can be justified by an *egalitarian* reason as well: as we saw in section 3, if the arbiter already treats A with moral-agent-respect, or if they are prepared to treat A with moral-agent-respect, the umpire has a reason of equality to treat any other individual with moral-agent-respect. This reason is one of *equality*: a reason not to treat A as *higher* in moral standing than B. (Recall the case of the feudal court: it is intuitive that the court is bound by a reason of *equality* to treat the servant's judgment of justice as a judgment of justice, rather than as a mere preference, as long as it treats the lord's judgment of justice as a judgment of justice.) Of course, the arbiter may have a reason of *equality* to treat both A and B *dis*respectfully, but, on the assumption that the arbiter must give moral-agent-respect to at least someone, the option of treating both A and B disrespectfully is excluded. With that option off the table, the arbiter has a reason of *equality* to level up.

[78] Note that giving moral-agent-respect to one further person (as Pareto requires) cannot consist in increasing the winning *chances* of the alternative supported by the judgment of that further individual. And this is simply because an increase in the chance of outcome *x* does not address the judgment in support of *x* as a judgment (rather than as a preference). Giving chances for *x* may be a fitting response to a preference for *x*, but it does not seem to be a fitting response to a moral judgment in support of *x*. (This is of course, consistent, with claiming that a chancy procedure may be a proper way to adjudicate a dispute *if* there is no procedure that can satisfy arbitral equality; but in that case, the chance-distributing procedure would be justified on grounds *other* than arbitral equality.)

Now, it could be wondered, why should we make this assumption? Why shouldn't we say that levelling down or treating everyone with moral-agent-*dis*respect is also on the table, or an option that the arbiter may choose? There is an *independent* reason for this. To see it, consider a related, but distinct respect, that the arbiter owes not to the persons who advance competing moral judgments, but to those upon which the umpire imposes an outcome. (The class of individuals who advance moral judgments and the class of individuals who have a verdict imposed upon them may be extensionally equivalent, but they may be separated intensionally, because the notion of respect I consider in this paragraph is concerned with individuals under their aspect as *imposees*, rather than under their aspect as persons who advance competing moral judgments.) If the imposer imposes an outcome for some arbitrary reasons (e.g., because this is their personal preference, or because this is what a random procedure yields), rather than because the imposer considers the moral reasons or judgments that support that outcome, it disrespects the imposees qua persons who care about morality. We can call this kind of respect moral-*patient*-respect (as it is concerned with individuals taken as patients, or imposees, rather than agents, and as it also concerned with the respect owed to patients qua individuals that care about morality). There is a moral difference between a procedure that imposes an outcome after it considers whether there is any moral judgment in favour of the outcome and one that imposes an outcome without even considering whether there is any moral judgment in favour of imposing that outcome at all. So, we can say that the requirement of moral-patient-respect entails at least this minimal constraint: that the procedure that is about to impose an outcome (whether x or $\sim x$) do so by tracking a moral judgment of at least one of the disputing parties that bears on the appropriateness of imposing that outcome. This requirement shows why we have to assume that the arbiter cannot level down: the arbiter must track at least one person's judgment, and it must do so in order to satisfy moral-patient-respect. (I say that the arbiter must 'track at least one

person's judgment', rather than simply 'consider the moral reasons that support an outcome', because, as we have already seen, an arbiter who complies with *EONC* must make abstraction of any considerations or reasons other than those expressly contained in the judgments *of* the individuals that are party to the disagreement.)[79]

So, we can conclude that there is an egalitarian rationale for Pareto: assuming that the arbiter must track at least one person's judgment (in order to satisfy moral-*patient*-respect), the arbiter, in complying with this requirement, will have to give moral-*agent*-respect to at least one person. But then there will be a reason of *equality* for the arbiter to be open to extend this moral-agent-respect to any other individual – at least in those

[79] Note that Pareto as formulated here is different from the notion of positive responsiveness from May's argument for majority rule (See May, "A Set of Independent Necessary and Sufficient Conditions", p. 682; Sen, *Collective Choice and Social Welfare*, p. 72). To employ a uniform standard for comparing these two principles, let us formulate positive responsiveness in terms of a distribution of moral-agent-respect. So, let us say that positive responsiveness requires that, if the arbiter is deadlocked between the decision to either track the judgments of the individuals holding judgment *x* or the judgment of the individuals holding judgments *y*, then, holding all else equal, the addition of one individual holding judgment *x* requires the arbiter to track the judgments of the individuals holding judgment *x*. (This definition leaves open when the umpire is deadlocked between these two decisions. But a further stipulative condition of neutrality – which is not part of my own argument – would imply that it is deadlocked just in case the number of individuals holding judgment *x* equals the number of individuals holding judgment *y*.)

Positive responsiveness so construed is compatible with (what on my own definition of Pareto would be) Pareto-noncomparable outcomes. If A and B hold judgment *x*, and C judgment *y*, then positive responsiveness (in conjunction with the neutrality condition) requires the umpire to track A's and B's judgment *x*, rather than C's judgment *y*. But the option (tracking A's and B's judgments *x*) is Pareto-noncomparable with the option (tracking C's judgment *y*). In choosing the first rather than the second option, the umpire would fail to track someone's (that is, C's) judgment, and in choosing the second rather than the first option, the umpire would also fail to track someone's (that is, A's and B's) judgments. Neither option satisfies Pareto. This shows that my own Pareto is not positive responsiveness. Leaving this difference aside, however, my own Pareto has a moral justification, grounded in *AE*. It is less clear what is the normative justification for the positive responsiveness from May's argument.

cases where in so doing the arbitrator does not fail to give moral-agent-respect to someone else. This implies that there is a reason of *equality* to accept Pareto.

Substitutability. At the bar of *AE*, individuals are *substitutable*. This condition is intuitively powerful. The identity of individuals should not make a difference to whether they are given the respect that the arbiter owes them qua moral agents. Whether the arbiter tracks an individual's judgment should not depend on that individual's identity. An arbiter should track the same judgment, for instance, regardless of whether it is held by A or by B.

Note that Substitutability does not say that *the judgments* that individuals have or make should not make a difference to whether their judgments are tracked. Substitutability rather says that the identity of individuals (as opposed to the identity of their judgments) should not make a difference to whether their judgments are tracked. So, if Substitutability is correct, there is no morally relevant difference (at the bar of *AE*) between Servant holding judgment *S* and Lord holding judgment *L not* because the identity of the judgments (whether it is *L* or *S*) is irrelevant, but because the identity of the individuals (whether it is Lord or Servant) is irrelevant. *AE* is meant to pick out a dimension of equality *between individuals* rather than *between judgments*.

One way of making this idea more precise is by saying that Substitutability requires that, keeping a judgment *J* constant, varying the identity of the individual making that judgment (e.g., from lord to servant) should not make a difference to whether judgment *J* is treated as judgment (rather than as a preference). This is because the feudal court has as much reason to treat judgment *J* as a judgment (rather than as a preference) when this judgment is made by the lord as it has when this judgment is made by the servant.

So, Substitutability must say that individuals, *taken in abstraction of* the specific judgments that they hold, are substitutable. If we substitute an individual (taken in abstraction from the judgment that individual makes) for another, that should not make a difference to whether the judgment is being treated as a judgment, rather than as a preference.

It could be argued, however, that, even if *AE* does not require equality between judgments, that does not entail that it requires substitutability between individuals, *taken in abstraction of* their particular judgments. That is because *AE* not requiring equality between judgments is consistent with *AE* requiring equality between *individuals-with-their-particular-judgments*.

But imagine a case – let us call it *Changing Judgments* – in which the lord changes his judgment from *L* to *M*, and in which the feudal court treats the lord's judgment *L* (at the time when the lord had this judgment) as a judgment, but his judgment *M* (at the time when the lord had this other judgment) as a mere preference. If *AE* were an equality between individuals-with-their-particular-judgments, then the court's disparate treatment in *Changing Judgments* would be an offense to arbitral equality. (There would be an inequality in the treatment of the individual-with-judgment-*L* as compared with the treatment of the individual-with-judgment-*M*.) But this seems intuitively implausible. Whatever other normative problems the court's treatment in *Changing Judgments* may raise, it does not seem to be a problem of equality.[80]

Moreover, if *AE* were an equality between individuals-with-their-particular-judgments, rather than an equality between individuals taken in abstraction of their particular judgments, then the particular judgment held by an individual would need to

[80] Moreover, if *AE* were an equality between individuals-with-their-particular-judgments, then the court's disparate treatment in *Changing Judgments* would be *on a par*, *AE*-wise, with the disparate treatment of the court when it treats the lord's judgment *L* as a judgment, and the servant's judgment *S* as a mere preference. But this parity seems implausible.

figure in the claim to *AE* as a precondition for the intelligibility of this claim as a claim to *AE*. But this seems intuitively implausible: when the servant claims that he should be treated according to *AE*, he need not make any reference at all to the specific judgment that he has. He need not say, 'I have a claim that my judgment that *x* be treated as a judgment, rather than as a preference'. He only needs to say, 'I have a claim that my judgment [whatever that is] be treated as a judgment, rather than as a preference.' This would suffice for the intelligibility of his claim as a claim to *AE*.

So, it is safe to conclude that the particular judgments that individuals have are not relevant at the bar of *AE*. What are substitutable – from the perspective of *AE* – are individuals, *in abstraction of* the specific judgments that they have, and not individuals-with-their-particular-judgments.[81]

5.2. The Conjunction of Pareto and Substitutability

Let us now see what the conjunction of Pareto and Substitutability implies in a case in which the umpire cannot track everyone's judgments but must choose whose judgment to track.

Assume, for instance, that the umpire can either (i) track the lord's judgment *L* or (ii) track two servants' judgments *S*. That is, the umpire can either select outcome O_1, in which they track Lord's judgment *L*, or outcome O_2, in which they track the judgments *S* of $Servant_1$ and $Servant_2$, respectively.

[81] Note that in this regard Substitutability is distinct from the anonymity condition from May's argument for majority rule. Substitutability requires only the substitutability of individuals *in abstraction* of their judgments. By contrast, the anonymity from May's argument does not rule out the substitutability of individuals-with-their-particular-judgments. (See Sen's formulation of the anonymity condition: if we interchange an individual preference [individual judgment] with another individual preference [individual judgment], that should not make any difference for the social preference [collective judgment]. Sen, *Collective Choice and Social Welfare*, p. 72)

The conjunction of Substitutability and Pareto entails that the arbitrator should select O_2. Rationale: by applying Substitutability, we substitute $Servant_1$ for Lord. That is, we imagine that, if outcome O_1 were chosen, the individual whose judgment would thereby be tracked would be $Servant_1$ rather than Lord. (Note that, because, as we have seen, Substitutability applies to individuals in abstraction of the judgments they make, saying that, if O_1 were chosen, the *individual* whose judgment would thereby be tracked would be $Servant_1$ rather than Lord is not saying that the *judgment* that would thereby be tracked would be *S* rather than *L*. In substituting an individual for another, we do not also substitute their judgments along with them.)

The result of this is the following: the question now becomes whether the arbitrator should choose between only tracking $Servant_1$'s judgment (if O_1 is chosen) or tracking both $Servant_1$'s judgment and $Servant_2$'s judgment (if O_2 is chosen). Now, by applying Pareto, we should say that the arbitrator ought to choose O_2, since by so doing, the arbitrator tracks the judgment of one further individual ($Servant_2$) without thereby failing to track the judgment of any other individual. Therefore, the application of these two conditions entails that the arbitrator ought to select an outcome in which it tracks the two servants' judgments, rather than an outcome in which it tracks only Lord's judgment.[82]

5.3. Extension

[82] Note that this procedure is formally equivalent with the sort of procedure that Frances Kamm uses to show that the moral betterness of saving the greater number in rescue dilemmas can be justified on non-consequentialist grounds. According to her argument, given that, by Pareto, it is better if B and C are saved than if only C is saved, and by Substitutability, B can be replaced with A (since their lives have equal moral significance), it follows that it is better if B and C are saved than if A is saved. See Frances Kamm, *Intricate Ethics* (Oxford: Oxford University Press, 2007), pp. 32, 51. For discussion, see Iwao Hirose, *Moral Aggregation* (Oxford: Oxford University Press, 2014), pp. 161-66.

Now note that this reasoning can be extended to other cases, in which the umpire has to decide whose judgments to consider in the first place, rather than whose judgments to track. There might be situations – recall the 'pressed-for-time' case and *Constrained Umpire** – in which the umpire's choice is not between whose judgment to track, but whose judgments to consider in the first place. When choosing whose judgments to track, the umpire chooses whose judgments to treat as judgments, and whose judgments to treat as preferences. (That is implied by the very definition of 'tracking an individual's judgment'.) But when choosing whose judgments to consider and whose judgments to exclude from consideration, the umpire does not thereby choose whose judgments to treat as judgments and whose judgments to treat as preferences. (And that is simply because, as we have seen, excluding a judgment from consideration does not necessarily mean treating that judgment as a preference, rather than as a judgment.)

Now, when the umpire chooses to consider (or not to exclude from consideration) a judgment, the requirements of *AE* become operative: the umpire has a reason to treat that judgment as judgment, rather than as preference. Assuming that, once the umpire considers a judgment, the umpire also complies with *AE* (and treats that judgment as judgment, rather than as a preference), the choice between (i) considering the judgment *L* made by lord and (ii) considering the judgment *S* made by two servants amounts to a choice between (i) tracking the lord's judgment *L* and (ii) tracking the servants' judgments *S*.

Since, as we have seen, *AE* implies – via the conjunction of Pareto and Substitutability – that the umpire should rather track the judgments of two individuals rather than the judgment of only one individual, this just means that *AE* also implies – via the conjunction of Pareto and Substitutability – that the umpire should choose to consider that judgment that is held by two individuals rather than that that is held by only one individual.

5.4. Majority Rule

With this framework in mind, let us return to the arbitral procedure from *Constrained Umpire**. Applying the reasoning developed above in this case, we can see that *AE* implies that the Rule of Exclusion requires the umpire to exclude from consideration the judgment of the minority. (In order to show this, in what follows, I will assume that there is no Rule of Exclusion, and I will consider instead what *AE* implies in the question of what judgment the umpire should exclude. Because *AE* will imply, as we will see, that the umpire should exclude the judgment of the minority, that will show that *AE* implies that the Rule of Exclusion requires the exclusion of the judgment of the minority.)

In *Constrained Umpire**, the umpire has to decide whether to exclude from consideration judgment x (held by B, C, and E) or judgment $\sim x$ (held by A and D). If the umpire excludes judgment x from consideration, then the umpire will consider the judgments of A and D. And if the umpire excludes judgment $\sim x$ from consideration, then the umpire will consider the judgments of B, C, and E. So, in facing the choice between either excluding judgment x or excluding judgment $\sim x$, the umpire faces the choice between either (i) considering the judgments of B, C, and E, or (ii) considering the judgments of A and D.

Now, for the reasons seen above, the choice between (i) considering the judgments x of B, C, and E, or (ii) considering the judgments $\sim x$ of A and D amounts to a choice between (i) tracking B's, C's, and E's judgments x and (ii) tracking A's and D's judgments $\sim x$. So, the choice confronted by the umpire is a choice between outcome O_1, in which the umpire tracks only the judgments x of B, C, and E, and outcome O_2, in which the umpire tracks only the judgments $\sim x$ of A and D.

AE requires us to apply Substitutability and Pareto. By Substitutability, we substitute B and C for A and D in O_2, such that B and C now hold judgment ~*x* in O_2. Now, the choice becomes whether the umpire ought to track the judgments *x* of B, C, and E (if O_1 is chosen) or whether it ought instead to track only the judgments ~*x* of B and C (if O_2 is chosen). By Pareto, the arbitrator ought to select O_1. So, the conjunction of Substitutability and Pareto requires the umpire to select O_1, and this is just to say that it requires the umpire to exclude from consideration the judgment held by the minority and to consider instead only the judgment held by the majority.[83]

This argument can be represented as follows:

(B, C, E) v (A, D) The options open to the umpire's choice

(B, C, E) v (B, C) By Substitutability

(B, C, E) By Pareto

So, *AE* – via the conjunction of Pareto and Substitutability – requires the umpire to select for consideration that judgment that is held by the majority.

AE thus implies that the Rule of Exclusion requires the exclusion from consideration of the judgment that is held by the minority and the consideration instead only of the judgment held by the majority.

[83] Question: if Substitutability says that individuals are substitutable, then why only substitute B and C for A and D in 0_2, but not substitute, symmetrically, A and D for B and C in O_1? Answer: It is true that we could make this latter substitution as well. But it suffices for my argument that Substitutability also warrants a one-way (or asymmetrical) substitution (only B and C for A and D, and not also vice versa). Even if we could continue the substitutions that Substitutability warrants, the point is that, *once* we have made the first (one-way) substitution, Pareto becomes operative, and requires the selection of 0_1.

And since this exclusion implies that the sole judgment left standing for the umpire to consider is the judgment of the majority, and since (as we have seen) the umpire is bound (as a result of the application of the Rule of Substantive Non-Interference) to rule in favour of the sole judgment left standing, it follows that the umpire is bound to rule in favour of the judgment of the majority. But this is just to say that the arbitral procedure that we have been considering all along just is the procedure of majority rule.

5.5. Conclusion

So, we can conclude that political equality (as the conjunction of *AE* and *EONC*) requires majority rule. *AE* and *EONC* jointly require that, in the context of moral disagreement about the decisions to govern society, such decisions be taken by an arbitral procedure on the model of the procedure from *Constrained Umpire**. Given that this procedure must exclude a judgment from consideration, given that this procedure is also bound (by the Rule of Substantive Non-Interference, which is implied by *EONC*) to rule in favour of that judgment that is not excluded from consideration, and given that that judgment that is not excluded from consideration is (as *AE* – via the conjunction of Pareto and Substitutability – requires) the judgment of the majority, it follows that the arbitral procedure is bound to rule in favour of the judgment of the majority. But this is just to say that the arbitral procedure is the procedure of majority rule.

So, because majority rule is required by political equality (by the conjunction of *AE* and *EONC*), we can conclude that majority rule is an egalitarian requirement.

6. Is Majority Rule a Problem from the Standpoint of *EONC*?

So, we have seen that majority rule is a requirement of equality: it is implied by the conjunction of *AE* and *EONC*.

But now it could be argued that my argument for majority rule collapses because the argument relies on *EONC* (or the claim of non-subordination), but if we inspect this principle of equality more closely, we will find that the members of the majority stand in an objectionable relationship of subordination – or in a relationship that violates *EONC* – with the members of the minority, simply in virtue of the fact that the former are able to impose their own judgment over the latter. If this is correct, this poses a problem for my own argument, since it shows that majority rule is not, after all, contrary to what I have been arguing, justified by *EONC*.

But the relationship of equality (expressed in the claim of non-subordination) is a relationship between individuals, taken one by one: between A and B, between, A and C, between B and C, and so on. And it is not clear how an *individual* member of the majority B stands in a relationship of subordination with an *individual* member of the minority A, simply because there are other individuals who concur with B. Excluding special cases, those other individuals from the majority do not themselves act under the power of B; they come to concur with B by their own free judgment. They could equally well have concurred with A.

It could be argued, however, that there is a sense in which they stand in a relationship of inequality, and that is captured precisely by my notion of equality of opportunity for negative control: the individual member of the minority A does not have the opportunity to veto the plan that the individual member of the majority B supports, while the individual member of the majority has, by contrast, the opportunity to veto the plan that the individual member of the minority supports.

But if we assume that the other voters' judgment is free and that their judgments could with equal probability go in either direction (either in the direction supported by A

or in that supported by B), then the opportunity that A has to veto B's proposal is equal with the opportunity that B has to veto A's proposal.[84]

But, even if we do not assume that the other people could with equal probability support either the position supported by A or the position supported by B, there are still grounds for saying that A and B enjoy equality of opportunity for negative control. Recall that the relationship of equality (as expressed in the claim of non-subordination) is between two individuals – between A and B, not between A and (B *plus* the majority).[85] This means that, in assessing the relationship between A and B, we must make abstraction of how the other people vote. Now, if we make abstraction of how all other people vote, then majority rule ensures that A and B enjoy *EONC*: majority rule dictates deadlock when there is an equal number of votes for both alternatives, and so it dictates deadlock when we count only the votes of A and B in abstraction of how all other people vote. But this deadlock means that majority rule affords both A and B the opportunity to veto each other's proposal. So, majority rule ensures equality of opportunity for negative control between A and B.

Now, it could be objected that, even if the relationship of non-subordination is a relationship between two individuals, we still cannot make abstraction of how other people vote. How other people vote, it could be argued, has an effect on the power that an individual has, at least in some circumstances. And that power is relevant in turn for the relationship of equality or inequality between individuals. For instance, it could be

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[84] To this extent, *EONC* is compatible with equality of *a priori* chances for decisiveness: assuming the other voters with equal probability could support either one of two alternatives, A and B have equal *a priori* chances for decisiveness just in case the proportion of all logically possible voting configurations where A is decisive – i.e., where A has the power to *veto* the imposition of an alternative – equals the proportion of all logically possible voting configurations where B is decisive.

[85] For this *dyadic* aspect of the claim of non-subordination, see Kolodny, "Being Under the Power of Others", pp. 109, 111-12.

argued, if a majority is guaranteed to vote together with B and if there is no such majority on A's side (A being, for instance, in a persistent minority), then B has more power than A; and if that is the case, that means in turn that A and B stand in an objectionable relationship of subordination.

We can state this argument as follows:

Premise 1: If B is in a persistent majority and A is in a persistent minority, then B is more powerful than A.

Premise 2: If B is more powerful than A, then A and B stand in an objectionable relationship of subordination.

Conclusion: If B is a part of the persistent majority and A part of the persistent minority, then A and B stand in an objectionable relationship of subordination.

Arash Abizadeh argues for Premise 1.[86] His argument relies on an analysis of the concept of power. According to him, the notion of power to effect an outcome cannot be plausibly understood in terms of counterfactual dependence, but in terms of the NESS test for effecting an outcome: one successfully exercises the power to effect an outcome *O* just in case one's vote is a necessary element in at least one minimally sufficient sub-set of votes, where this sub-set is part of the set of votes that is (non-minimally) sufficient for outcome *O*.[87] The implication of this notion of power is that an individual voter B from the

[86] See Arash Abizadeh, "The Power of Numbers: On Agential Power-With-Others Without Power-Over-Others", *Philosophy and Public Affairs* 49 (2021), 290-318; Arash Abizadeh, "A Recursive Measure of Voting Power with Partial Decisiveness or Efficacy", *Journal of Politics* 84 (2022), 1652-1666.

[87] The NESS test for effecting an outcome is an alternative to the counterfactual dependence test, which does not incur the problems of the latter. (On the counterfactual dependence test, an event E effects an outcome O just in case, had E been missing, O would not have occurred.) For instance, if fire 1 preempts fire 2 from reaching the barn, and if the barn is burned by fire 1, then

(persistent) majority is more powerful than an individual voter A from the (persistent) minority. The majority that is on B's side has (by stipulation) the power either to adopt or to reject *O*, while the minority voting together with A has the power neither to adopt nor to reject *O*, and so B, *unlike A*, is a (necessary) member in (a number of the minimally sufficient sub-sets from) the set of votes (viz. the votes of the majority) that is sufficient for either adopting or rejecting *O*, which just is to say that, if the notion of power as determined by the NESS test is correct, B is more powerful than A.

I do not want to take issue with Premise 1.[88] I want to argue instead that the argument fails because it relies on a *fallacy of equivocation*: the notion of power is used in both premises, but that notion of power that is *normatively* relevant for the claim of non-

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the counterfactual dependence test implausibly implies that fire 1 did not burn the barn, since, had fire 1 been missing, the outcome of the barn burning would have still occurred. Or, if fires 1, 2, and 3 (all coming from different directions) jointly burn the barn, the counterfactual dependence test again implausibly implies that no fire burns the barn, since no each single fire is such that, had it been absent, the barn would not have burned. The NESS test for effecting outcomes avoids this problem. While for counterfactual dependence, E must be *necessary* for O in order for E to effect O, for the NESS claims that E must be part of a set of events that is *sufficient* for O. More specifically, the NESS test works as follows: we start by taking the events taking place prior to O, and which is sufficient for O occurring. From all that class of evidence, we single out a (hypothetical) sub-class which is *minimally* sufficient for O. And then we see whether E is a necessary element of this sub-class, i.e., whether this sub-class would have still been minimally sufficient for O had we removed E. If E is necessary for this sub-class, then E effects O. For instance, in the case of the 3 fires jointly burning the barn, one minimally sufficient sub-class from all the class of events is fire 1 burning the barn. Since fire 1 is a necessary element of this sub-class, it follows that fire 1 effects the outcome. And since another minimally sufficient sub-class is fire 2 burning the barn, and since fire 2 is a necessary element of that sub-class, it follows that fire 2 also effects the outcome. For extended critical discussion of the NESS test of causation, see Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009), chap. 19.

[88] Niko Kolodny and Sean Ingham, "Is It One More Powerful with Numbers on One's Side?", *Journal of Political Philosophy*, 31 (4), 2023, pp. 452-469, take issue mainly with Premise 1.

subordination (in Premise 2) is crucially distinct from the notion of power from Premise 1.

The notion of power needed for Premise 1 is power understood in terms of the NESS test for effecting an outcome. This power is the power to contribute to a set that is *sufficient* for an outcome. But this notion of power is not *normatively* relevant from the standpoint of the claim of *non-subordination*. If it were relevant, then we would expect B to have a complaint of subordination that she is not (part of a set of events that is) *sufficient* for the imposition of an outcome in the same way in which A is (part of a set of events that is) *sufficient* for the imposition of an outcome. But it does not seem that B has such a complaint.

When the servant complains about her subordination to the master, her complaint is not that she lacks the opportunity to impose her own views or preferences over the master in the same way in which the master imposes his own views or preferences over her. That is, her complaint is *not* that she cannot be *sufficient* for the imposition of an outcome over the master in the same way in which the master is *sufficient* for the imposition of an outcome over her.[89] Rather, her complaint is that she cannot control or veto the master's imposition over her. But this is just to say that her complaint is that she cannot be *necessary* for the imposition of the outcome: that is, that she cannot be in the position to decide whether the master imposes his plan over her or not.

But this is just to say that, if the complaint against subordination captures a complaint against inequality of power, it does not capture a complaint against inequality of power understood as power to be *sufficient* for an outcome, but rather against inequality of power understood as power to be *necessary* for an outcome. This means in turn that any

[89] And, by extension, her complaint is not that she is not a (necessary) member in (any number of the minimally sufficient sub-sets from) the set of events that is *sufficient* for the imposition of an outcome over the master.

inequality in the power to effect outcomes as determined by the NESS test is irrelevant from the perspective of the claim of non-subordination.

It might be argued, however, that we can see instead the servant's complaint as a complaint *not* that she cannot be sufficient for the imposition of an outcome over the master, but rather than she cannot be *sufficient* for the imposition of an outcome *over her herself*. But this complaint either (i) is simply the complaint that the servant is not *necessary* for the imposition of an outcome by the master on her (i.e., that she has no power to veto the master's imposition), or (ii) it goes beyond that complaint. If (i), then the complaint is not a complaint that the servant lacks the kind of power that is identified by the NESS test, since the kind of power that is identified by the NESS test does not consist simply in the power to be necessary for an outcome. If (ii), then the servant's complaint no longer seems to be a complaint against subordination: if the servant complains that she cannot determine the plans governing her own life, but if this complaint is (*ex hypothesi*) not a complaint that the master stands in the way of her being able to determine her own plans (i.e., not a complaint that she lacks a veto power against the master), that complaint looks more like a complaint that the master violates some claim of the servant to positive autonomy, rather than like a complaint against being subordinated to the master.[90]

So, either way, it remains true that the complaint against subordination is not a complaint against inequality of the kind of power identified by the NESS test.

Because an inequality of power as determined by the NESS test is irrelevant from the standpoint of equality expressed in the claim of non-subordination, Premise 1 cannot support the Conclusion of the argument. So, the argument fails. The relationship of

[90] Of course, this is not to say that that complaint is not a valid one; it is only to say that the principle of equality as expressed in the claim of non-subordination (which has only a *pro tanto* force) does not capture it.

equality or inequality (as expressed in the claim of non-subordination) between A and B is not affected by whether A is in the majority and B in the minority. This makes it safe to assume that, in assessing the relationship of equality or inequality between A and B, we may *abstract from* how the other voters vote (i.e., from whether A is in the majority of voters and B in the minority).

But this allows us to say that majority rule ensures non-subordination between A and B: as we have seen, making abstraction of how the others vote, majority rule ensures that, when A and B disagree, there is deadlock, and thus it ensures that neither A nor B is able to impose the plans that they favour on each other: it ensures that each is *necessary* for the imposition of an outcome supported by the other on each. In other words, it ensures that each has an *equality of opportunity for negative control*.

So, we can conclude that majority rule is consistent with *EONC*.

1.1. One Further Argument

Even if we put aside this argument, there is still one other argument that can be made to show that majority rule is consistent with *EONC*.

This argument proceeds as follows: it starts by reminding the reader about the notion of equality of opportunity of conditional negative control that we have met in section 2, it then asks the reader to imagine two cases in which this kind of equality is satisfied, and it then proceeds to show that the majority rule case is just like these two cases, in all relevant respects. And, given that in the two cases mentioned above, the parties do not stand in a relationship of inequality that is objectionable from the standpoint of *EONC*, the same must be said, by parity of reasoning, about the parties from the majority rule case.

So, recall from section 2 that, when A and B cannot exit a relationship in which either one of them must impose a judgment over the other, the objectionability of the

social inequality inherent in this relationship can be moderated if they have equal opportunities for *conditional* negative control: conditional on there being an arrangement that A and B agree to, they both have the power to negatively control the imposition of any other arrangement that the other party may favour. Let us call the arrangement that each party needs to agree to as a condition of each of them having the power to negatively control the imposition of any other alternative arrangement the Ultimate Arrangement.

Now, let us imagine a case (*No Exit, Lottery*) in which the Ultimate Arrangement corresponds with judgment x supported by B and fails to correspond with judgment $\sim x$ supported by A. Let us imagine at the same time, however, that neither A nor B had a power to determine that this should be the Ultimate Arrangement. That is, let us imagine that neither A nor B had a power to determine that it is conditional on their accepting arrangement x, rather than conditional on their accepting $\sim x$, that they each have a power to negatively control the imposition of any other alternative arrangement that the other party may favour. Instead, let us imagine that it was a lottery run by someone else that determined that x, rather than $\sim x$, should be the Ultimate Arrangement. We may imagine that the third party who run the lottery applied the following algorithm: identify whether A and B have different opinions regarding the collective arrangements regulating their non-exitable interaction; if they have the same opinion (regardless of what that is), then leave them as they collectively choose to be; if they have different opinions (regardless of who holds what opinion), then run a lottery to determine which one of the different arrangements favoured by these opinions should become the Ultimate Arrangement.

Now, it seems that, because in *No Exit, Lottery*, A and B have equal opportunity to negatively control the imposition of an arrangement other than the Ultimate Arrangement, this fact seems to moderate the objectionability of the social inequality between them. Moreover, because it is the lottery, rather than B, that fixes x as the Ultimate Arrangement, the mere fact that x is the Ultimate Arrangement, and that A has

to accept it, does not seem to make A stand as a social inferior *to* B. It is true that arrangement *x* is favoured by B more than it is favoured by A. But it seems implausible to say that, simply because B, unlike A, happens to think that *x* is the arrangement that is more just or that is closer to the balance of moral reasons, that fact, by itself, makes B stand as a social superior to A.[91]

Another possibility would be to argue that B stands as a social superior to A because it is as a result of B failing to agree to ~*x*, that is A forced to accept *x*. And, so, on this line of thought, B would stand as a social superior to A because of his power to make A accept *x*. But this argument fails, for the following reason. A has no claim at the bar of *EONC* that B accept ~*x*. That is, A cannot claim that, in order for B to stand as a social equal to A, B must accept the arrangement favoured by A, namely ~*x*. (If A had that claim, then, by parity of reasoning, B must have had a symmetrical claim against A that A accept the arrangement favoured by B, namely *x*.[92] But since this conclusion contradicts the premise that A has a claim against B that B accept ~*x*, and thus implies absurdity, it follows that A cannot have the aforementioned claim against B.) But, if A does not have a claim at the bar of *EONC* that B accept ~*x*, it follows that it cannot be that B offends *EONC* when he refuses to accept ~*x*, and thus, it cannot be that B stands as a social superior to A simply in virtue of the fact that, by refusing to agree to ~*x*, B makes it so that A is left with no alternatives but to agree to *x*.[93]

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[91] For a similar claim, see Kolodny's second argument against the neutrality condition. Kolodny, "Rule Over None II", pp. 324-25.

[92] This is because A and B are symmetrically situated insofar as the facts that are morally relevant from the perspective of *EONC* are concerned. It is true that the lottery run by the third party goes in B's favour, but it is unclear how this very fact could make B a social superior to A. The lottery could have equally gone for the arrangement favoured by A. So, this fact must be morally irrelevant insofar as *EONC* is concerned.

[93] Note that I have made abstraction of the content of the arrangement *x* favoured by B. That content might itself make B a social superior to A – or, instead, it might make A a social superior to B. The evaluation of the content of the arrangement, however, is distinct from the evaluation

Let us now imagine *No Exit, Lottery**, in which everything is as in *No Exit, Lottery*, but with the added detail that, if A does not accept the Ultimate Arrangement, this arrangement is simply imposed on A. (This is, after all, a natural extension of *No Exit, Lottery*, given that, since neither A nor B can exit the relationship, the most plausible consequence, in *No Exit, Lottery*, of a situation in which A and B fail to agree on any arrangement, including the Ultimate Arrangement, is that this arrangement is simply imposed on A.) Now, it seems that the same considerations that forced us to say that in *No Exit, Lottery* A and B do not stand in a relationship that is objectionable at the bar of *EONC* apply to *No Exit, Lottery** as well. After all, there is nothing relevant that changes between these two cases.

Let us now turn to the majority rule case. Recall the example above in which B, C, and E hold judgment *x*, and A and D judgment ~*x*, and in which the application of majority rule results in *x* being imposed upon A. For the same reason that we do not (and should not) say that in *No Exit, Lottery**, simply by virtue of the fact that *x* is imposed on A, and simply by virtue of the fact that B has the power to make *x* be imposed on A, A stands in a relationship of social inequality with B, we should not say anything analogous to that in the majority rule case, either. After all, there is nothing relevantly different between *No Exit, Lottery** and the majority rule case. In both cases, the fact that *x* is imposed on A is the result of a lottery or of a random process. In *No Exit, Lottery**, the fact that *x* is imposed on A is determined (in part) by a lottery run by a third party. And in the majority rule case, the fact that *x* is imposed is determined by a natural lottery or by a random

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of the procedure by which that content is imposed. (See Kolodny, "Rule Over None II", p. 309). Here, I am concerned only with the latter. Note in addition that all the argument given here is consistent with the claim that A being forced to choose arrangement *x* is a normative problem (*if* it is) that stands in need of remediation. That problem, however, whatever its nature, is not a problem of social inequality between A and B.

process[94] – namely, by the fact that B, C, and E happen to think that *x* is more just or closer to the balance of moral reasons than ~*x* is, and by the fact that they happen to vote accordingly.[95]

And, in both cases, B voting for *x* causally contributes to *x* being imposed on A.[96] In both cases, but for B voting for *x*, *x* would not have been imposed on A. In *No Exit, Lottery**, but for B voting for *x*, A and B would have agreed on ~*x*, and thus, *x* would not have been imposed on A. And in the majority rule case, but for B voting for *x*, B, A, and D would have agreed on ~*x*, and thus *x* would not have been imposed on A. (The same could be said if we switch from counterfactual dependence to the NESS test for causation. In both *No Exit, Lottery** and the majority rule case, B voting for *x* is a necessary element in a set that is individually minimally sufficient for *x* being imposed on A.)

So, given that *No Exit, Lottery** and the majority rule case are similar in all relevant respects, it follows that, on pain of saying the implausible thing that in *No Exit, Lottery**, B stands as a social superior to A simply in virtue of *x* being imposed on A, or simply in virtue of B having the power to determine that *x* is imposed on A, we should *not* say that in the majority rule case, B stands as a social superior to A simply in virtue of *x* being imposed on A, or simply in virtue of B having the power to determine that *x* is imposed on A.

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[94] Note that the claim is not that their individual decision to vote is random; rather, what is random is the mere fact that they vote *in the same way*.

[95] Compare with the amazement, at the beginning of the French Third Republic, at the operation of the democratic vote, which was seen as a "sphynx", or as a "strangely mysterious force", whose results are determined by the chance of some voters happening to share the same judgment with some other voters. See Pierre Rosanvallon, *Le Sacre du Citoyen. Histoire du suffrage universel en France* (Paris: Gallimard, 1992), pp. 312-314.

[96] I use 'voting for *x*' as a simplified expression for 'acting on the basis of judgment x', where this means in turn either literally voting for *x* (as in the majority rule case) or refusing to agree to ~*x* (as in *No Exit, Lottery**).

It could be argued that there is a relevant distinction between *No Exit, Lottery**, and the majority rule case, namely that in the majority rule case, the imposition of *x* on A could be attributed to B in a way that the imposition from *No Exit, Lottery** could not. But it is unclear in what sense this could be true. In both cases, as we have seen, B's holding judgment *x* causally contributes to the imposition of *x* on A. It could be argued that the difference is that in the former, but not the latter, B *effects* the imposition of *x* on A, where 'to effect' is to do something more than to merely 'affect' something or merely be a cause of, or have a causal contribution to, something.[97] Effecting an outcome is causing it, but in a way which preserves a close connection between the outcome and the relevant intentions of the agent, so that we could say that the outcome is something that is *brought about* or *accomplished* by the agent. But it seems that, if we can say that the imposition of *x* in the majority rule case is something that B accomplishes, we should be able to say the same in *No Exit, Lottery**. In both cases, the imposition of *x* is something that is brought about in part[98] by way of B's acting with the intention that it be brought about. (In *No Exit, Lottery**, B does this by rejecting ~*x*, and in the majority rule case, by voting for *x*.) This shows that the notion of effecting (as accomplishing) an outcome cannot identify any relevant distinction between *No Exit, Lottery** and the majority rule case.[99]

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[97] For the distinction between effecting and affecting, see Charles Morris, *Power: A Philosophical Analysis* (Manchester: Manchester University Press, 1987), pp. 10-11, 29-32. See also Arash Abizadeh, "The Power of Numbers: On Agential Power-With-Others without Power-Over-Others", *Philosophy and Public Affairs* 49 (3), 2021, pp. 290-318, at p. 294.

[98] I say 'in part' because there are more factors at play that causes the outcome.

[99] Another possible way of characterising the notion of 'effecting' at issue here is by saying that it is simply a placeholder for a transitive verb, such as 'to make', 'to kill', 'to hit', 'to write', and, in our case, 'to impose'. For a notion of causation in the law that makes such verbs central, see H.L.A. Hart and Tony Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1985), pp. 73-74. But this notion of effecting (as placeholder for a transitive verb) does not identify any relevant distinction between *No Exit, Lottery** and the majority rule case. Let us assume that we take 'effecting' here to be a placeholder for 'imposing'. It is unclear, however, how we can say in the majority rule case that B imposes outcome *x* on A. (This is an incomplete statement at best. The

So, we are forced to the conclusion that there is no relevant distinction between *No Exit, Lottery** and the majority rule case, and that, as result, just as we cannot say that B stands as a social superior in virtue of the imposition of *x* in the former case, so we cannot say that in the latter.

Note that it is consistent with this argument to claim that there may be cases in which the application of majority rule may offend *EONC*. This might be so when it is not appropriate to characterise the outcome resulting from the application of the majority rule as the mere result of a natural lottery. That fact would break the analogy with *No Exit, Lottery**. (This might be so, for instance, when the members of the majority deliberately coordinate to vote in the same way. Here, we could no longer say that it simply happened that they voted in the same way.) It is beyond the scope of this inquiry to give a fuller specification of when and under what conditions the application of majority rule could no longer be seen as a natural lottery, in the sense that is relevant for the analogy with *No Exit, Lottery**. It suffices that I have shown that, at least in a central category of cases in the application of majority rule, all the elements that are necessary for the analogy with *No Exit, Lottery** hold, and that, at least in *that* category of cases, we are justified in saying that the application of majority rule does not introduce any relationship of social inequality between individuals.

So, to conclude this discussion, majority rule is consistent with *EONC*. This means in turn that the conclusion defended in this chapter remains safe: the conjunction of *AE* and *EONC* entails the requirement of majority rule, and thus, majority rule is a requirement of equality.

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more accurate statement seems to be that B, C, *and* E impose *x*.) Perhaps, however, we can say something like: 'Against the fixed background of C and E voting for *x*, by voting for *x*, B imposes *x* on A'. But this fails to identify a distinction from *No Exit, Lottery**. In this case as well, we can say something like: 'Against the fixed background of the random events that make the lottery return *x* as the Ultimate Arrangement, by refusing to agree to ~*x*, B imposes *x* on A'.

Chapter 4

Democratic Authority: Content-Independent Reasons[100]

Suppose A is a state official that has the power to decide what happens with B's property. A commands coercive power that can be used to force B to relinquish some of his assets to the state. Nevertheless, A's power is regulated by a standing law. A is expected to exercise the coercive power only in the forms prescribed or allowed by the law. Furthermore, let us imagine that the law is democratically made.

Now, it might be the case that, if A complied with the law, she would fail to act according to what justice requires. For instance, we might imagine that the law requires that those in B's income category pay a 30 % tax rate, but that justice requires that they pay a 40% tax rate.

Does A have a duty, even a *pro tanto* duty, to comply with the democratically made law, notwithstanding the law's divergence from the requirements of justice? In asking whether A has such a *pro tanto* duty, we are asking at least two distinct questions: (i) Does A have a *pro tanto* duty to obey the law simply because it is the law?; and (ii) Does A have a *pro tanto* duty to obey the law simply because the law is the output of a democratic procedure?

If the second question is answered in the affirmative, then a moral (justificatory) ground of the *pro tanto* obligation to obey the law is the democratic pedigree of the law, or

[100] Section 1 of this chapter reproduces the content of the paper "Equality and Democratic Authority" (*Analysis*, forthcoming).

the fact that the law is the outcome of a democratic procedure (rather than the moral merits or demerits of the actions or omissions required or prohibited by the law). We can call the claim that there is such a ground a claim of *Democratic Pedigree Content-Independence* (DPCI).

If the first question is answered in the affirmative, then a moral (justificatory) ground of the obligation to obey the law is simply the fact that the law exists, regardless of whether the law had been brought about into existence by a democratic procedure or not. We can call the claim that there is such a ground *Existence Content-Independence* (ECI).[101]

Both ECI and DPCI identify what has been called *'content-independent reasons'*, i.e., reasons to perform an action that do not derive from some moral facts about the quality of the action itself (e.g., such as the fact that it secures justice or it maximizes priority-weighted aggregate welfare), but from some moral facts that are external to the action itself.[102] In our case, if ECI were true, the moral reason for performing the action is simply the fact that the law prescribes, and if the DPCI were true, the moral reason

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[101] Laura Valentini, "The Content-Independence of Political Obligation: What It Is and How to Test It", *Legal Theory* 24 (2), 2018, pp. 135-157, at pp. 155-6, and George Klosko, "Content-Independence and Political Obligation", *Political Studies* 71 (1), 2023, pp. 30-46, at pp. 36-37, have a somewhat different terminological choice, as they do not take the democratic pedigree to be a content-independent reason or ground in its own right, as I do here. Rather they take it to be a moral reason that grounds or justifies *Existence Content-Independence*. This terminological choice, however, makes no substantive difference. The substantive question of whether the democratic provenance of the law provides a reason to obey the law still remains, regardless of whether democratic provenance is itself labelled as a content-independent ground or not.

[102] For the notion of content-independent reasons, see H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982), pp. 254-255; Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), pp. 40-41; Valentini, "The Content-Independence of Political Obligations."

for performing the action is simply the fact that the action is prescribed by a democratically made law.

In this chapter, I am concerned with the question of whether egalitarian considerations are able to vindicate DPCI – i.e., whether they are able to vindicate the claim that there is a reason or a duty to obey a democratically made law simply because it is democratically made.

For the purposes of this chapter, I will take 'democratic authority' to denote the fact denoted by DPCI, namely that the democratic provenance of the law itself gives a reason to obey the law. This notion of 'democratic authority' does not entail that the reason to obey that is given by the democratic provenance of the law is preemptive – rather than being a mere *pro tanto* reason, that is to be balanced against other competing reasons – and thus it does not vindicate authority in its preemptive sense. 'Authority' has been identified in many cases not only with preemptive reasons, but also with *content-independent* ones, and since these two categories of reasons are distinguishable, I will pursue the question of whether democratic law is authoritative in the sense of giving a *content-independent reason* (which includes the question that is under review in this chapter, namely whether democratic law is authoritative in the sense of supporting DPCI) separately from the question of whether it gives a preemptive reason. In this chapter, I will be interested only in authority in the content-independent sense. (I will pursue of question of whether democratic law is authoritative in the preemptive sense, as well, in the next chapter.)

Four observations are in order before we go. First, if there are content-independent duties of the sort mentioned in the above paragraph, they are not fundamental duties. Rather, they are grounded in some other duties or moral reasons. For example, the Subordination Complaint can be mitigated if the officials do not

exercise their own autonomous judgment when making decisions that affect an individual, but instead they blindly follow a law made by no one (or one bequeathed by previous generations). The imposee would then be under a rule of law, rather than under a rule of men. If this is the case, however, then the officials have a content-independent duty to obey the law simply because it is the law. This could vindicate ECI. Nevertheless, this duty is *not* fundamental. Rather, it is grounded in considerations related to non-subordination. So, we could say, in this case, that the social-egalitarian considerations or the claim of non-subordination ground or are a reason for [the law being a ground or a reason for performing some action]. They ground, in other words, a content-independent duty to obey the law simply in virtue of its being the law.[103]

Second, the content-independent duty (either ECI or DPCI) is not a duty prescribing the motivations that individuals need to have when they comply with the law. The claim, for instance (if we take ECI as an example), that individuals have a content-independent duty to obey the law simply because it is the law is not the claim that they should perform the action prescribed by the law with the thought or the motivation that they are doing it because the law requires it. Rather, the claim is simply that the existence of the law as such provides a *justificatory* ground or a reason for these individuals to be under a moral duty to perform the action prescribed by the law. This duty can be complied with even by persons who perform the action in question for reasons that are independent of the fact that the action is prescribed by a law. The only point that matters here is that performing this action – regardless of the motivations people have in performing it – is morally required by the very fact that the action is

[103] The fact that in blindly following a law, rather than imposing their own judgments, the official stands in a relationship of equality or non-subordination with their subjects is a theme with ancient roots. See Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford: Oxford University Press, 2008), chap. 2.

legally prescribed.[104] (This is, of course, consistent with claiming that there are additional, but nevertheless, *distinct*, justificatory grounds for performing the action, such as the fact that the action is required by rights-based justice or that the action maximizes priority-weighted aggregate welfare.)

Third, the thesis that there are content-independent reasons to obey the law (in either the ECI or the DPCI version), if true, does not presuppose or entail (even if it is compatible with) the thesis that the law, as a conceptual matter, purports to give content-independent reasons for obedience.[105] Even if it turns out that the law, as a conceptual matter, does not purport to give content-independent reasons, the thesis that the there is a content-independent reason to obey the law (in either the ECI or DPCI version) – which is a thesis about what is *morally* (as opposed to merely conceptually) the case – is still independently intelligible.

Fourth, the claim that there are content-independent duties (of the sort captured by either ECI or DPCI) does not presuppose, even if it is consistent with, the claim that there must be a moral power to create such duties.[106] One possible ground for saying

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[104] For the distinction between justificatory and motivational content-independence, see Stephen Perry, "Political Authority and Political Obligation", in Leslie Green and Brian Leiter, eds., *Oxford Studies in Philosophy of Law*, vol. 2 (Oxford: Oxford University Press, 2013), pp. 1-74, at pp. 13-16; Laura Valentini, "The Content-Independence of Political Obligation", pp. 137-138.

[105] For the use of the notion of 'content-independent reasons', as a conceptual analysis of legal authority, see H.L.A. Hart, *Essays on Bentham*, pp. 254-255; N.P. Adams, "In Defense of Content-Independence", *Legal Theory*, 23 (3), 2017, pp. 143-167.

[106] Some identify political authority with the moral power to create such duties. See, for instance, Perry, "Political Authority"; Gerald Gaus, *The Order of Public Reason* (Cambridge: Cambridge University Press, 2012), pp. 465-467. There are, however, some subtle variations on this notion of authority. Isak Applbaum construes political authority as the moral power to create a Hohfeldian moral no-right against the enforcement of a legal (not necessarily moral) duty (where this no-right is correlated with a Hohfeldian moral liberty to enforce that duty). On this proposal, political authority does not necessarily have the moral power to create a moral duty. See Arthur Isak Applbaum, "Legitimacy without the Duty to Obey", *Philosophy and Public Affairs* 38 (3),

that content-independent duties presuppose a moral power to create content-independent duties is that (i) the only way to make sense of the idea of a content-independent reason is by assuming that this is a reason that someone in position of authority *intends* to give or create,[107] and that (ii) the exercise of a moral power to create a duty just is the intentional giving or creation of a duty.[108]

But (i) is not true. Consider, for instance, the result of a lottery held to decide the allocation of a scarce medicine between two patients. The result gives the administrator of the medicine a *pro tanto* duty to do as the lottery provides, simply in virtue of the fact that the lottery provides it, independently of any of the merits of choosing one of the

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2010, pp. 215-239, at pp. 228-229. In symmetrical opposition, Estlund defines political authority as the moral power to create a moral duty, where this power does not necessarily include the power to create a moral liberty to enforce that duty. See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2007), pp. 42, 118, 127, 134.

[107] For this argument, see Stefan Sciaraffa, "On Content-Independent Reasons: It's Not in the Name*", Law and Philosophy*, 28(3), 2013, pp. 233-260. Sciaraffa's main argument for why we should accept the claim that the content-independent duties presuppose the existence of someone intentionally creating them is that, otherwise, it is difficult to distinguish between 'content-independent reasons' and 'content-dependent reasons'. For instance, the fact that there is a command prescribing not defrauding customers might itself be part of the merits of the (in)action of not defrauding customers, and so might itself be a content-*d*ependent, rather than content-independent reason, not to defraud customers. But in response, many concepts have fuzzy boundaries, but that does not mean that there is no distinction between these concepts. And, even if we include, *arguendo*, the command as itself part of the merits of the (in)action of not defrauding customers, this kind of merit is intuitively of a *distinct sort* than the merits that are given, for instance, by the fact that not defrauding customers is intrinsically morally wrong, regardless of what commands are given. See also Edmund Tweedy Flanigan, "Do We Have Reasons to Obey the Law?", *Journal of Ethics and Social Philosophy*, 17(2), 2020, pp. 159-197, at pp. 166-173.

[108] For the characterisation of the exercise of moral powers as intentional creation of jural positions, see William Edmundson, "Political Authority, Moral Powers, and the Intrinsic Value of Obedience", *Oxford Journal of Legal Studies*, 30 (1), 2010 pp. 179-192; David Enoch, "Authority and reason giving", *Philosophy and Phenomenological Research*, 89 (2), 2014, pp. 196-332.

patients over the other. (The merits here may consist, for instance, in the fact that choosing one patient over another maximizes welfare, or that it satisfies the claim of the neediest patient.) So, the lottery gives a content-independent duty. But there is no relevant intention here. The lottery does not intentionally give this duty to the administrator. (Of course, the administrator might have the intention to employ the lottery. But this is not the relevant intention for our purposes. Suppose, for instance, that the lottery's verdict is that the medicine should be administered to B, rather than A. The administrator will then have a content-independent duty to give the medicine to B, rather than A: a duty to do so simply in virtue of the fact that the lottery so provides. Even if the administrator intends the employment of the lottery, we cannot say that the administrator intends creating a duty (in himself) to give the medicine to B, rather than A.) So, the lottery example shows that there can be content-independent duties without anyone intentionally creating these duties, and thus, it shows that the claim that there are content-independent duties does not presuppose the existence of a moral power to create such duties.

(Now, of course, in the lottery example, this content-independent duty is not fundamental. It exists only in the virtue of a more fundamental reason of fairness, which provides that the administrator is to do as the lottery says, simply because the lottery says so. This is the correct analogy since, recall, we are also assuming that ECI or DPCI, if they were to be true, they would be true in virtue of some more fundamental reason.)

In addition, the argument given by the Subordination Complaint for ECI provides another counterexample to the claim that content-independent duties presuppose that there must be someone intentionally creating them. The considerations picked out by the Subordination Complaint entail that the mere fact that there is a law (regardless of how that law came into existence) is something that gives A, in a choice

between following the law and imposing her own view of justice upon B, a reason to follow the law. So, A has a *content-independent reason* here to follow the law simply because it is the law. But, in order to be able to make this claim, we do not need to postulate anything about anyone intentionally creating this kind of content-independent reason in A. We do not need to know anything about how the law was created – and, *a fortiori*, we do not need to know anything about what kinds of intentions (if any) had those who created that law – in order to be able to say that the claim of non-subordination implies that A has a content-independent reason to follow the law simply because it is the law. The law could simply be the codified form of the norms that have evolved without anyone intending that they be norms. In this case, it is still true that the Subordination Complaint entails that the mere fact that this law exists gives A a reason to follow it.

So, there can be content-independent reasons or duties even if there is no intention to create them, and thus, even if there is no exercise of a moral power. Thus, the notion of 'authority of law' that is picked out by the category of content-independent reasons or duties to obey the law does not entail the notion of authority as a moral power to create (content-independent) duties.

In what follows, I argue that the social egalitarian considerations captured by the Subordination Complaint (in either Kolodny's version of equality of opportunity for influence or in my own version of *EONC*) are unable to vindicate DPCI: that is, they do not entail that the democratic pedigree of the law gives a reason to obey the law. I show this in sub-section 1. Then, in sub-section 2, I argue, by contrast, that the arbitral quality of the democratic procedures (i.e., its majoritarian character) is able to vindicate DPCI.

1. Non-Subordination Does Not Entail Democratic Authority

So, let us come back to the example in which A has the choice to either obey the democratic law which requires her to do something that is not perfectly just, or to disobey that law, by performing an action that is more just. Does A have a *pro tanto* duty to obey the law simply because the law is the output of a democratic procedure?

Here I want to focus on the argument that the claim of non-subordination implies that A has such a duty. Kolodny gives such an argument.[109] According to this argument, law-making democratic procedures mitigate a special kind of objectionable social inequality –inequality of opportunity for influencing decisions – and this fact gives A a reason to obey the law simply in virtue of its being the output of democratic procedures.[110] The democratically made law, if followed, ensures that A and B have equal opportunity for influencing the tax levels that A demands from B – and this implies that, in order for A to treat B as a social equal, she needs to follow the democratic law (Kolodny 2014: 315).[111] The argument can be stated as follows:

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[109] Kolodny, "Rule Over None II", pp. 290, 315.

[110] Kolodny, "Rule Over None II", takes equality of opportunity for influence to be a necessary (but insufficient) component of social equality. It is impaired, for instance, in the relationship between lord and servant, where the lord has a greater (opportunity for) influence over decisions affecting both of them than the servant has.

[111] Kolodny argues that '[i]f I were to disregard the democratic decision, then I would be depriving others of equal opportunity to influence this very decision. For influence over the decision . . . is not simply influence over what gets engraved on tablets or printed in registers; it is influence over what is actually done. [And] by depriving others of that equal [opportunity for] influence, [I would be] relating to them as a social superior, at least in that instance.'. See Kolodny, "Rule Over None II", p. 315. So, if A were to disregard the democratic choice to tax those from B's income category at a 30% rate, and instead apply to B a 40% tax rate, A would be depriving B of an opportunity to influence A's action (of taxing B at a 30% rate), where this opportunity would have been equal with A's opportunity for influencing the same action. And, by doing that, A would relate to B as a social superior.

Premise 1: By obeying the democratically made law, A upholds relations of equality of opportunity for influence with those affected by her actions.

Premise 2: A has a *pro tanto* obligation to uphold relations of equality of opportunity for influence with those affected by her actions.

Conclusion: A has a *pro tanto* obligation to obey the democratically made law in virtue of its being democratically made.[112]

Does this argument work?[113] The most popular way in the literature to contest the argument has been by attacking Premise 2. Viehoff and Cox offer different arguments that, if successful, would warrant rejecting the notion that equality of opportunity for influence is (independently of its instrumental effect on other dimensions of social equality) a distinctive component of social equality we should care about.[114]

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[112] Kolodny, "Rule Over None II", p. 290, formulates the question of authority (to which he gives the social-egalitarian answer on p. 315) as follows: 'Why does the fact that a political decision was made democratically contribute, *pro tanto*, to my being morally required, as an official or a citizen of the relevant polity, to implement or comply with it?'

[113] Daniel Viehoff, "Democratic Equality and Political Authority*", Philosophy and Public Affairs* 42 (2), 2014, pp. 337-375, has an argument with somewhat similar premises (with the difference, however, that 'equality of opportunity for influence' is replaced by 'not acting on the basis of considerations of greater power'). As I understand his argument, however, Viehoff does not seek to derive the same conclusion. He argues that it is the fact that the law provides coordination in contexts of disagreements, rather than its being the output of a democratic procedure, that grounds the content-independent duty to obey it. See Viehoff, Democratic Equality and Political Authority", p. 370. (Viehoff, however, argues that the democratic pedigree grounds another kind of reason, namely an exclusionary reason, that pre-empts acting on considerations of greater power.)

[114] See Daniel Viehoff, "Power and Equality", in D. Sobel, P. Vallentyne, and S. Wall, eds., *Oxford Studies in Political Philosophy*, vol. 5 (Oxford: Oxford University Press, 2019), pp. 3-38; Ryan Cox, "Democracy and Social Equality", *Journal of Ethics and Social Philosophy* 23 (1), 2022, pp. 86-114. Their arguments have been criticized in chapter 2.

In this chapter, I want to argue, by contrast, that, even if we accept the truth of both premises, the conclusion still does not follow. (Denying Premise 1 would have anyway been unavailable, given the argument from Chapter 2.)

Before that, however, a clarification is in order. In what follows, I will take, in line with Kolodny's argument, the claim of non-subordination to be spelt out in terms of equality of opportunity for influence. I leave 'equality of opportunity for influence' deliberately at a high level of generality, to be specified either (on Kolodny's account) as equality of *a priori* decisiveness, or (on my account) as equality of opportunity for negative control (*EONC*). What I will say about Kolodny's argument below applies regardless of which one of these two notions is taken to specify equality of opportunity for influence.

Why the Premises do not Entail the Conclusion

All else being equal, if the relationship between A and B is regulated by law (regardless of whether the law is democratic or not), and if the law does not leave scope for discretion, A's use of coercive power over B is not intuitively objectionable from the standpoint of social equality. It is the law, and not A's independent judgment, which controls what happens. In blindly following the law – which happens to require her to φ – A has no more influence on the decision to φ than B has, and thus she does not relate to B as a social superior.[115]

If this is true, then it seems that ECI is true: the mere fact that there is a law prescribing φ-ing is a ground for an obligation to φ – since, by obeying the law, A ensures equality of opportunity between her and B. A will have no greater (opportunity for) influence than B and, as a result, she will not relate to B as a social superior. But if A

[115] Kolodny, "Rule Over None II", pp. 311, 312-313, fn. 28.

stands as a social equal to B simply by following the law, rather than unilaterally imposing her own judgment, it is unclear what is the contribution made by the democratic pedigree of the law to the relationship with B.

Now, it could be argued, the democratic pedigree is surely relevant, since, had A followed instead a law made by a small group of people in which she, but not also B, was included, for instance, she would have stood as a social superior to B. She would have had a greater opportunity for influence than B would have had.

This point, however, seems to be irrelevant for whether A has a duty to obey the democratic law – by assumption, the question we are asking (does A have a duty to obey the democratic law, in virtue of its being democratically made?) is a question that arises in the context in which A confronts a choice to either obey or *dis*obey the democratic law. But this kind of choice is clearly *not* a choice to either obey a democratic law or obey instead a law made by a small group of people. But if this is so, then the fact that the law is democratically made, rather than made by some other procedure, does not seem to make a difference to the reasons that A has in obeying the democratic law. (What seems to be relevant, instead, is whether A follows the law, rather than unilaterally imposing her own judgment on B – and, in this context, ECI seems to suffice, since, by simply following a law, A avoids unilaterally imposing her own judgment.)

Now, it could be argued that the democratic pedigree of the law does make a difference, for the following reason: if only ECI, and not also DPCI, were true, then it would follow implausibly that A could treat B as a social equal simply by following a law made by an oligarchic procedure which gave A, but not B, an opportunity for influence. Since, however, it is not true that A treats B as a social equal in such a circumstance, it must follow that DPCI is also true.

But this argument fails. It is not true that we must add DPCI in order to deliver the verdict that A does not treat B as a social equal when she obeys a law made by a non-democratic procedure. ECI *alone* could do the job. It is possible for ECI (and for the considerations of social equality that support ECI) to operate as a moral reason for obeying the law only when the law is made by a procedure that treats A and B equally, while at the same time the fact that the law is made by a procedure that treats A and B equally is *not* itself a moral reason for obeying the law. Compare with promising: the fact that X made a promise to φ gives X a reason to φ. Now, it is possible that promising gives a reason only in certain circumstances, when certain conditions are in place or when X follows certain procedures or conventions. (For instance, the promisor needs to speak the same language as the promisee.) But this claim is conceptually consistent with the claim that, when A follows these procedures, and her promise satisfies all the needed conditions, these conditions do not *themselves* provide A a moral reason for φ-ing. It is rather the promise that provides A this reason. In a similar way, we cannot exclude the possibility that, if the social-egalitarian reasons support ECI only on condition that the law has a democratic pedigree, this condition, if satisfied, does not itself provide A a reason to obey the law. Thus, even if we grant Premises 1 and 2, DPCI does not follow.

Moreover, even if we assume *arguendo* that ECI could not do the job alone, DPCI still does not follow. The objection above has assumed that, if we can show that A is given a reason to obey simply by the fact that a law has been made by a procedure that treated A and B equally, we would have *eo ipso* shown that the democratic pedigree of the law gives A a reason to obey the law. But this assumption is not true. As a result, even if we assume *arguendo* that the fact that the law is made by a procedure that treated A and B equally gives A a reason to obey the law, DPCI still does not follow.

Before we go to see why this is so, it needs to be clarified that the relation of social equality is a relation between two individuals: between A and B, between B and C,

between A and C, and so on.[116] The society as a whole stands in a relation of equality when the relationships between every two individuals are relationships of equality. This implies that the claim that, by obeying the democratically made law, A would make it the case that all relevant persons stand in a relationship of equality should be construed as the claim that, by obeying the democratically made law, A would make it the case that an outcome would obtain in which the relationship between A and B, between B and C, between A and C, between A and D, and so on, are all, taken one by one, relationships of equality.

Now, let us assume, for the sake of the argument, that the fact that the law is the output of a procedure that treats A and B equally is something that gives A a reason to obey the law. From this it does not follow, however, that the democratic pedigree of the law gives A a reason to obey the law.

To see this, let us consider procedures in which the inclusion of B is not corelated with the overall democratic nature of the procedure. We may imagine, for instance, a procedure (*Halved Franchise*) that includes B, but that disenfranchises half of the taxpayers from B's income category. Now, if the law A obeys were the output of this procedure, the nature of equality *between A and B* that would result from A's obedience would *not* be different from the nature of equality that would result from obedience if the law A obeyed had instead been the output of a perfectly democratic law (*Perfect Democracy*). The same could be said if A disobeyed the law. A would stand as a social superior to B in the same way in either *Halved Franchise* or *Perfect Democracy*.

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[116] See Niko Kolodny, "Being under the Power of Others", in, Y. Elazar and G. Rousselière, eds., *Republicanism and the Future of Democracy* (Cambridge: Cambridge University Press, 2019), pp. 94-114, at pp. 107, 111-112.

Now, we must assume (in line with the assumption granted two paragraphs above) that, at least in *Perfect Democracy*, the fact that the law is made by a procedure that treated both A and B equally gives A a reason to obey the law. But if this is true for *Perfect Democracy*, it must also be true for *Halved Franchise*. The argument for this claim runs as follows. If A, in obeying the law from *Perfect Democracy*, upholds the same kind of social equality with B, and avoids the same kind of social inequality with B, that she would uphold or avoid if she were to obey the law in *Halved Franchise*, then whatever reasons to obey the law that are grounded in more fundamental reasons to treat B as a social equal A has in *Perfect Democracy*, she must also have them in *Halved Franchise*. It follows that, since, *ex hypothesi*, A has a reason to obey the law in *Perfect Democracy* that is given by the fact that the law is made by a procedure that treated both A and B equally, and which is grounded in the more fundamental reason to treat B as a social equal, it must be that A also has this kind of reason in *Halved Franchise*.

But, if A has this kind of reason in both *Perfect Democracy* and *Halved Franchise*, then it follows that the reason to obey the law that is given by the fact that the law is made by a procedure that treated both A and B equally is *not* the same as the reason to obey the law that is given by its democratic pedigree (since only in *Perfect Democracy*, but not also in *Halved Franchise*, is the procedure democratic).

Moreover, let us now consider *Almost Perfect Democracy*, which is a law-making procedure in which everyone, except for B, is enfranchised. The procedure from *Almost Perfect Democracy* is much more democratic than the procedure from *Halved Franchise*. Yet, A obeying the law in *Almost Perfect Democracy* treats B as a social inferior, while A obeying the law in *Halved Franchise* treats B as a social equal. As far the relationship of social (in)equality between A and B is concerned, A does not seem to have a reason to obey the law in *Almost Perfect Democracy*, or if she has such a reason, it is certainly not grounded in the democratic pedigree of the law. This suggests that – even if the reason to

treat B as a social equal is one that grounds a duty to obey a law in virtue of its being the output of a procedure that treats A and B equally (as it happens, ex hypothesi, in *Halved Franchise*) – it does not also ground a duty to obey the law in virtue of its being democratically made.

And the same thing applies when we investigate any other (dyadic) relationship. The fundamental reason to treat C as a social equal does not imply that the democratic pedigree of the law gives A a reason or a duty to obey the law, for the same reason for which – as we have just seen – the fundamental reason to treat B as a social equal does not imply that the democratic pedigree of the law gives A a reason or a duty to obey the law.

This suggests a generalization: for any possible dyadic relationship in which A stands, the democratic pedigree of the law which A could obey does not itself provide a reason to obey it. And since dyadic relationships exhaust the relationships in which A could stand as a superior, inferior, or social equal to others, we could say, more generally, that, for any possible relationship that is relevant at the bar of social equality in which A could stand with others, the democratic pedigree of the law which A could obey does not itself provide a reason to obey it.

Objection: My argument above is consistent with the claim that the more democratic the procedure that made the law is, the more reasons A has to obey the law. Making the procedure more democratic, for instance, by including C, in addition to B, gives A more reasons to obey the law – because A will have not only the reason to obey the law that derives from the fact that the law-making procedure treated A and B equally, but also the reason to obey that derives from the fact that the procedure treated A and C equally. But, if this is true, then it seems to follow that the democratic provenance of the law does, after all, give A a reason to obey the law.

Reply: It is true that, the more democratic a procedure is, the more reasons A has to obey the law. But it does not follow that the democratic provenance of the law *per se* gives A a reason to obey the law.

To see this, let us assume that a society is composed of only A, B, and C. A law-making procedure that treats A, B, and C equally (i.e., it gives them equal opportunities for influence) is the most democratic procedure. Now, assuming that such a law-making procedure (treating A, B, and C equally) is in operation, the following facts will be true, *ex hypothesi*: (1) The fact that the law is enacted by a procedure that treated *A and B* equally gives A reason to obey it. This is because *B* has a claim against A at the bar of social equality to be treated as an equal. (2) The fact that the law is enacted by a procedure that treated *A and C* equally gives A reason to obey it. This is because *C* has claim against A at the bar of social equality to be treated as an equal.

But it will not be also true that the fact *itself* that the law is the output of a procedure that treated *A, B, and C* equally gives A a reason to follow the law. This is because there is no entity – *B and C* – which has a claim against A at the bar of social equality to be treated as an equal. It is individual people, and not conjunctions of people, that can stand in relations of social superiority, inferiority, or equality to A.[117]

Thus, the conclusion of my argument remains unchallenged: the fact that a law is made by a democratic procedure – i.e., by a procedure that gives everyone (A, B, and C) equal opportunity for influence – does not itself provide A a reason to obey it.

So, even if it is true that, by obeying the democratically made law, A upholds a relationship of social equality with B (Premise 1), and even if it is true that A has a *pro*

[117] Even if we were to allow that corporate persons stand in relations of social (in)equality with natural persons, this would be irrelevant, because a corporate person is not the mere conjunction of some natural persons.

tanto duty to uphold a relation of social equality with B (Premise 2), it still does not follow that the democratic pedigree of the law is the ground of a *pro tanto* obligation for A to obey the law.

2. Arbitral Equality and Democratic Authority

Now, I want to argue that arbitral equality (*AE*), unlike the social equality captured by the Subordination Complaint, is able to vindicate the claim that A has a *pro tanto* duty to obey a law that is the output of democratic procedures (or, more accurately, majoritarian procedure) simply in virtue of its being the output of such a procedure. In other words, *AE* is able to vindicate DPCI.

One clarification before we begin. I want to leave open the extent to which representative procedures that results in the adoption of a law satisfy *AE*. (This is because I want to leave open whether the majority rule that *AE* implies, in conjunction with *EONC*, is satisfied by 'indirect' procedures, such as those of representative democracy, in which voters' relation with the law adopted is mediated by representatives.)

If an arbitrator judges a dispute, the decision of the arbitrator is binding on the parties. The parties will have a duty to do as the arbitrator says, simply because the arbitrator says so. If this is so in the case of an ordinary arbitrator, it must be so in the case of the majority rule. We can make this inference (if there is a reason to obey the arbitral verdict in an ordinary arbitration situation simply because it is the arbitral verdict, then there is a reason to obey the majoritarian decision, simply because it is the majoritarian decision) because (i) it is plausible that at least part of what explains why the parties in an ordinary arbitration situation have a reason to obey the arbitral verdict simply because it is the arbitral verdict is that the arbitral verdict is the output of a

procedure that satisfies *AE* (i.e., equally treats the parties' judgments on the merits), and because (ii) majority rule also satisfies *AE*.

So, this supports the claim that officials (and ordinary citizens) have a *pro tanto* duty to follow the law adopted by a majoritarian procedure simply because it is adopted by a majoritarian procedure. Thus, *AE* is able to vindicate DPCI.

Note that the considerations that forced us above to say that the equality of opportunity for influence does not entail DPCI are not present here. From the perspective of equality of opportunity, the mere fact that the law exists seems to be sufficient for the official's having a duty to obey the law, and – as I argued in the previous sub-section – the democratic pedigree of the law does not make a difference. But the same cannot be said about *AE*. If the law is not adopted by a procedure that satisfies *AE*, then *AE* fails to entail that officials (or ordinary citizens) have a duty to obey the law. The fact that the law was made by a procedure that satisfies *AE* makes a difference. (It is only laws passed by this kind of procedures that can give a reason to comply.) And, since what it takes for a law-making procedure to satisfy *AE* is for that procedure to be a majoritarian one, it follows that the fact that law was made by a majoritarian procedure makes a difference. The majoritarian character of the law-making procedure gives officials (and ordinary citizens) a reason to follow the law.

Equality of opportunity for influence implies, recall, that it is not the fact that the law is democratically made, but the fact that it treats A and B equally – *regardless of* how it treats anyone else – that gives A (if it gives) a reason to obey the law. *AE* does not have the same implication.

To see this, consider that an umpire is charged with arbitrating the conflicting claims of A and B, on the one hand, and C, on the other, and that the umpire treats A's and C's judgments as judgments, but dismisses B's judgment as a mere preference. Now,

let us imagine that the umpire finds in favour of C. Regardless of the (objective) correctness of the umpire's verdict, the mere fact that the umpire avoided consideration of B's judgments is something that entitles A to say that the umpire failed to discharge its arbitral function, such that the verdict is not binding. Thus, even if the umpire treats A's and C's judgments equally, the mere fact that the arbitrator treats B's judgment unequally precludes the claim that A has an obligation to comply with the arbitral verdict.

So, answering the question of whether the umpire's verdict binds A turns on the answer to the question of whether this verdict is based on a procedure that satisfies *AE*. But whether the procedure satisfies *AE* does not reduce merely to the question of whether the procedure treats A's and C's judgments in an equal manner. The treatment the procedure accords to relevant *third parties* is also relevant.

Now, the fact that a decision-making procedure is majoritarian suffices for concluding that the procedure satisfies *AE*. And the fact that it satisfies *AE* entails in turn, as we have seen, that A has a reason or a *pro tanto* duty to obey the decision adopted by that procedure.

So, if A is confronted with the question of whether to obey or disobey the majority's decision, it is the fact *itself* that the decision is adopted by a majoritarian procedure that gives A a *pro tanto* duty to obey it. This is because the fact itself that the procedure is majoritarian means that it satisfies *AE*, and the fact *itself* that a procedure satisfies *AE* gives A a reason to obey the decision adopted by that procedure.

This shows that *AE* is able to vindicate the claim that the democratic pedigree of the law *itself* – in this case, the majoritarian character of the law-making procedure – gives officials (and ordinary citizens), a *pro tanto* duty to obey the law. Thus, *AE*, unlike equality of opportunity for influence, is able to vindicates DPCI.

Chapter 5

Democratic Authority: Preemptive Reasons[118]

1. Introduction

We have considered in the preceding chapter whether democratic authority in its content-independent aspect can be vindicated, and more specifically, whether it can be vindicated by principles of equality. We have seen that, even if the principle of equality expressed by the Subordination Complaint is unable to vindicate this kind of authority, there is nevertheless another principle of equality, namely arbitral equality, which is able to vindicate this kind of authority.

In this chapter, we consider another aspect of authority, namely its preemptive aspect. I proceed as follows. I begin (in section 2) by analysing the concepts of preemptive reasons, and that of preemptive authority. I then move on (in section 3) to show that the egalitarian principles considered in earlier chapters do not fully vindicate the preemptive aspect of authority. Then (in section 4), I provide an argument for the preemptive authority of democratically made law that starts from different premises. These different premises are provided by the wrong of neglecting one's own moral fallibility and imposing a moral risk on others.

2. Authority and Preemptive Reasons: Setting the Stage

[118] This chapter reproduces in part the content of my paper, "Authority, Democracy, and Legislative Intent" (*Law and Philosophy*, forthcoming).

In this section, I aim to make preliminary clarifications of some of the central concepts on which the argument in the rest of the chapter will build. I will firstly analyse the concept of pre-emptive reason, and then that of authority.

2.1. Preemptive Reasons

By pre-emptive reason I mean a reason that either renders irrelevant, or prevents someone to act upon, some other reason. That some other reason will be called a *first-order* reason. A pre-emptive reason is then a *second-order* reason.[119]

A preemptive reason differs from other kind of reasons in that when it comes in conflict with competing reasons, it is *not* usually *balanced* against that competing reason. When reasons are balanced against each other, the outcome that is supported by the balance of reasons is determined by which reason (or conjunction of reasons, if multiple, but distinct, reasons support the same outcome) is *stronger* or *weightier*. For instance, when the government decides to allocate some optional good (to which no individual has a prior claim), the reason of allocating that good on the basis of need may come into conflict with the reason of allocating it on the basis of merit. What the government should do here depends on the outcome of *balancing* need against merit. If need *outweighs* merit in strength, then the government should allocate the goods on the basis of need.

Preemptive reasons are not like this. They are not balanced against competing reasons. Rather, they simply exclude or preempt some conflicting reasons. For instance, in a procedure for the assessment of job applications, fairness is a preemptive reason which excludes or preempts need as a reason. Unlike what happens in the government

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[119] The idea of analysing preemptive reasons in terms of second-order and first-order reasons comes from Raz. See Joseph Raz, *Practical Reasons and Norms* (Princeton: Princeton University Press, 1990), pp. 39-47. Raz refers to them as exclusionary. In *The Morality of Freedom*, however, he refers to them as preemptive. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 59-60. What I refer to as the invalidating and the non-invalidating reasons, however, are not identical with what Raz calls exclusionary reasons (see *infra*, fn. 123). But they have in common the fact that they can be analysed as second-order reasons.

case from the paragraph above, where need is simply balanced against merit, in this case (of the procedure for the assessment of job applications), need is not balanced against fairness. Rather, fairness simply excludes or preempts need. (Note, however, that this is compatible with claiming that the preemption or exclusion is limited in scope.)

There are plausibly more types of preemptive reasons. For our purposes we can distinguish between the following types.

Invalidating Preemptive Reason. This is a second-order reason excluding some first-order reason as the basis of a given decision. To take again the example above, in a competition between several applicants for a job, fairness can be considered as an invalidating pre-emptive reason. Fairness requires the panel assessing the applicants to exclude some first-order reasons *as grounds of* the decision that might have otherwise been relevant, such as the need of the competitor. The need is rendered morally irrelevant. At the bar of fairness, it is not valid as a reason.[120]

Non-invalidating Preemptive Reason. Unlike an invalidating preemptive reason, which preempts a first-order reason by making it irrelevant or invalid as the grounds for a decision, a non-invalidating preemptive reason preempts the decision, and with it the first-order reasons for the decision, but it does not invalidate the first-order reasons as grounds for that decision.

As an example, consider that among the rules on the basis of which a panel needs to assess competitors for a job is one which prohibits from consideration any individual who is related to a member of the panel. This rule could be considered to be morally justified on the grounds not of fairness itself, but of the publicity of fairness. Now, let us assume that the panel finds out, while assessing A's application, that A is related to one

[120] For this notion of pre-emptive reason, see N. P. Adams, "In Defense of Exclusionary Reasons", *Philosophical Studies*, 178 (1), 2021, pp. 235-53, and Thomas Scanlon, *What We Owe To Each Other* (Cambridge, Mas.: Harvard University Press, 2000), pp. 51-2.

of the members of the panel. The rule gives the panel a non-invalidating preemptive reason not to treat A on the basis of her merit. A's merit is a reason that still applies in the relevant sense – the value of fairness that is, *ex hypothesi*, the cardinal value guiding the panel's assessment does not exclude merit. Unlike need, for instance, merit is still a valid ground of any decision that the panel might take to select A. The 'no relatives' rule, however, prohibits the panel from taking this kind of decision, and thus, it preempts the reason for this decision that is given by A's merit. The rule, however, does not deny the validity of A's merit as a reason for this decision. A's merit would still be valid or relevant as a ground of the decision to select A, *if* the panel were to make such a (prohibited) decision.

It might be objected that the preemptive reason given by this rule is still an invalidating reason, because, it could be argued, it renders A's merit invalid as a reason for the possible decision to consider A's application in the first instance. But, even if A's merit is an invalid reason for *that* decision,[121] it is still true that, for all that the 'no relatives' rule says, A's merit is relevant or valid as a ground for another decision, namely the decision to select A for the job. And this aspect of the preemptive reason given by this rule – the fact that it does *not* render A's merit invalid *as the ground of* the decision to select A (if such a decision were to be made), while at the same time prohibiting this decision, and thus preempting a reason, namely A's merit, that (validly) supports this decision – is sufficient to distinguish it from that class of preemptive reasons which (like fairness) renders some reason (like need) invalid as a ground of the decision to select A.

[121] It is plausible that A's merit is not a valid reason for the decision to consider A in the first place, simply because – for reasons that are *in*dependent of the 'no relatives' rule – merit is not the right sort of reason for such a decision. What is relevant for such a decision is only whether the candidate has applied and whether his application conforms to the relevant procedures. Even if there were no 'no relatives' rule, merit would still not be the right sort of reason here.

Both the invalidating and the non-invalidating preemptive reasons are species of what Michael S. Moore would call "justificatory" preemptive reasons: reasons that preempt the first-order reasons from determining "the rightness of an action", where these preempted reasons would have otherwise been relevant for determining the rightness of the action. This notion is opposed to a "motivational" one, on which preemptive reasons are concerned not with the rightness of actions as such, but rather with the motives it is morally appropriate for individuals to act – or rather, not act – upon.[122],[123]

An *invalidating* preemptive reason is a *justificatory* preemptive reason because it blocks a reason from determining the rightness of an action simply by rendering it irrelevant or invalid as a ground of engaging in that action.

By contrast, a *non-invalidating* preemptive reason is also a *justificatory* preemptive reason, but it is one of a different kind: it blocks a first-order reason from determining the rightness of an action not by rendering it invalid as a ground for that action, but by ignoring (rather than denying) its validity as a ground for that action – it

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[122] Moore proposed the "justificatory" and the "motivational" notions as possible interpretations of Raz's notion of exclusionary reasons. See Michael Moore, "Authority, Law, and Razian Reasons", in *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000), pp. 150, 152-4. The distinction between justificatory and motivational preemptive reasons corresponds with Cullity's distinction between second-order determinative reasons and second-order response reasons. See Garrett Cullity, "The Context-Undermining of Practical Reasons", *Ethics*, 124 (1), 2013, pp. 8-34, at pp. 12-13.

[123] By contrast, the exclusionary reasons on Raz's account (or, at least, under the account developed in the "Postscript to the Second Edition" of *Practical Reasons and Norms*) are not justificatory, but rather *motivational*. On this account, exclusionary reasons are reasons not to act upon a first-order reason, or "reasons for not being motivated in one's action by certain (valid) reasons". They do not exclude the first-order reasons from one's deliberation as such, but merely dictate one not to take them as a basis for one's action. See Raz, *Practical Reasons and Norms*, p. 185. The plausibility of motivational exclusionary reasons is questioned by Daniel Whiting, "Against Second-Order Reasons", *Noûs*, 51 (2), 2017, pp. 398-420.

makes the action impermissible, *despite* the fact that the first-order reason is a *valid ground for* that action.[124]

One note before we go. Preemptive reasons (of whatever sort) may be limited in scope.[125] In other words, there may be a limit up to which they are able to exclude or preempt first-order reasons, but beyond which they are no longer so able.[126]

2.2. Authority

So, let us define the moral authority of the law – in its *preemptive* aspect – to refer to the moral standing or status that the law has when it provides officials (and ordinary citizens) a first-order reason to apply or follow the law that coupled with a *preemptive* reason. This preemptive reason preempts or excludes first-order reasons that run counter to the first-order reason to apply the law. I will refer, following the Razian analysis of

[124] Ruth Chang, "Comparativsm: The Grounds of Rational Choice", in Errol Lord and Barry Maguire, eds., *Weighing Reasons* (Oxford: Oxford University Press, 2016), pp. 213-240, at pp. 223-227, argues that what Raz takes as exclusionary reasons can be better explained as ordinary reasons not to be in a certain choice situation. The reasons that one has *in* a choice situation (*if* one were to be in that situation) are not preempted by the reasons that one has not to *be* in that choice situation, and that is simply because they represent reasons belonging to different circumstances. This seems plausible for some cases, but it is unclear how far it can be extended. In many cases, even if the preemptive reason is a reason not to be in a certain choice situation, it still seems to have a (preemptive) force *once* one is in that situation. For instance, the reason not to consider relatives could be represented as a reason not to be in a choice situation (e.g., the situation in which one assesses candidates) in which A's merit is a reason for selecting A. But once one is in that choice situation, it still makes sense to say that A being a relative is a reason that preempts selecting A, and consequently it is a reason that preempts A's merit as a reason for selecting A.

[125] See Raz, *Practical Reasons and Norms*, p. 40

[126] For instance, fairness preempts the reason of need in usual job-assessment circumstances, but it is not able to preempt it in, for instance, a case in which, as with Schindler's employment of the Jews in factories as a way of making them escape the concentration camp, the need at issue is escaping ultimate evil.

authority, to the coupling of the first-order reason and the preemptive reason as a *protected reason*. (The first-order reason to apply the law is *protected by* the preemptive reason that preempts countervailing first-order reasons.)[127]

Now, on the basis of the preceding discussion, we can say that the claim that the authority of the (democratic) law is preemptive is itself *ambiguous* between multiple readings.

First, it could mean that the first-order reason that officials (and ordinary citizens) have to apply the law is protected by an *invalidating (justificatory) preemptive reason* – i.e., a reason that preempts countervailing first-order reasons (that run counter to the first-order reason to apply the law), where this pre-emption consists in invalidating those reasons as grounds for a decision that runs counter to what the law prescribes.

Second, it could mean that the fist-order reason that officials (and ordinary citizens) have to apply the law is protected by a *non-invalidating (justificatory) preemptive reason* – i.e., a reason that preempts countervailing first-order reasons, but which do not invalidate those reasons as grounds for doing an action contrary to what the law prescribes.

Third, it could mean that the first-order reason that officials (and ordinary citizens) have to apply the law is protected by a *motivational preemptive reason* – i.e., a reason that requires officials (and ordinary citizens) to discard in their deliberation any reasons for acting contrary to what the law requires, or (as in Raz's own version)[128] that requires officials (and ordinary citizens) not to take some reasons as the basis of the action

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[127] See Raz, *Practical Reasons and Norms*, p. 77; *The Morality of Freedom*, p. 60; John Gardner and Timothy Macklem, "Reasons", in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), pp. 440-475, at p. 465.

[128] See *supra*, fn. 123.

that is required by the law, regardless of whether they consider those reasons in their deliberation.[129]

Before we move on, two clarifications are in order. First, the claim that the law gives a protected reason does not presuppose the claim that there is some relevant *moral power*, which, by giving the law, thereby gives a protected reason, in a way that would be analogous with exercises of moral powers in promising, where the promisor, by the very act of promising, *intentionally* creates new moral facts (such as obligations and rights).[130] We do not need to claim that the relevant law-makers intentionally seek to give protected reasons (or have the right sort of intentions that are necessary for them to qualify as exercising a moral power) *as a prerequisite of* being able to claim that the law gives (if it gives) protected reasons. My argument below that the democratic character of the law gives the judge (or any other law-enforcer) a non-invalidating protected reason works regardless of whether the lawmakers have the sort of intentions that would qualify their law-making as an exercise of a moral power.[131]

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[129] There is some controversy whether the specific arguments that Raz gives in favour of the claim that the reasons given by authorities are preemptive/exclusionary supports the view that what are preempted/excluded are only the reasons that run contrary to the first-order reason to follow the law, or all the reasons (either in favour of or against performing the action required by the law) that are distinct from the first-order reason to follow the law. See Cristopher Essert, "A Dilemma for Protected Reasons", *Law and Philosophy*, 31 (3), 2012, pp. 49-75.

[130] For views that identify authority with moral power, see David Enoch, "Authority and Reason-Giving", *Philosophy and Phenomenological Research*, 39 (2), 2014, pp. 296-332; William Edmundson, "Political Authority, Moral Powers, and the Intrinsic Value of Obedience", *Oxford Journal of Legal Studies*, 30 (1), 2010, pp. 179-191; Stephen Perry, "Political Authority and Political Obligation", in John Gardner, Leslie Green, and Brian Leiter (eds.), *Oxford Studies in Philosophy of Law*, vol. 2 (New York: Oxford University Press, 2013), pp. 1-74. These views characterise the intentions that are necessary for moral power in different ways.

[131] In this regard, we can simply assume what Enoch calls a 'mere triggering model', on which the protected reason simply results from a fact (namely, the law being democratic) triggering a pre-existent reason. See Enoch, "Authority and Reason-Giving".

Second, and relatedly, that the thesis that law gives protected reasons does not presuppose or entail (even if it is compatible with) the thesis that the law, as a conceptual matter, claims for itself the fact that it gives protected reasons (as is the case, by analogy, with Raz's account, on which the demonstration that law gives preemptive reason – albeit of a different kind than those we are concerned with in what follows – involves a stage where it is shown that, conceptually, law *claims* to give preemptive reasons, and then a stage where it is shown that such a claim is actually satisfied in some conditions).[132] Regardless of whether law, as a conceptual matter, makes the claim that it gives non-invalidating protected reasons, the thesis that the law gives protected reasons – which is a claim about what is morally the case – is still independently intelligible.

3. Equality and Preemptive Authority

I want to argue that the social-egalitarian considerations that we have discussed so far in this thesis (the claim of non-subordination and arbitral equality; but also related social-egalitarian considerations) are not able to fully vindicate the preemptive aspect of authority. (And this is the case regardless of which one of the three readings listed above of preemptive authority is considered.)

Daniel Viehoff argues that social-egalitarian considerations (of a sort that are similar to those captured by the Subordination Complaint)[133] imply that laws that are democratically made give preemptive reasons to individuals to exclude from consideration

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[132] See Raz, *The Morality of Freedom*, chapters 2, 3, and 4. This methodology is also shared by William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge: Cambridge University Press, 1998), even if Edmundson proposes another understanding of authority.

[133] For the similarities and differences between the social-egalitarian considerations taken by Viehoff to ground preemptive reasons and the Subordination Complaint, see Kolodny, "Rule Over None II", p. 315, fn. 30.

reasons to act on the basis of power differences (if they happen to have greater power than others), even if acting on the basis of such power differences could bring about a just, or a more just, outcome.[134]

Now, I do not want to deny that the social-egalitarian considerations give preemptive reasons. Moreover, I want to allow this regardless of the nature of preemptive reasons in question (i.e., regardless of whether they are motivational or justificatory, or if, justificatory, whether they are invalidating or non-invalidating). The problem, however, is that, even if we make this concession, this falls short of *fully* vindicating the preemptive aspect of democratic authority. To see this, consider justice – which is one of the reasons that Viehoff claims the preemptive reasons given by social-egalitarian considerations preempt or exclude. Justice itself is a *preemptive* reason. The usual claim, for instance, that Lady Justice is *blind* to any considerations unrelated to justice seems to support an interpretation of justice under which justice is itself a preemptive reason. So, the reasons of justice which the social-egalitarian considerations seek to preempt are not usual first-order reasons, but they are rather second-order preemptive reasons in their own right. On Raz's account, when two competing exclusionary reasons conflict, the question of whether exclusionary reason R1 excludes exclusionary reason R2, or vice versa, turns on which of these reasons is stronger and which is able to outweigh the other.[135] If this is so, however, then the question of whether social-egalitarian considerations are able to *preempt* considerations of justice turns on the question of whether they are actually able to *outweigh* in strength considerations of justice.[136] This

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[134] See Daniel Viehoff, "Democratic Equality and Political Authority", *Philosophy and Public Affairs*, 42 (4), 2014, pp. 338-375.

[135] Raz, *Practical Reasons and Norms*, p. 40.

[136] It could be argued that this objection does not apply if we construe the Subordination Complaint as itself a complaint of rights-based justice. (This is, recall, a possibility that we considered in chapter 2, and on which I wanted to remain neutral.) But, even if we do so, this

suggests a *balancing* of competing moral considerations that falls short of fully vindicating authority as preemptive reason-giving.[137]

Now, it could be argued that even if this argument could work against social-egalitarian considerations of the sort captured by the Subordination Complaint and neighbouring complaints, it does not work against Arbitral Equality. It could be argued, more specifically, that, because (i) the verdict of an umpire is binding on the parties, and, moreover, if mistaken, it *preempts* (within limits) countervailing considerations of justice, and because (ii) the arbitral procedure employed by the umpire satisfies Arbitral Equality, just as the majoritarian decision-making procedure does, it follows that (iii) the law that is the output of the majoritarian procedures *preempts* (within limits) countervailing considerations of justice.

This argument, however, is not satisfactory. It is possible that the reason why we think that the arbitrator's verdict gives officials a preemptive reason to disregard its

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does not help us here. When *equally valid* claims of justice diverge and conflict, it is plausible that a resolution of this conflict must consist in a *balancing* of these claims against each other, to see which one is greater in strength.

[137] Christiano's argument for democratic authority also fails to vindicate the preemptive aspect of authority. According to Christiano, the democratic legislature has a moral right to rule which is grounded in the citizens' duty to treat each other on the basis of justice. Such a duty requires obeying democratic procedures because it is only on the basis of such procedures that publicity of justice (which for Christiano means publicity of equality) can be secured, and because publicity of justice is a component of justice itself. See Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008). The problem is that, even assuming that democratic procedures ensure publicity of justice, it is not clear why the publicity component of justice is able to preempt acting on what the substantive component of justice requires. It might be the case that publicity overrides in some cases considerations of substantive justice, but this at most shows that the question of obeying democratic decisions is one that relies on balancing different moral considerations. For a similar argument (though applied to the question of the permissibility of enforcing democratic laws, rather than to that of democratic authority), see Zofia Stemplowska and Adam Swift, "Dethroning Democratic Legitimacy", *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018), pp. 3-27, at pp. 18-19.

objective injustice is *not* because it satisfies Arbitral Equality, but in virtue of some other facts, such as the fact that it is epistemically reliable.[138] But if this is so, then the inference from the previous paragraph does not go through.[139]

So, absent any other argument, it is safe for the time being to conclude that neither the social egalitarian considerations of the sort captured by the Subordination Complaint or by neighbouring complaints nor Arbitral Equality are able to fully vindicate the claim that democratically made law enjoys authority in its preemptive sense.

This does not mean, however, that all hope of arguing for the preemptive authority of democratically made law is lost. In the next section, I provide an argument for the preemptive authority of democratically made law. This argument is based not on a premise of equality *per se*, but on one concerning the wrong of neglecting one's own moral fallibility.

4. The Preemptive Authority of Democratic Law

In this section, I will argue in favour of the claim that the law gives the judge a *non-invalidating preemptive* reason not to modify the law, because, and to the extent that, the law is democratically made.

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[138] Compare Estlund's argument that the verdict of a jury is authoritative in virtue of being the output of an epistemically reliable procedure. See Estlund, *Democratic Authority*, chap. 6.

[139] Note that this reasoning does not threaten the argument from chap. 4 that Arbitral Equality is able to vindicate authority in its *content-independent* sense. In order to vindicate content-independent authority, it is not necessary to show that the reason to obey the verdict preempts considerations of justice. It remains plausible, for the reasons discussed in chap. 4, that the mere fact the jury trial's verdict satisfies Arbitral Equality gives officials a *pro tanto* duty to obey. This is consistent with this duty not being able to preempt the reason not to enforce objective injustice.

The argument for this claim will run as follows: firstly, I will identify what I will call the Wrong of Neglecting Fallibility; secondly, I will argue that avoiding this kind of wrong requires employing democratic procedures; and thirdly, I will argue that the reason the judge has for avoiding the Wrong of Neglecting Fallibility implies that she has a reason to treat the democratically made law as giving her a non-invalidating preemptive reason. Let us take these things in turn.

Three notes before we go. First, my argument applies mainly to judges and other officials. I want to leave it open to what extent it applies to ordinary citizens as well.

Second, in what follows I will use the notion of the (moral) *authority* of the law to refer to the moral standing or status that the law has when it provides to judges and law-enforcers a first-order reason to apply the law that is protected by a *non-invalidating preemptive* reason. I will call this a *non-invalidating protected reason*.

Third, the preemptive reason that I argue considerations of moral fallibility give judges is limited in its scope. It is operative only in those cases where judges are fallible. It does not apply in cases, such as those of grave injustice, in which the judge's judgment (as that of any other human being) that the law is too gravely unjust to merit enforcement is not fallible.

4.1. The Wrong of Neglecting Fallibility

Suppose that the existing law coordinates everyone on a coordinative scheme S, but that someone with the relevant power to coordinate people on schemes – let us call this person A – could make use of coercion to replace S with S*. Let us suppose in addition that both S and S* are eligible schemes, in the sense that having either of them is better from the standpoint of conformity with the relevant reasons (e.g., justice, fairness, relational equality, the maximization of welfare, etc.) than not having either. Let us suppose, however, that S* is closer to the balance of reasons – i.e., to the truth about what

these general reasons require in specific circumstances, and what is the morally best way to weigh them against each other in those circumstances. In forcing S* on everybody, A seems to be acting on the basis of what reason (the balance of reasons) requires.[140]

Given the difficulties and complexities of moral reasoning, however, there is a sense in which A's action is wrong. Getting the balance of reasons right is a very complex exercise. Even if A is a very good moral reasoner, it still remains the case that she is fallible. Thus, when A imposes S* on everybody, there is a sense in which we could say that she thereby exhibits a wrongful disposition because she acts on the basis of a judgment that could be mistaken.[141] Note that the claim is not that the coordinator wrongs

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[140] Note that I am assuming that what makes S* closer to the balance of reasons includes everything about that scheme and its implementation that is morally relevant. That includes the costs of bringing S* about or the costs of replacing S with S*. Even if S* is, for instance, all else being equal, more just than S, it might be that replacing S with S* is so disruptive in upsetting the expectations already given by S that, on balance, the moral costs of upsetting the expectations outweigh the moral benefits obtained by the improved justice of S*. In that case, S* would not be closer to the balance of reasons.

[141] The moral disagreement (especially on complicated issues such as getting the balance of reasons rights) is evidence that A could be mistaken. David Christensen, "Epistemology and Disagreement: The Good News", *Philosophical Review*, 116 (2), 2007, pp. 187-217, argues that the proper response to peer disagreement is to lessen one's confidence in a belief. See also William MacAskill, Krister Bykvist, and Toby Ord, *Moral Uncertainty* (Oxford: Oxford University Press, 2020), pp. 12-14. By contrast, David Enoch, "Not Just a Truthometer: Taking Oneself Seriously (but not Too Seriously) in Cases of Peer Disagreement", *Mind*, 119 (2010), pp. 953-997, argues that, even though in some cases, the peer disagreement is an evidence for you that you are no longer justified in being as confident in a given proposition p as you were, in other cases, it is an evidence for you that entitles you (epistemically) to no longer treat the person you disagree with as an epistemic peer – and this is so, even if the other person is *symmetrically* justified to no longer treat you as a peer. This symmetry occurs because, given that none of you can escape your own beliefs, what it is justified for each of you to think on a given occasion is relative to your own more general beliefs (including beliefs about what makes the other a peer), and from this *first-person perspective*, each of you may be justified in thinking that the other got things wrong, and justified in confidently holding onto your own views.

them by instituting a *right* scheme (if S* is actually a morally right scheme). There is no wrong there. The wrong I am interested in here is a *distinct* kind of wrong. It consists in the fact that, in imposing a law or a coordinative scheme on people (whether that scheme is right or wrong), A displays a *wrong kind of disposition*: in imposing the scheme, A imposes a scheme that *could* have been wrong, and for all that A is warranted to know

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Now, I do not need to claim that moral disagreement makes it unjustifiable for A to continue to confidently believe a given moral proposition p. The only thing that I need to suggest is that, when we get outside what A is justified in thinking from within her first-person perspective, and adopt a sort of *impartial standpoint*, from which we can see that other individuals (who are justified – from within their own first-person perspective – to believe that non-p) disagree with A, but from which we still do not have access to the truth to judge who is correct in the dispute (in this regard, this kind of impartial standpoint is not a full-blown God's point of view), we can see – from within this special kind of impartial standpoint – that the warrant that A has for her belief is not so strong as to make the case that her belief could not be wrong.

This special kind of impartial perspective is the one that is *morally* relevant in the context of our discussion (regardless of its epistemic relevance, as such). It is intuitively plausible that, if asked by B why she imposed what she took to be what true moral reason requires over B, A could respond by pointing to the fact that she was justified – by her first-person perspective – in thinking that that which she imposed is what true moral reason requires. It seems appropriate in this context for B to respond, 'Even if you are justified – by your own first-perspective – in thinking that that is what true moral reason requires, you should have paid attention to the fact that I am also justified (by my own first-person perspective) in thinking that what you imposed was not what true moral reason requires. You should have paid attention to this *not* for purposes of establishing what you should *believe*, but rather for purposes of establishing how you should *treat* me. And you should have paid attention to this, not because my views needed to be somehow respected by you, but because the fact that I *justifiably* disagree with you is evidence that, standing outside your own first-person perspective, you could be wrong.' (For an argument that in situations of potential risk imposition, the moral stakes either increase the standards for what counts as knowledge, or, if not, the moral standards for action simply diverge from the epistemic standards, see Alexander Guerrero, "Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution", *Philosophical Studies*, 136 (1), 2007, pp. 59-97, at pp. 68-70.)

(given the fact of her fallibility), which could *be* wrong.[142],[143] Call this the Wrong of Neglecting Fallibility (WNF).

The WNF is a wrong of failing to satisfy a particular kind of interest. Individuals have an interest in being treated according to what reason, or in this case, the balance of reasons, truly requires. Note that the interest in being treated on the basis of true reason can be seen as having what we might call a 'dispositional component'. The dispositional component makes it the case that the interest in being treated on the basis of what true reason requires is more than an interest that others act in ways that happen to coincide with what true reason requires. For instance, if A has a reckless or a negligent conduct, which poses a risk of harm to B, and if she fails to harm B only by accident, there is a sense in which A will have failed to satisfy B's interest in being treated according to what reason requires. A satisfies this interest only if she has a disposition such that, across a range of relevant actual and possible situations, she will not have harmed B.[144]

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[142] If you think that in many cases moral disagreement does not make it epistemically appropriate to lower one's credence in a moral belief, then the claim that 'for all that A is warranted to know, she could be wrong' should not be read to suggest that A is not warranted or justified in believing that a certain proposition p, *in the sense* that there is no truth that makes her belief justified (on an externalist view of justification). Nor should it be read to suggest that, *from within her own first-person perspective*, it is not justified for A to believe that p. It could simply be read to suggest that, from the perspective of the impartial standpoint described in fn. 141, A could be wrong.

[143] For a more general defence of the claim that there are two parallel normative standards of assessment in cases of moral uncertainty, see Andrew Sepielli, "Subjective and Objective Reasons", in Daniel Star, ed., *The Oxford Handbook of Reasons and Normativity* (Oxford: Oxford University Press, 2018), pp. 784-799.

[144] It might be the case that what accounts for this requirement is the fact that there is value in a good being provided robustly or in a way that is invariant across relevant actual and counterfactual situations. For such a view, see Philip Pettit, *The Robust Demands of the Good* (Oxford University Press, 2015), pp. 107-111, 120-137. In addition, Philip Pettit, "Justice: Social and Political", *Oxford Studies in Political Philosophy*, vol. 1 (Oxford University Press, 2015), pp. 8-35, at p. 25, argues that individuals' claims of justice should be understood in a similar way, as

The reason (that on the basis of which B has an interest that A treat him) that features in this example is a general reason to make sure that one's actions do not unjustifiably result in harming individuals. But the same point must apply *mutatis mutandis* to cases in which the reason (that on the basis of which B has an interest that A treat him) is a reason to make sure or guarantee that the laws or schemes that one imposes are morally right (or get the balance of reasons right). In this regard, B's interest that A treat him on the basis of what the balance of reasons requires is not simply an interest that A act in a way that happens to coincide with what the balance of reasons requires.[145] Rather, it is an interest that, when imposing coordinative schemes, A be disposed such that, across a range of relevant actual and possible situations, A treats B on the basis of what the balance of reasons requires.[146]

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claims that need to be satisfied robustly (though he connects this point with an argument for democracy in a distinct way than I will do here).

[145] The claim that A only *happens* to act on what true reason requires is not the claim that, either from her own perspective or from God's own point of view, the grounds on, and/or the method by, which she came to truth were not reliable. Rather, it is simply the claim that, if we take the kind of *impartial perspective* described in fn. 141, from which we step outside what A is justified, from her own first-person perspective, to believe, and from which we have no Godly access to external truth, there is no warrant to believe that her relevant belief could not be wrong, and no warrant to believe that the grounds on, or the method by, which she came to believe what she takes to be the truth could not be unjustified or unreliable. In other words, the claim that A only happens to act to act on what true reason requires is the claim that she acts upon 'not fully justified true belief', where the label 'true' is the description of her belief from God's point of view, and the label 'not fully justified' is the description of her belief from the *impartial perspective* described in fn. 141.

[146] It could be objected that I am mistaking what sorts of dispositions are appropriate. It could be argued that what matters is simply the fact that A has the *intention* that B be treated on the basis of reason, and the scheme that she imposes is a conscientious application of a laudable intention. I do not need to deny that such an intention might make a moral difference. But it seems implausible that it exhausts by itself all that is morally relevant. Consider a reckless or negligent imposition of risk. An individual who practices medicine without being sufficiently knowledgeable, thereby posing a high risk of harm, for instance, might have praiseworthy

Now, if A neglects her fallibility in ascertaining what the balance of reasons requires and imposes on everyone a scheme that she thinks is supported by that balance, she fails to have the proper kind of disposition: she fails to be disposed in a way that guarantees that, across a range of actual and possible situations, A treats B on the basis of what the balance of reasons requires. Even if it happens that she is right on scheme S*, the disposition with which she imposes S* ('S* should be the new coordinative scheme because S* is, according to my judgment, supported by the balance of reasons') is not the appropriate sort of disposition: given her fallibility on the matter, her judgment could have been wrong, and therefore her disposition to impose a scheme on the basis of what she takes to be the balance of reasons could have resulted in her imposing a scheme that was not supported by such a balance. Thus, her disposition does not guarantee that across a relevant range of actual and possible situations, the balance of reasons is instantiated.[147]

Note that the WNF is what we might call a wrong of standing – it matters whether a good is provided by A to B across actual and possible situations partly because this indicates what kind of *standing* B has *for* A – it indicates whether B has such a moral standing for A that A can recognise that he warrants being treated on the basis of what true reason requires.

Note in addition that I want to allow that either one of these two possibilities is true: the WNF is not applicable when the degree of fallibility is small, or it is applicable,

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intentions, but he acts on the basis of a wrongful disposition, which does not ensure that across a relevant range of actual and possible situations, he does not harm the patient.

[147] For similar arguments that there is a wrong of moral recklessness, that consists in acting upon moral beliefs in which one is uncertain, or in which one should be uncertain, see Guerrero, "Don't Know, Don't Kill"; MacAskill, Bykvist, and Ord, *Moral Uncertainty*, pp. 16-38; Andrew Sepielli, "How Moral Uncertaintism Can Be Both True and Interesting", in Marc Timmons, ed., *Oxford Studies in Normative Ethics*, vol. 7 (Oxford: Oxford University Press, 2017), pp. 98-116; Claire Field, "Recklessness and Uncertainty: Jackson Cases and Merely Apparent Asymmetry", *Journal of Moral Philosophy*, 16 (4), 2019, pp. 391-413.

but it has a very low stringency (such that it is for practical purposes virtually insignificant). I take the degree of fallibility to be small not only in the case of (many, if not all) scientific judgments, but also in the case of many moral judgments (such as the judgment 'slavery is unjust'). However, the degree of fallibility is significantly higher in the case of judgments regarding the balance of reasons, in part because specifying the exact point (or range of points) at which a reason (or a value) should be traded off for another competing reason (or value) is a much more complex task. The disagreement between (equally morally competent) individuals on such matters is evidence of this.

The argument below that the law produced by democratic procedures has authority will be limited only to those issues over which there is a *high* degree of moral fallibility.

4.2. Why the Democratic Procedures are Special

Before I get to the argument for the authority of the democratic law, however, one more step is necessary: I need first to argue that democratic procedures are special, in the sense that the laws imposed by such procedures avoid the WNF.[148] I will argue for this in this sub-section. This argument, then, will enable me to show, in the following sub-section, why democratic law has authority.

By democratic procedure I mean a law-making procedure that assigns equal weights to all relevant individuals' judgments about what the law should be.

My argument (in this sub-section) for the claim that laws imposed by democratic procedures avoid the WNF comes in two stages. First, I argue that individuals that

[148] Niko Kolodny, "Rule Over None I: What Justifies Democracy?", *Philosophy and Public Affairs* 42 (3), 2014, pp. 200-4, argues that strategies to justify democratic procedures on the basis of considerations related to individuals' "substantive interests", such as interests in justice, do not succeed. However, he does not consider – as I do here – that the relevant substantive interests are not merely interests that justice or reason be instantiated, but they are actually interests in being treated on the basis of a disposition that guarantees that justice (and reason more generally) is instantiated across a range of relevant actual and possible situations.

participate in a law-making procedure that satisfies what I will call the No-Imposition Constraint avoid the WNF. The No-Imposition Constraint restricts the category of eligible law-making procedures. A democratic procedure is one of those procedures, but it is not the only one. Second, I argue that the democratic procedure is special in that it satisfies the No-Imposition Constraint without at the same time giving rise to what I will call a second-order WNF.

Stage One: *The No-Imposition Constraint*. Let us assume that the law reflects or can be traced back to a least a judgment of at least one individual (whatever this judgment is, and whoever this individual is). A law placing a ceiling on the interest rate charged by investment banks, for instance, must be traced back (in whatever way) to some judgment of some individual; that judgment could be something like 'there should be such a law', or 'it would be it good if that were the law', etc. I take this assumption to be uncontroversial for positive law.

With this assumption in mind, I want to argue that one way in which individuals avoid wrongfully imposing laws on each other (in the sense of the WNF) is by participating in a law-making procedure which is such that, even if A's judgment plays a role in determining what the law is, we can still say that A does not impose her judgment – or the content of her judgment – into law.[149] A procedure of this kind satisfies what I want

[149] Joseph Raz, "Disagreement in Politics", *American Journal of Jurisprudence*, 43 (1), 1998, pp. 27-8; David Enoch, "Against Public Reason", in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, vol. 1 (Oxford University Press, 2015), pp. 131-3; and Daniel Viehoff, "Democratic Equality and Political Authority", pp. 344-5, have argued, in distinct contexts, for the importance of this distinction: while the imposition of one's judgment in virtue of its being one's judgment is wrong, the imposition of what one judges to be right, in virtue of its being right (as judged by one) is not similarly wrong. In our context, however, this distinction is not so important. If A imposes on B that which she judges to be right, in virtue of its being right (as judged by her), her imposition is still wrongful in the sense of the WNF. Therefore, B's interest in being treated on the basis of true reason requires that, if there is to be a law that

to call *The No-Imposition Constraint*. Before proceeding to investigate this condition more closely, a clarification is in order. I do not take the Non-Imposition Constraint as a condition, either necessary or sufficient, for avoiding the WNF *tout court*. It might be that what is needed for avoiding the WNF *tout court* is to reduce one's confidence in one's moral judgments and to act upon some decision procedure that reflects this lowered confidence.[150] I want to remain agnostic on this issue. The only, and more modest claim, that I wish to make, is that *The No-Imposition Constraint* is only a sufficient condition for avoiding the WNF in *that* way that still allows one's moral judgment to be an input into the law-making procedure, even when one does not lower one's confidence in that judgment (as, *ex hypothesi*, it would have been appropriate to do, given one's fallibility). I take this constraint to be more appropriate for real-life democratic procedures. In such procedures, individuals who input their judgments do not necessarily input a judgment that reflects what they think it would be appropriate in conditions of moral uncertainty. In such conditions, I want to argue, there is a way in which the WNF can still be avoided, provided the law-making procedure satisfies the No-Imposition Constraint.

The No-Imposition Constraint requires that, if an individual's judgment is to play a role in determining what the law is (such that the law in question would end up reflecting that individual's judgment or the content of her judgment), then it should *not*

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reflects that which A judges to be right, that must come about by a route other than A's imposing *that* which she judges to be right.

[150] This procedure might be one that selects that option which maximizes expected moral choiceworthiness (i.e., the sum of choiceworthiness scores given by the competing moral theories, multiplied by the probability of those theories being correct), or that option that obtains the highest credence-weighted Borda score (i.e., the Borda score assigned to an option by a moral theory multiplied by the probability of that theory being correct) (MacAskill, Bykvist, and Ord, *Moral Uncertainty*, chaps. 2, 3), or that option that is supported by the class of structurally similar theories that has the highest probability (Christian Tarsney, "Vive la Différence? Structural Diversity as a Challenge for Metanormative Theories", *Ethics*, 131 (2), 2021, pp. 151-182), or some other procedure.

play that role *by way* of that individual *imposing* the (content of his) judgment on others. If the law is imposed by a procedure that satisfies the No-Imposition Constraint, then the individuals whose judgments would end up being reflected into law will not commit the Wrong of Neglecting Fallibility – and this is because those individuals' judgments play a role in determining the content of the law in a way that does not involve those individuals imposing (the content of) those judgments on others.

To see an example of a procedure that satisfies the No-Imposition Constraint, consider an arbitration procedure. A and B submit their dispute over what the law should be to an arbitrator, who assesses the cogency of A's and B's respective judgments regarding the balance of reasons. Let us refer to A's and B's respective judgments about the balance of reasons as judgments X and Y, respectively. Now, if the arbitrator gives a verdict on the basis of the weight she thinks those judgments deserve, and if the arbitrator happens to think A's judgment X is the correct one, and gives a corresponding verdict, then we cannot say that A imposes (the content of) her judgment X on B, and *a fortiori*, we cannot say that she imposes (the content of) her judgment on B in a way that is wrongful (in the sense of the Wrong of Neglecting Fallibility). This arbitration procedure satisfies the No-Imposition Constraint. The law reflects, or can be traced back, to A's judgment, but it is not itself the result of A's having imposed her judgment X – or the content of her judgment X – over B. Rather, A's judgment X plays a role in what law there ultimately is (such that the law can be said to reflect that judgment) by way of its being recognised as correct or true by the arbitrator, who in turn made (the content of) that judgment into law.

Crucially, the arbitrator does not act as an agent of A. If the arbitrator were merely an agent of A, then we could have seen in the arbitrator's decision A's own imposition of (the content of) her judgment X. In that case, the arbitration procedure could have been analysed under what we might call an 'agent-principal' model: the arbitrator

(*qua* agent of A) would have been responsive to A's intention to *impose* (the content of) judgment X on B. Then the arbitrator would simply act upon this intention; the arbitrator would impose A's judgment X on B, and they would do so *in virtue of* A's intention to *impose* (the content of) judgment X on B. Thus, on the 'agent-principal' model, the arbitrator (acting as an agent of A) would be responsive to A's intentions regarding the *imposition of* judgment X, such that, by being so responsive, the arbitrator would need to *impose* judgment X on B.

However, the agent-principal model is inappropriate as a model for the arbitration procedure, and this is because, according to what is paradigmatically the case for an arbitrator, if the arbitrator were to impose A's judgment X on B, they would not do so in virtue of A's having intentions regarding the *imposition of* judgment X. The arbitrator is tasked only with judging whether A's judgment X is closer to the truth about the balance of reasons than B's judgment Y is. From the perspective of the truth about the balance of reasons, A's intention to impose her judgment on B is irrelevant. The arbitrator's decision to impose judgment X is based solely on the fact that the arbitrator thinks this judgment closer to the truth.

Because the arbitration procedure cannot be analysed on an agent-principal model, the arbitrator's imposition of a law cannot be read as being A's imposition of her own judgment into law. For this reason, the arbitration procedure satisfies the No-Imposition Constraint: the law imposed by the arbitration procedure reflects A's judgment, but the judgment comes to be reflected into law in a way that does not involve *A*'s imposing that judgment into law.[151]

[151] It could be argued that the agent-principal model is misguided, because intentions should not be relevant for determining whether A imposes the (content of) her fallible judgment, since this would imply that whether she commits a WNF depends on what intentions she has, and it is unclear whether it is A's having such and such intention that makes WNF a wrong in the first place. This objection, however, rests on a confusion. On the agent-principal model, intentions are

We can say the same about a democratic procedure, such as a majoritarian decision-making procedure. The picture of democratic procedures that we need to have for satisfying the No-Imposition Constraint is something like this: the judgments of the individuals constituting the majority play a role in determining what the law is, but they do so not by way of the majority's imposing their judgments – or the content of their judgments – over the minority.

For instance, consider the relevant democratic procedure to be that a text will become law if it is approved by a majority. Now, we can distinguish between: (i) A's judgment 'this text should be law' (where A makes this judgment because this text – if enacted into law – comes closer to the *balance of reasons* than not having this text enacted into law); and (ii) A's intention to impose over others her judgment 'this text should be the law' or the content of this judgment, namely the text itself.

What is characteristic of democratic procedures, or at least what is normatively significant (for purposes of satisfying the No-Imposition Constraint) is – on the picture laid out here – the fact that they are responsive to, or give weight to, (i) rather than to (ii). If A happens to be committed to both (i) and (ii), then a democratic procedure – in order to satisfy the No-Imposition Constraint – needs to be responsive to, or to give a weight to, only (i), and to make abstraction of (ii). In this vein, the democratic procedure needs to determine whether this text is the law not by determining whether there is a majority of individuals who intend that (the content of) their judgment 'this text should be the law'

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relevant for helping us in identifying 'impositions' – but their role in this task is consistent with those impositions not being wrongful *in virtue of* the imposer's intentions, but rather in virtue of some other features. The intention would be then a necessary condition for the *existence* of the WNF, but not an explanation of the *wrongfulness* of the WNF. (By analogy, a printing press may be a necessary condition for the existence of an aesthetically valuable novel, but not also a necessary condition for, or an explanation of, the aesthetic value of the novel.)

be imposed over others, but rather simply by determining whether there is a majority of individuals who hold the judgment 'this text should be the law'.

Now note that if A judges 'this text should be law', she need not, by the mere holding of such a judgment, intend that (the content of) her judgment 'this text should be the law' be *imposed* over others.[152] If therefore the democratic procedure gives a weight to A's judgment ['this text should be the law'], as well as to C's and D's similar judgments (who together form a majority) and its giving A's, C's, and D's judgments these weights results in the imposition of a law reflecting their judgment (because all three hold the same judgment), this does not imply that the procedure gives effect to A's, C's, and D's disposition to impose (the content of) their own judgment.

If the democratic procedure were to be responsive to the majority's intention to impose (the content of) their judgment, it would have been plausible to claim that the democratic procedure acts as an agent for the majority, and that A, C, and D impose their judgment via the democratic procedures. The democratic procedure would have conformed to an agent-principal model: the democratic procedure would have imposed a law *in virtue of* the majority's intentions regarding the *imposition of* their own judgment. However, the claim that I want to make is that the democratic procedure should not be understood on the agent-principal model if it is to satisfy the No-Imposition Constraint. On the picture of democratic procedure that we need (for satisfying the No-Imposition Constraint), when the democratic procedure imposes a law, it does *not* do so in virtue of the majority's intentions regarding the *imposition* of (the content of) their own judgments. The democratic procedure (on this normative model) is not responsive to such intention.

[152] It could be argued that it is possible to infer the latter kind of intention or judgment from the former kind of judgment, if we assume that there is a premise in the background stating that judging 'this text should be the law' commits one to intending or judging that the first judgment ('this text should be the law') be imposed over others. However, the picture of democratic procedures laid out here assumes that there is no such valid premise in the background.

Instead, the democratic procedure imposes the law only in virtue of its being responsive to the judgment 'this text should be the law'.

Now, it is true that, if the majority had not held the judgment 'this text should be the law', the democratic procedure would not have imposed that text. But from this it does not follow that the majority imposed the judgment 'this text should be the law' or the text itself (that which their judgment was about). It was the democratic procedure which did that. This is simply because, as we have seen above, the democratic procedure (or that sort of democratic procedure that is needed to satisfy the No-Imposition Constraint) does not conform to an agent-principal model.

By analogy, in the arbitration case, it may be true that if A had not held judgment X, the arbitrator would not have imposed the content of the judgment X on B (if the arbitrator simply imposes the judgment of the party who is closer to truth, then if some party had held a judgment that would have been even closer to truth than judgment X, the arbitrator would have imposed that judgment). But from this it does not follow that A imposed her judgment X on B. It was the arbitrator who did that. This is simply because the arbitration procedure does not conform to an agent-principal model.[153]

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[153] Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy", David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, vol. 4 (Oxford University Press, 2018), pp. 28-52, at pp. 41-2, distinguishes (in the distinct context of Kantian political philosophy) between 'reflexive privileging of judgments', which occurs when one privileges one's judgment in determining some political question, and 'non-reflexive privileging of judgments', which occurs when one's judgment is privileged not by the judgment-holder himself, but by an external procedure. Something like this distinction may map onto the distinction between (i) one's imposition of the (content of) one's judgment over others, and the (ii) imposition of the (content of) one's judgment by procedures which do not conform to the 'agent-principal' model. These procedures are responsive to (the content of) A's judgment, in the sense that had A not held that judgment, they would not have imposed it. In this regard, A's judgment is 'privileged'. Nevertheless, because these procedures do not conform to the 'agent-principal' model, A's judgment is 'privileged' in a 'non-reflexive' manner: the (content of) A's judgment is not imposed in virtue of A's intending it to be so imposed.

Note that this picture of democratic procedures (which we need if we are to have a democratic procedure that satisfies the No-Imposition Constraint) is consistent with actual or real exercises of democratic law-making as we know them. It is plausible that, whatever other intentions and judgments they might have, the lawmakers (in real settings of democratic law-making) have at least the minimal judgment 'this text should be law' (or: 'this text should not be law'). Now, it might be true that they have other intentions or judgments in addition – but the point is that those other intentions and judgments lack normative significance from the perspective of the No-Imposition Constraint (this point will be crucial – as we shall see below – for what should count as authoritative law and for how to apply the democratically made law).

For this reason, as well as for reasons of brevity, in what follows, whenever I refer to 'democratic procedure', I mean the picture of democratic procedure that satisfies the No-Imposition Constraint.

To conclude Stage One of the argument: If parties to a dispute about the balance of reasons were to impose (the content of) their judgments on each other, they would commit the WNF. They avoid, however, this wrong, if they take part in a procedure that satisfies the No-Imposition Constraint. Both an arbitration procedure and a democratic procedure satisfy this constraint.

Stage Two: Avoiding the second-order Wrong of Neglecting Fallibility

As we have seen, the No-Imposition Constraint restricts the set of eligible procedures to only those procedures which are able to make the law reflect an individual's judgment, but in a way that does not involve that individual imposing their own judgment over others. Now, at Stage Two, I want to argue that, among those procedures that we remained with at the end of Stage One, the democratic procedure is special because it avoids what I will call a second-order Wrong of Neglecting Fallibility.

To see this, consider again the arbitration procedure. If A's judgment comes to be reflected into law by way of the arbitrator's judgment, A will not have imposed their judgment on B, and thus, she will not have committed a WNF. The arbitrator, however, would commit a WNF. This is because the arbitrator's own judgment – the content of which she imposes over the parties to the dispute – is itself a fallible judgment. Let us call the arbitrator's wrong a second-order Wrong of Neglecting Fallibility. While a first-order WNF is the wrong that one party to a dispute may commit if he were to impose his fallible judgment on the other party (to the dispute), a second-order WNF is the wrong that arises when the law-making procedure that adjudicates the dispute between the parties – or some individual that is in charge of applying this procedure – imposes some fallible judgment on the parties.

The arbitration procedure employs criteria of correctness that are independent of, or external to, each party's judgment. The truth – as judged by the arbitrator – about the balance of reasons is such an independent or external criterion of correctness. Other external criteria could be: the epistemic quality of the parties, or the probability that the parties' judgment is correct. Applying these criteria is a very difficult task, and any judgment related to their correct application is fallible. It follows that, if the arbitrator – or any person who takes decisions in a procedure that adjudicates between the parties' dispute – were to make decisions on the basis of any of these criteria, she would impose (the content of) her fallible judgment on the parties to the dispute. She would commit the *second-order* WNF.

The alternative, therefore, for avoiding the second-order WNF is to have a procedure that seeks to adjudicate the individuals' disagreement *without* employing criteria of correctness that are independent of, or external to, the parties' own judgments.

Now it might be claimed that the fact that the procedure must refrain from employing external standards of correctness may still allow for the procedure to be biased

towards some party's judgment or another, *provided that* this bias does not rest on an external criterion of correctness. Note, however, that allowing bias in such conditions is irrational and arbitrary. If we remove the merits of the judgment, the probability that the judgment is correct, the presumed epistemic capacity of the judgment-holder, or any other possible external standard of evaluation – and we must remove them if the procedure is to avoid the second-order WNF – we remain with no rationale for favouring one judgment over another. Insisting on favouring some judgment at the expense of another, when there is no rationale for doing so, is thus irrational and arbitrary.

In this context, I want to argue, a procedure that treats all parties' judgments equally (or gives them an equal weight) avoids the second-order WNF.

The argument for this claim runs as follows: In the absence of external standards of correctness for evaluating judgments, we have no positive grounds for treating the parties' judgments either equally or unequally (nor, *a fortiori*, for treating them unequally in some more specific way rather than another). The external standards thus tell us nothing about the weight that we should give to the parties' judgments. In this context, we may look, however, to what we may call internal standards, namely the individuals' own judgments. The individuals' own judgments can be standards of assessment, in the sense that we may assess one individual's judgment from the perspective of another individual's judgment. If we do this, however, we notice a *symmetry* between all relevant judgments. For instance, from the standpoint of an individual's judgment, 'this text should be law', another individual's opposing judgment, 'this text should not be law', is wrong; and vice versa. Therefore, from the perspective of the internal standards (the judgments themselves), judgments are *symmetrically* situated to each other.

A decision-making procedure that assigns parties' judgments an *equal weight* is one which treats opposing judgments as symmetrically situated to each other.[154] Because such a procedure does not employ criteria of correctness that are independent of, or external to, the parties' judgments, it avoids the second-order WNF. And since the democratic procedure is one that assigns judgments an equal weight, it follows that it is a procedure that avoids the second-order WNF.

To conclude the argument for democratic procedures: A procedure that satisfies the No-Imposition Constraint is a sufficient condition for avoiding the first-order WNF in a way that allows one's moral judgment to be an input into the law-making procedure, even when one does not lower one's confidence in that judgment. Now, more procedures satisfy the No-Imposition Constraint, and not all of them are democratic. However, a democratic procedure is special in that it satisfies the No-Imposition Constraint without at the same time giving rise to a second-order WNF.

4.3. Why the Democratically Made Law Gives Non-Invalidating Protected Reasons

We have seen so far that the democratic procedure is special in that the laws imposed through such a procedure do not give rise to the WNF. Now, building on this result, I want to argue that the fact that the law is democratically made gives the judge a non-invalidating protected reason to enforce that law: a first-order reason to enforce the law, coupled with a non-invalidating preemptive reason that protects the first-order

[154] Note that I do not claim that only a procedure that assigns an equal weight to parties' judgments is a procedure that treats opposing judgments symmetrically. The only point is that a procedure that assigns an equal weight to the parties' judgments is a sufficient (even if perhaps not necessary) condition for the symmetric treatment of judgments in the relevant sense.

reason by prohibiting the judge from acting on the basis of reasons which conflict with the first-order reason to enforce the law.[155]

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[155] The argument in this sub-section could be subject to the following objection: Stemplowska and Swift, "Dethroning Democratic Legitimacy", p. 15, argue that the fallibility that one claims besets judgments of justice may also threaten (and even to a greater extent) claims about legitimacy – and *mutatis mutandis* perhaps also the claim that the democratic law has authority. It is true that my own argument for democratic authority is itself fallible, but I do not see why this is a problem. It would be a problem only if fallibility would somehow render it inappropriate for us to advance any kinds of arguments. I assume it is appropriate, however, for individuals to advance arguments about justice, about the balance of reasons, and about authority, despite their fallibility. The problem is not with the arguments, but with imposing them on others: fallibility, as I argued, makes it morally problematic to impose such kinds of judgments. Now, it could be objected that I cannot escape this consequence, either, since the democratic authority implies that democratic majorities impose the (content of) their judgments on others. But I argued in this section that this is not true. When they make law on the basis of democratic procedures, *no* individual imposes in the strict sense (the content of) their judgments on others.

Perhaps the concern could be that I derive practical consequences from the fallibility of judgments about substantive justice – e.g., judges should defer to the democratic law – without considering the fact that my arguments for these consequences are themselves fallible. If, *ex hypothesi*, fallibility is not by itself a reason that undermines the validity of an argument, this concern could only be the concern that I do not treat cases *symmetrically*: I apply a standard to judgments about the balance of reasons that I do not apply to judgments about the authority of the law. I take fallibility into consideration in the first case, but not also in the second. This might be a concern, but it is not *the kind of* concern that could undermine the validity of my argument for democratic authority. Consider by analogy Raz's Ann, who is confronted with the offer to make a certain investment, but who is very tired and prone to error (Raz, *Practical Reasons and Norms*, p. 37). Not making the investment is a solution to her fallibility – it spares her from the possibility of making an erroneous decision. We can imagine that Ann's reasoning is *asymmetrical* – she adopts a decision aiming to deal with her first-order fallibility on how good she is in assessing the investment opportunity, but neglects a kind of second-order fallibility, namely her fallibility in dealing with her first-order fallibility. But this asymmetry *by itself* does not seem to tell us anything about whether the decision Ann adopts is correct *qua* solution to the problem of first-order fallibility (thinking otherwise would be what William Alston calls in another context a "level confusion": the correctness of a solution for a first-order problem would depend on whether one can give a correct solution for the second-order problem of justifying that one's first-order solution was correct. See William Alston, "Level Confusions in Epistemology", in *Epistemic Justification* (Cornell University Press, 1989), pp. 153-71).

Imagine a coordinative scheme D that was democratically selected. D is an eligible scheme, in the sense that it reasonably administers the relevant reasons. However, there are other possible schemes, such as S, which are closer to the balance of reasons than D is. Now imagine that A is a judge that could, by means of a ruling on a dispute between parties, replace D with S* (the change may, but need not be, a large scale change; as I understand the notion of coordinative scheme, the judge could replace scheme D with S* simply when, if the law requires that scheme D be implemented for two litigants, she instead decides that S* should be binding for the two litigants, regardless of the legal effects for third-parties). A is able to replace D with S* because the law-enforcement arm of the executive, and the citizens more generally, treat her rulings as binding.

The democratic procedure ensures that the individuals over whom the law is imposed are not wronged in the sense of the WNF. If A, by contrast, were to impose her own fallible judgment about the balance of reasons (by replacing D with S*), she would commit the WNF. Given these two facts, the reason for avoiding the WNF gives the judge a first-order reason to enforce D rather than S*. In other words, given that A, as a judge, is to make a decision either to enforce the democratic law or to enforce some other morally relevant reason, the reason to avoid the WNF implies that, between these options, she needs to pick the option of enforcing the democratic law. Thus, the judge has a first-order reason to enforce the democratically made law.

Now, this first-order reason might be outweighed by the conflicting reasons to enforce S* instead. Nevertheless, the individuals' interest in being treated on the basis of reason also give A a *non-invalidating preemptive reason* that makes it morally inappropriate for her to act upon these conflicting reasons, regardless of their strength. This preempts A from enforcing S* instead of D.

To see why A is bound by this non-invalidating preemptive reason, let us start by considering an analogy. (Note that in the analogy that will follow, we have a preemptive reason that preempts not the balance of all reasons, as is the case with the democratic authority, but only a specific set of reasons, namely reasons to maximize welfare.)

In an ordinary case in which an individual would act recklessly if he were to perform some action, the fact that his action would risk harming third parties is not merely a reason to be balanced against the value that would *actually* be realised if he were to perform the action. When a risk-imposition is impermissible (whatever it is that makes it impermissible),[156] there is a limited range of values that the expected benefits accruing from the risky conduct could take, and which do not change the fact that the conduct is wrong, even if, *objectively*, the benefits, but not also the costs, will materialise. For instance, if there is a low probability that demolishing a building would kill ten people, and there is a high probability that demolishing the building would bring small improvements in wellbeing for many people (e.g., for aesthetic reasons), there is a range within which we can increase by stipulation the size of the wellbeing improvements, without changing the fact that demolishing the building is wrong, even if, *objectively*, there is no one that would actually be killed, and many people that would actually benefit.

An actor might have a moral reason for maximizing (objective) welfare, and thus a reason for bringing those benefits about. But the reason to avoid WNF preempts that reason from making the risky conduct permissible.[157]

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[156] I want to leave open, however, what is the correct account for determining when a risk-imposition is permissible or not. For a possible account, see John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford: Oxford University Press, 2017), chap. 5.

[157] Chaim Gans, "Mandatory Rules and Exclusionary Reasons", *Philosophia*, 15 (4), 1986, pp. 373-394, at pp. 385-386, argues that Raz's argument that uncertainty or fallibility provides an exclusionary reason rests on a confusion. It might be true, as Raz claims, that in such conditions, one may be justified in taking a decision that is not based on the first-order merits of the subject-

By parity of reasoning, the reason that a judge has to avoid WNF must also preempt the reason to institute the morally correct coordinative scheme. Since what it takes for a judge to avoid the WNF – when confronted with the choice of either obeying the democratically made law or instituting the morally correct scheme – is to obey the democratically made law, it follows that the reason to obey the democratically made law is a preemptive reason – a reason that preempts the reason that the judge has to institute the scheme that is closest to the balance of reasons.[158]

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matter. But this does not show that the first-order merits of the subject-matter have been excluded by the second-order reason to act cautiously under uncertainty. Rather, Gans claims, all that it shows is that the first-order merits have been *outweighed* by the first-order considerations related to the costs of further inquiry. But it is consistent with Gans' argument to say that there are precautionary reasons that act as preemptive reasons. All that Gans' argument may have shown is that those precautionary reasons do not become operative when the costs of further inquiry are outweighed by the expected benefits of taking an informed decision. But it is consistent with Gans' argument that, *when* those precautionary reasons become operative (whatever it is that makes them operative), they preempt the first-order reason to perform an action. It is intuitive that in a situation in which there is no time for further inquiry to determine whether a bottle contains either poison or medicine, the reason to give the patient the stuff from the bottle (which is supported by a reason to cure the patient's headache, as well as by the fact that the bottle *actually* contains medicine) is preempted by a reason to act cautiously. The (objective) reason to give the patient the stuff from the bottle is not balanced against the (subjective or evidence-based) reason not to risk the patient's death (these two reasons operate on different planes, as it were). It is rather simply preempted by the latter reason.

[158] Stemplowska and Swift, "Dethroning Democratic Legitimacy", p. 15, argue that confidence in judgments may not track severity or gravity of injustice: we may be confident in the (not severe) injustice of things that are not severely unjust, and not confident in the injustice of things that might actually be severely unjust. This point could be directed against my argument, in the sense that someone could claim that my argument implies judges should defer to democratic laws that are *severely* unjust when the moral judgments on the content of those laws are fallible. This is indeed an implication of my argument, but not one that I regard as implausible. To see this, consider Stemplowska and Swift's example, in which you are not certain whether pricing life-saving drugs in order to finance injections that relieve women of pain when giving birth is just, when "it may well be gravely unjust" (p. 15). But note that just as, unbeknownst to you, the first option (more expensive life-saving drugs plus fewer women in pain) is actually severely unjust, so

So far, we have seen that the reason to follow the democratic law gives A a preemptive reason. But let us now see why this preemptive reason is a *non-invalidating* one.

The reason to avoid WNF is entailed by the individuals' interest in being treated on the basis of reason. This is an interest that individuals have that true reason obtains across a range of actual and counterfactual scenarios. But if WNF is entailed by an interest in true reason, this means that true reason, including true reason in the actual scenario, could not be morally irrelevant. This is still a morally *valid* reason – even if it is preempted by the reason to avoid the WNF. Compare again with cases of reckless or impermissibly risky conduct. Consider, for instance, that A performs a medical operation, but he has insufficient relevant knowledgeable. The moral reason that A has to bring about a benefit for the patient is preempted by the reason to avoid the WNF. Nevertheless, it still remains true that the objective benefit for the patient (assuming A's operation would actually be successful) remains a *valid* moral reason for A to operate the patient. This reason is preempted, but its validity as a moral ground for the decision to operate the patient is not denied. (This structure is similar with that of the 'no relatives rule' from

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it might be that the second option (free life-saving drugs plus more women in pain) is actually severely unjust. If you have *no* (internal) *reason* to think that the first option is unjust, but cannot exclude the possibility that it is severely unjust, then, by parity of reasoning, it must follow that, if you have *no* (internal) *reason* to think that the second option is severely unjust, then you must, nevertheless – for the sake of rational consistency with your response to the first option – hold that there is a possibility that the second option is severely unjust. Acting *either* way might result in *severe* injustice. But let assume that you confidently think (justifiably from your own first-person perspective) that the first option is severely unjust. Assume, at the same time, that I confidently think (justifiably from my own first-person perspective) that the second option is severely unjust. From the impartial perspective described in fn. 141, *both* you and I could be wrong. Again, acting *either* way might result in *severe* injustice. In this context, the claim that the administrator of medical funds should defer to the democratic decision does not seem (when one also factors in the argument from this section) to be an implausible verdict.

section 2: this rule preempts the reason given by the merit of the candidate, but it does not deny that his merit is a valid moral ground for selecting him.)

By analogy, given that the judge's reason to avoid the WNF is entailed by the individuals' interest in being treated on the basis of true reason, the reason that the judge has to has to institute S* rather than D remains a morally valid reason or ground for her to do so – even if this reason is preempted by the reason to follow the democratically made law.

But this just is to say that the reason to follow the democratically made law must be a *non-invalidating* preemptive reason. This preemptive reason allows that the fact that a decision would bring about the (scheme that is closest to the) balance of reasons is valid as a ground or reason for taking that decision, even while it prohibits that decision, thus preempting the balance of reasons that (validly) supports that decision. (Compare again with the non-invalidating preemptive reason discussed in section 2: the 'no relatives' rule does not deny that A's merit is a valid ground or reason for selecting A, but it prohibits that decision, and thus it preempts the reason given by A's merit which validly counts in favour of that decision.)

To conclude: given the individuals' interest in being treated on the basis of true reason, the fact that the law is democratically made gives the judge a first-order reason to enforce the law protected by a non-invalidating preemptive reason that enjoins A from acting on any reasons whose requirements are in conflict with the requirements of the law (for short, it gives a *non-invalidating protected reason*). This means that A will be enjoined from enforcing the balance of reasons, if what this balance requires is in conflict with the democratic law.

Note that the considerations of fallibility discussed so far, unlike the social-egalitarian considerations, are able to fully vindicate the preemptive authority of the democratically made law. Even though the balance of reasons includes reasons of justice,

and even though these reasons are, in their turn, second-order exclusionary reasons, my account will *not* have the implication that the preemptive reasons given by the law will have to be *balanced against* the preemptive reasons given by justice. On my account, the preemptive reasons given by justice will themselves be *preempted* by the reasons given by the democratic law.

Of course, this vindication of the preemptive authority of democratic law is subject to the limits mentioned above: the democratic law has preemptive authority only when the individuals are fallible on the matters at hand. In matters that are not subject to reasonable disagreement, and where judges (just as any human being) can infallibly recognise an injustice, the argumentative machinery expounded in this chapter fails to get off the ground. In that case, judges will have no protected reason to enforce the democratic law.

Chapter 6

Democratic Authority and Statutory Interpretation[159]

1. Introduction

Consider a judge that needs to apply democratically enacted statutes. There are two distinct and partially conflicting theses that are sometimes claimed that should guide the judge in the application of the statutes:

OVERRIDING INTENT: The judge ought to treat as binding the relevant intention behind the statute, even when this intention dictates an outcome that is distinct from that dictated by the clear public meaning of the text of the statute.[160]

CABINED INTENT: The judge ought to treat as binding the public meaning of the text of the statute when this meaning is clear, but she ought to treat the intention behind the statute as binding, when the public meaning is unclear.[161]

By 'the public meaning of the text', I mean the assertive content of the text of the statute, and by that I mean the communicative content that the author of the text can reasonably be inferred by the relevant audience to have intended to convey (regardless of whether this is the content that they actually intended to convey).[162] By 'intention behind

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[159] This chapter reproduces part of my article, "Authority, Democracy, and Legislative Intent" (*Law and Philosophy*, forthcoming).

[160] For arguments that support this kind of position, see Larry Alexander, "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions", in Andrei Marmor (ed.), *Law and Interpretation* (Oxford: Clarendon Press), pp. 357-404; Larry Alexander and Emily Sherwin, "Interpreting Rules: The Nature and Limits of Inchoate Intentions", in Goldsworthy and Campbell, eds., *Legal Interpretation in Democratic States* (Aldershot: Ashgate) pp. 3-28; Larry Alexander, "Telepathic Law", *Constitutional Commentary*, 27 (2010), pp. 139-150; David Tan, "Objective Intentionalism and Disagreement", *Legal Theory*, 27 (4), 2021, pp. 316-351.

[161] For this position, see John Manning, "Justice Ginsburg and the New Legal Process", *Harvard Law Review* 127 (1), 2013, pp. 455-460.

[162] For this understanding of public meaning, see Jeffrey Goldsworthy, "Moderate versus Strong Intentionalism", *San Diego Law Review* 42 (2005), pp. 669-683; Goldsworthy, "The Case for

the statute' I mean the intention of the democratic majority enacts the statute. I want to allow, however, that the phrase may refer either to an intention to convey a meaning by means of the text of the statute, or to an intention to change the legal content, or to an intention that such and such effects in the application of the law occur,[163] or to an intention to convey (by means of the text of the statute) a change in the legal content,[164] or to the intention to convey (by means of the text) that such and such effects in the application of the law should occur, or to all the intentions listed above, or to any combination of the intentions listed above.

Consider as an example *Holy Trinity Church v United States* (1892), in which the issue was whether the Alien Contract Labor Act of 1885, which prohibited the importation under contract of foreigners "to perform services or labor of any kind", subject to a number of specific exceptions, prohibited the importation under contract of a priest. Priests or

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Originalism", in Grant Huscroft and Bradley Miller (eds.), *The Challenge of Originalism. Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011), pp. 42-69; See also Hrafn Asgeirsson, *The Nature and Value of Vagueness in Law* (Oxford: Hart Publishing, 2020), p. 128; Scott Soames, "Toward a Theory of Legal Interpretation", *New York University Journal of Law and Liberty*, 6 (2) 2011, pp. 231-259; Scott Soames, "Deferentialism: A Post-Originalist Theory of Legal Interpretation, *Fordham Law Review*, 82 (2) 2013, pp. 597-617; Scott Soames, "Deferentialism, Living Originalism, and the Constitution", in Brian Slocum (ed.), *The Nature of Legal Interpretation* (Chicago: University of Chicago Press, 2017), pp. 218-240.

[163] Mark Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication", in Andrei Marmor and Scott Soames (eds.), *Philosophical Foundations of Language in Law* (Oxford: Oxford University Press, 2011), pp. 217-256, suggests that the relevant intent should be taken to be an intent to change the content of the law, but the example used to support this (*Saadeh v Farouki*) illustrates another intention, namely an intention regarding the effects of the application of the law.

[164] For the notion of an intention to convey by means of the text of statute a certain change in the legal content, see Andrei Marmor, *The Language of Law* (Oxford: Oxford University Press, 2014), pp. 12-17. For the distinction between intentions to change the legal content and intentions to *convey* (by means of the text of the statute) a change in the legal content, see Dale Smith, "What is Statutory Purpose?", in LB Crawford, P Emerton, and D Smith (eds), *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Oxford: Hart, 2019), pp. 13-38, at p. 26.

related clerical occupations were not listed as exceptions in the statute. So, the public meaning, or the assertive content, of the statute seemed to cover priests. That is, what the audience/reader could reasonably infer the drafter or the lawmaker to have intended to convey in the text of the statute was to prohibit *all* categories of labour, except for the definite exceptions listed in the statute. And that means that what the audience/reader could reasonably infer the drafter to have intended to convey was to prohibit the importation under contract of priests. (Note that some argued that 'labor' meant, at least in those times, mainly 'manual labour', and that fact by itself excluded priests from the coverage of the act.[165] It is not very clear that this is so,[166] but this is irrelevant for our purposes. We need only an illustration. And for illustrative purposes, we could simply assume that 'labor' encompassed at that time both manual and non-manual labour.)

At the same time, however, some argued that the majority that enacted this statute in Congress had as its only purpose the protection of the wages of blue-collar workers, and so, they must have intended to prohibit only the importation of manual labour.[167] So, *if* this is correct, then there is a divergence between what they *succeeded* in communicating and what they *actually* intended to communicate. What they succeeded in communicating was that *all* labour, manual and non-manual, except for the definite

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[165] See Victoria Nourse, *Misreading Law, Misreading Democracy* (Cambridge, Mass.: Harvard University Press, 2016), pp. 76-79.

[166] If they intended 'labor' to cover only manual labour, then it is unclear why they have included a list of exceptions that catalogued non-manual labour professions.

[167] Though note that there are substantial grounds for doubting this claim. As Vermeule argues, even if the majority's main purpose was the protection of the wages of blue-collar workers, there is evidence that they wanted to balance this purpose against other (side-constraining) purposes when drafting statutory language, such as that of not drawing arbitrary distinctions between classes of citizens. And that meant in turn that the language they ultimately preferred deliberately did not exempt all non-manual labour. See Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Mass: Harvard University Press, 2006), pp. 99, 302, n. 37.

list of exceptions from statute, is prohibited. This is the clear assertive content or the public meaning of the statute. But what they *actually* intended to communicate was that *only* manual labour is prohibited.

Recall that the public meaning or the assertive content is what the audience can reasonably infer the author to have intended to convey by means of the words of the statute – *regardless of* what the author *actually* intended to convey. So, the assertive content or the public meaning of the statute at issue here is simply that all labour, manual or non-manual, subject to the definite list of exceptions, is prohibited – *even if* what the majority actually intended to convey is that only manual labour is prohibited.

So, according to CABINED INTENT, judges ought to enforce the assertive content or public meaning of the statute – which is clear in this case – and thus prohibit the importation under contract of foreign priests. The fact that this is not what the majority intended is immaterial. All that matters is that this is what the clear public meaning of the statute dictates.

By contrast, according to OVERRIDING CONTENT, judges ought to ignore the clear public meaning of the statute and give force only to the intention of the majority. And since the intention of the majority was not to prohibit the importation of priests, it follows that the court should not prohibit the importation of priests. So, here CABINED INTENT and OVERRIDING INTENT diverge.

Now, let us imagine a counterfactual in which everything is as above, except that the meaning of 'labor' is ambiguous between 'manual labour' and 'all labour, manual and non-manual' and there is no list of exceptions in the statute that could disambiguate its meaning.[168] In this scenario, the public meaning of the statute is unclear. It is unclear

[168] If there had been a list of exceptions that included non-manual labour professions (as was the case in the actual statute), that would have disambiguated the meaning of 'labor', since it would have made clear that 'labor' referred to both manual and non-manual labour (since otherwise one could not make sense of *non*-manual labour professions as *exceptions* to 'labor').

whether it is meant to prohibit the importation of priests or not. In such a case, unlike the case above, the verdicts of CABINED INTENT and OVERRIDING INTENT converge. This is because they agree that when the public meaning is unclear, the judge ought to give force only to the intention of the majority. And since the majority, *ex hypothesi*, does not have the intention to prohibit the importation of foreigners for clerical positions, it follows that both CABINED INTENT and OVERRIDING INTENT say that the judge ought to decline from prohibiting the importation of foreigners for clerical positions.

In this chapter, I want to argue against both OVERRIDING INTENT and CABINED INTENT. The grounds of my case against these two theses will not consist in conceptual considerations about the nature of the law or of the language used in the statute. Rather, it will consist in considerations related to the *moral authority* of the democratic law.[169]

More specifically, I argue that the argument for the preemptive authority of democratic law that I have built in the previous chapter shows that what has moral authority – what the judge has a non-invalidating protected reason to enforce – is the assertive content, and not the intention of the majority.

In addition, I argue that the same argument for the preemptive authority of democratic law entails that, when the assertive content is unclear, what the judge ought

[169] In this respect, my argument is in that tradition of inquiry which seeks to determine how judges ought to apply the law on the basis of an account of the moral authority of democratic law. See especially Jeremy Waldron, "Legislators' Intentions and Unintentional Legislation", in his *Law and Disagreement* (Oxford University Press, 1999), pp. 119-146; Heidi Hurd, *Moral Combat: The Dilemma of Legal Perspectivalism* (Cambridge University Press, 1999), chap. 6. And, more broadly, it is in a tradition that seeks to determine how judges ought to apply statutes on the basis of an account of the moral authority of the law (whether democratic or not). See, e.g., Alexander, "All or Nothing at All?"; Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Hart, 2005), chap. 8.

to enforce is not the intention of the majority, as CABINED INTENT prescribes, but rather the interpretation of the assertive content that is closest to the balance of moral reasons. This follows, as I will show, from the specific preemptive reason that democratic law gives to judges, namely the non-invalidating preemptive reason.

This chapter proceeds as follows. In section 2, I show in more detail why my argument from the previous chapter that the democratic law has preemptive authority entails that both CABINED INTENT and OVERRIDING INTENT are false. In section 3, I show why the same argument implies that, when the assertive content is unclear, the judge ought to select that interpretation that is closest to the balance of moral reasons. Finally, in section 4, I argue that the conclusion that my argument for the preemptive authority of democratic law entails – namely, that judges ought to enforce the assertive content when this is clear, and that interpretation that is closest to the balance of moral reasons, when the assertive content is unclear – is a claim that is compatible with, even if not directly entailed by, other arguments for democratic authority, such as those of Christiano and Estlund.

2. The Moral Authority of the Assertive Content of the Statute

First, the coordinative scheme that the judge is bound by the non-invalidating protected reason to enforce is *not* what the majority *intended*. As we have seen in section 3, that which counts as morally authoritative (i.e., that which the judge has a non-invalidating protected reason to enforce) is not what the majority intended – since otherwise the imposition of the law would be wrongful in the sense of the WNF. The judge has a protected reason to enforce the democratically made law in part because (and to the extent that) this law is the output of a procedure that satisfies the No-Imposition Constraint. And, as we have seen, what qualifies as the output of a procedure that satisfies the No-Imposition Constraint is not what the majority intended. Whatever it is

that the majority intended (if there is anything that it intended) – e.g., that the meaning it intended the audience to recognise be such and such, that the legal content be such and such, that the effects in the world of the enactment be such and such – is not morally authoritative. There is no protected reason to enforce it.

This argument rebuts CABINED INTENT: the judge ought not to enforce the intention of the majority, when the public meaning of the statute is unclear. It also rebuts OVERRIDING INTENT: the intent of the majority could not override the public meaning of the text.

Second, the coordinative scheme that the judge is bound by the non-invalidating protected reason to enforce is defined or determined by the public meaning (or the assertive content) of the text of the statute. This is because what the judge has a non-invalidating protected reason to enforce is the text imposed by a procedure that satisfies the No-Imposition Constraint. And, as we have seen, the democratically enacted text qualifies as the output of a procedure that satisfies the No-Imposition Constraint because (and to the extent that) it is the text that was selected by a procedure that was responsive to the individuals' *judgments* (as opposed to being responsive to their intentions) regarding that text. So, it is *that* text, with regard to which individuals held their judgment, that should be taken as authoritative.

Now, that text regarding which the individuals form the judgment 'this text should be the law' is a text with a certain public meaning. Lawmakers form the judgment 'this text should be the law' partly because that text bears such and such a public meaning.

The purpose of the law-making process is to coordinate individuals around a certain scheme. When some lawmakers judge that a certain scheme is sufficiently close (and when some others judge that it is not sufficiently close) to the balance of reasons to

be enacted into law, the scheme that they are judging is a coordinative scheme.[170] But if it is a coordinative scheme, then that which they are judging must be something which is publicly available to all persons who are supposed to be coordinated by the scheme in question. So, out of the many possible judgments that lawmakers might have, the judgment that is (normatively) relevant here is that judgment about the public meaning (or the assertive content) of the text – i.e., about the meaning that the audience of the law (the person to whom the law is addressed) would reasonably infer the drafter to have intended.[171] It is not a judgment about the meaning that the drafter *actually* intended,

[170] I want to allow that the class of the persons who are coordinated by a statute might vary from case to case.

[171] What about the alternative possibility that the judgment that is normatively relevant is not a judgment about the meaning that the audience could reasonably infer the drafter to have intended (i.e., about the text's assertive content, or 'what is said' by an author in a text), but rather simply a judgment about the *literal* meaning of the words, regardless of what the drafter could reasonably be inferred to have intended by using those words? For the distinction between these categories, see François Recanati, *Literal Meaning* (Cambridge: Cambridge University Press, 2004), chaps. 1, 2; Scott Soames, *Philosophical Essays*, vol. 1: *Natural Language: What It Means and How We Use It* (Princeton: Princeton University Press, 2009), chaps. 10, 11, 15; Robyn Carston, "Legal Texts and Canons of Construction: A View from Current Pragmatic Theory", in M. Freeman and F. Smith, eds., *Law and Language* (Oxford: Oxford University Press, 2013), pp. 8-33, at pp. 30-31. I do not have a *normative* argument for preferring assertive content over the literal meaning. It is plausible, however (and this is something that my normative argument cannot rule out), that the judgments about the text in the procedure that satisfies the No-Imposition Constraint are judgments about the assertive content of the text, and this might be so for the simple (non-normative) reason that this is a more natural way in which to construe what it is to have a judgment about a text. Because of this, I will assume, unless otherwise specified, that what the judge has a non-invalidating protected reason to enforce is the assertive content, rather than the literal meaning, of the text. But even if we take the relevant judgments to be about, and thus, the authoritative content to consist in, the literal meaning of the text, that would not diverge in practice very much from the outcome we would end up with if we took the authoritative content to consist in the assertive content of the text. And this is because the conversational background in the context of legislation is not rich enough in most contexts to enable the drafters of the legislative text to intend to assert something else than the literal

since that meaning might not be publicly available. Thus, the judgment that is normatively relevant here is something like: 'This text, with this public meaning (i.e., with the meaning that the addressees of the law would reasonably infer to have been intended by the drafter), is sufficiently close to the balance of reasons to be enacted.'

It might be argued that, even if lawmakers have such judgments, and even if they are normatively relevant, they may also have intentions (e.g., an intention that, by adopting this text, the legal content be modified in such and such ways, or an intention that, by adopting this text, such and such effects should occur in the world), and those intentions take normative priority over the judgments they have about the text with a public meaning. But we have just seen above that these kinds of intentions (if they exist) are not normatively relevant for what counts as morally authoritative. What counts as morally authoritative (what it is that the judge has a non-invalidating protected reason to enforce) is the output of a procedure that satisfies the No-Imposition Constraint, and, as we have seen, the output of such a procedure cannot be what the majority intended.[172]

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meaning of the text. See Marmor, *The Language of Law*, pp. 30-34; Asgeirsson, *The Nature and Value of Vagueness in Law*, pp. 106-117.

[172] Note that it is not possible for an utterer to have an intention that the audience recognise the utterer to take his use of *x* as meaning *y*, if the utterer knows that, by using *x*, it is impossible for the audience to recognise meaning *y*. So, the utterer could not have an intention, when using phrases, to mean things that depart from the public meaning (or the meaning that that the audience would reasonably infer him to have intended). See Stephen Neale, "Pragmatism and Binding", in Z. G. Szabó, ed., *Semantics vs. Pragmatics* (Oxford: Clarendon Press, 2005), pp. 165-285, at p. 181; Larry Alexander, "Simple-Minded Originalism", in Grant Huscroft and Bradley Miller, eds., *The Challenge of Originalism* (Cambridge: Cambridge university Press, 2011), pp. 87-98, at p. 90; Larry Alexander, "Goldsworthy on Interpretation of Statutes and Constitutions: Public Meaning, Intended Meaning, and the Bogey of Aggregation", in *Law Under a Democratic Constitution*, pp. 5-11, at pp. 10-11. If this is so, then taking the public meaning as morally authoritative (as my account does) would have results that converge in practice with those OVERRIDING INTENTION accounts that take the author's actual semantic intention as morally authoritative. The only difference would be that, when, for instance, members of the majority inadvertently misidentify the public meaning of the text that they approve, then the

What about those (rare) situations, however, in which some lawmakers are mistaken about, or misidentify, the public meaning of the text, so that their judgments about a text are in fact judgments about a content that is distinct from the public meaning that the text *actually* has? Here, my account does not imply that it is that content mistakenly believed by (some) lawmakers to be the public meaning of the text (*if* there is a majority who misidentifies the public meaning) – rather than the *actual* public meaning – that is morally authoritative. And that is because what is morally authoritative – what it is that the judge has a non-invalidating protected reason to enforce – is the output of a procedure that satisfies the No-Imposition Constraint. And it is not a requirement that, in order for the content conveyed by a text to qualify as the output of a procedure that satisfies the No-Imposition Constraint, the participants' judgments about the text that bears that content actually be judgments about *that* content. What seems to be required is only that there be one thing (content) that all participants target as the object of their judgments, even if some participants' judgments inadvertently fail to be about it.[173]

To see this, compare with an arbitration procedure (which, recall, is another procedure that satisfies the No-Imposition Constraint). We might imagine that one of the parties to the dispute (B) inadvertently misidentifies the argument of the other party, with the result that their judgments are not, properly speaking, about the same thing. But that does not imply that the verdict that the arbitrator will yield will be about that

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OVERRIDING INTENTION account would take that public meaning that the majority misidentified, rather than the *actual* public meaning of the text, to be authoritative. See Alexander, "Goldsworthy on Interpretation of Statutes and Constitutions", pp. 10-11. By contrast, as we are about to see, under my account, what is morally authoritative is the *actual* public meaning of the text. See the argument *infra*, the text accompanying fn. 173 to 178.

[173] I will leave aside in what follows cases in which everybody makes the *same* mistake in identifying the public meaning, because it is not clear why, given the pervasiveness of that 'mistake', we would still be warranted to view it as a mistake, and not as a correct identification of the public meaning.

thing that B misidentified as the object of dispute. Rather, it will be – and it must be, in order for the arbitrator to properly discharge its arbitral function – about *that* thing which was the *actual* object of dispute, and which B's judgment purported, but failed, to be about. More generally, the arbitrator's verdict must be about *that* thing – the *actual* object of dispute – which the parties try to target as the object of their judgments, even if some of the parties' judgments may inadvertently miss it. In other words, the arbitral verdict must be a verdict about that thing which the parties' judgments purport to be about, and not about that thing misidentified by one or another party.[174]

(Note that this feature of the arbitral verdict is also a feature of what makes the arbitration procedure a procedure that satisfies the No-Imposition Constraint – and thus it is a feature that is relevant for the analogy with democratic procedures. Discounting cases in which the arbitrator themselves may inadvertently misidentify things, an 'arbitral' verdict that is concerned with the things that one party misidentified as the object of dispute, rather than with the thing that is actually the object of dispute (that actual thing which the party strive their judgment to be about), would make, in a way, the 'arbitrator' a mere agent of that party that misidentified the object of dispute, or at least it would make the arbitrator partial and non-neutral, and that would not be consistent with the motivation behind the No-Imposition Constraint.)

To keep the analogy with the arbitration procedure, this suggests that, in order for the democratic procedure to qualify as a procedure that satisfies the No-Imposition Constraint, its output must be that *actual* thing that the participants' judgments strive to be about, and not that thing which some of them misidentify as the thing they are striving to judge. And that actual thing (which they strive to judge) must be the *actual*

[174] Note that this is consistent with claiming that, if the parties *deliberately* talk past each other, so that there is no thing that we can say that needs adjudication, the procedure in which they participate can no longer be called arbitral.

public meaning of the text. Given that the democratic procedure seeks to discharge a coordinative function, and that the coordinative function is achieved by the (actual) public meaning of the text, it is plausible that, when participants in this procedure make judgments about the meaning of the text (e.g., 'This text, with this meaning, is closest to the balance of reasons'),[175] what it is that they are trying to take as the object of their judgments (or what it is that their judgments strive to be about) is the actual public meaning of the text. (They cannot strive to have judgments simply about what they parochially take to be the public meaning, and not about what the public meaning *actually* is, since that would amount to failing to have a judgment about a text that is supposed to coordinate everyone, and thus to be understood in the *same* way by *everyone* concerned.)

So, that output of the democratic procedure that qualifies as the output of the No-Imposition Constraint must be the actual public meaning of the text. This vindicates the claim that what is morally authoritative – what it is that judges have a protected reason to enforce – is the actual public meaning (assertive content) of the text.[176]

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[175] A judgment about the public meaning of a text can be construed as a judgment about the candidate norm (or the candidate legal content) conveyed by the public meaning of that text.

[176] It is possible that this result can also be reached more generally by those accounts of democratic authority that see democratic procedures as discharging an arbitral function (even though they do not proceed from the same premises as my account does). For such an account, see Scott Shapiro, "Authority", in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 382-439, at pp. 435-436. As we have seen, in an arbitration procedure, it is not the object of individuals' actual judgments that constrain what is picked out as the object that is being adjudicated, or as the output of the procedure, but it is that thing which their actual judgments strive to be about. And, since, in order for the arbitral procedure to satisfy a coordinative function, it must be that that thing which they strive their actual judgments to be about just is the actual public meaning of the text, it seems to follow that what is authoritative on such accounts must be the actual public meaning of the text. (On Shapiro's account, democratic procedures provide a fair arbitration of disputes, by giving everyone an equal power. It is not clear, however, why Shapiro, pp. 437-8, takes this arbitral function to show that the "will of the majority" – rather than, say,

In addition, recall that the output of a democratic procedure is morally authoritative not only in virtue of its being the output of a procedure that satisfies the No-Imposition Constraint, but also in virtue of its being the output of a procedure that gives everyone's judgment an *equal weight*, and thus avoids the second-order WNF. But it is the actual public meaning of the text, and not the public meaning that some (or the majority) misidentify, that is the output of a procedure that gives equal weight to all parties' judgments.

A democratic procedure that yields as an output the actual public meaning of the text (rather than the public meaning misidentified by some) gives an equal weight to everyone's judgments – more specifically, to all participants' judgments about *that* thing which they try to target as the object of their judgement (even if they may miss it). *That* thing – which they try to target as the object of their judgments – is the *actual* public meaning of the text (whatever that meaning is). Even if they have a judgment about the thing that they actually succeeded in judging (which is the public meaning that may have *mis*identified), there is a sense in which they also have a judgment about that thing which they were trying to, but failed to actually, judge. (That judgment might be false, by dint of being misdirected. But it is hard to see how it is not a judgment, whether true or false, about that thing which it tried to be about, but it missed.)[177] A procedure yielding as its

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the public meaning of the text each had an *ex hypothesi* fair and equal power to adopt – is authoritative.)

[177] Consider, as an analogy, the judgment of someone about Aristotle. He might say, 'Aristotle's position that x is F is insightful.' If it turns out that Aristotle did not actually say that x is F, there is still a sense in which his judgment is about Aristotle. (This is also indicated by a practice of accountability, in which people are held accountable for the mistaken judgments that they have. If it were true that the judgment had not been Aristotle, that would implausibly imply that a critic would not be warranted in responding, 'But you are wrong in saying that that is Aristotle's view'. The criticism would simply be misdirected.)

output the *actual* public meaning of the text (which is that thing which everyone tries to judge) would give an *equal* weight to these judgments.

By contrast, if the output of the procedure were the meaning that some members of the majority misidentify as the actual public meaning, it would be more difficult to see how that procedure gave equal weights to all relevant judgments. Under such a procedure, all the weight would be given to those judgments of the members of the majority, or to those judgments (whether or approval or disapproval) that implicitly *mis*identify the public meaning in the same (mistaken) way as the above-mentioned members of the majority do, and no weight at all to those judgments (whether of approval or disapproval) that implicitly identify the public meaning in a *different* way. In order for a procedure to avoid the second-order WNF, it needs to give equal weight to all disputing judgments. Even if there is a sense in which a judgment approving a text misidentified as having the meaning *x* and a judgment disapproving a text identified as meaning *y* are not in dispute, there is another sense in which they are, since they both purport to be judgments regarding the *same* thing – namely, the text with its *actual* public meaning. This suggests that the output of a procedure that gives equal weight to all relevant judgments (that are relevant for purposes of avoiding the second-order WNF) must be the *actual* public meaning of the text (whatever that is), and not the meaning that only some misidentified as the public meaning.

And since the content that is morally authoritative – that which a judge has a protected reason to enforce – is authoritative partly in virtue of being the output of a procedure that gives an equal weight to all relevant judgments (since such a procedure, as we have seen, avoids the second-order WNF), it follows that what is *morally*

authoritative must be the actual public meaning, and not the meaning misidentified by members of the majority.[178]

So, to conclude the discussion so far: Both OVERRIDING INTENT and CABINED INTENT are false. What is morally authoritative – what the judge has a non-invalidating protected reason to enforce – is *not* the majority's intention or what the majority intended. It is neither the legal content, nor the communicative content, that the majority intended. Nor is it the purpose (of whatever generality or specificity) that the majority had in enacting the text. Rather, what is authoritative is simply the (actual) public meaning or assertive content of the text – or the meaning that the relevant audience could reasonably infer the drafter of the text to have intended to convey.

Note that the rejection of OVERRIDING INTENT and of CABINED INTENT is consistent with the claim that legislative intent is a necessary condition of legislation, or that it is needed, as a conceptual matter, for something to count as law.[179] Such a necessary intention would be a minimal intention, something like the legislature's corporate or group intention (however to be characterised) to enact a law, and to do so by

[178] Similar results could be reached by social-egalitarian accounts of democratic authority. See Viehoff, "Democratic Equality and Political Authority"; Niko Kolodny, "Rule Over None II". On such accounts, equality of power is a dimension of social equality, and the democratic law is morally authoritative in virtue of being the output of a procedure that gives everyone equal power. If the choice is restricted between the option (actual public meaning) and (the meaning misidentified by members of the majority), what is morally authoritative on such accounts must be the former, since it is only the former, but not also the latter, that we can say that everyone has had an equal power to adopt.

[179] Raz argued that it cannot be the case, for instance, that if I now start to do so some action or another, I would, unbeknownst to me, thereby enact a law. Enacting law must require, among other various things, an intention on the part of the enactor that, by doing such and such, they are enacting law. See Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2012), pp. 274-5, 281-2.

means of a certain procedure.[180] An intention of this kind can be a necessary condition for a procedure (such as a democratic procedure) to count as the sort of procedure that, by doing this or that, is thereby adopting a law. But that is consistent with claiming that what is morally authoritative – or what it is that the judge has a protected reason to enforce – is not the legislature's corporate intention, but rather the public meaning of that text that the legislature enacts into law.

3. When the Public Meaning is Unclear

There is still one more thing to investigate: CABINED INTENT has been rejected. But what do we put in its place? What are the judges bound by when the public meaning is unclear, if they are not bound by the majority's intent? On my account, when the public meaning is unclear, judges are bound by democratic authority to enforce that interpretation of the text which is closest to the balance of moral reasons. Let us see why this is so.

Among the cases in which the public meaning is unclear, I want to focus here mainly on those cases in which the public meaning supports more than one interpretation. If the public meaning is defined (as I assume here) as the communicative content that the author (namely, the drafter) can reasonably be inferred to have intended (regardless of whether this is the content they actually intended), then these are cases in which more than one interpretation is reasonable – it is reasonable for the audience to infer the drafter to have intended *x*, at the same time as it is reasonable for the audience to infer the drafter

[180] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012), pp. 56-8, 220, argues that the legislature, in making laws, acts upon a 'standing intention', which is an intention to use such and such procedures (for instance, majority rule) to enact a law.

to have intended *y*. In these cases, then, the public meaning warrants more than one outcome.[181]

For instance, imagine a statute that makes it a misdemeanor to bring vehicles in the park, and which contains a provision that increases the fine depending on whether the defendant has been fined in the past for "littering, battery, or assault in a park". Does the qualifier "in a park" apply to all elements from the series or only to the last one? Both the case that it applies to the whole series and the case that it applies to the last item seem plausible.[182] The drafter(s) of the text could be reasonably taken to have intended to mean the phrase "in the park" to qualify only the last element – but an interpretation that they intended it instead to qualify any element from the series seems also reasonable.[183]

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[181] This is a case which Jules Coleman and Brian Leiter, "Determinacy, Objectivity, and Authority", in Andrei Marmor, ed., *Law and Interpretation* (Oxford University Press, 1995), pp. 213-5, 226, 236-9, would classify as one kind of indeterminacy. What is specific of this kind of indeterminacy is that there is an oversupply of legal reasons (too many reasons to warrant only one outcome) – by contrast with other kinds of indeterminacy, where there is an undersupply of legal reasons (not enough reasons to warrant any outcome).

[182] See *Lockhart v United States,* 577 US 347 (2015), in which the issue was whether a statutory provision that enhances a sentence for possession of child pornography depending on whether the defendant had any prior state convictions for crimes "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or a ward" is triggered if the defendant had been convicted in the past of sexual abuse which did not involve a minor or a ward.

[183] For another case in which the public meaning supports more than one reasonable interpretation, consider a statute that refers to a contract "not to be performed within one year from the making thereof". It is unclear whether the provision is triggered when the contract is not performed by one party or only when it is not performed by both parties (Francis Bennion, *Statutory Interpretation: A Code*, Butterworths: London, 2002, p. 422). Or consider a statute that requires a regulatory agency to adopt standards with a view to ensuring that "to the extent feasible", no harm from toxic materials results for employees. *AFL-CIO v. American Petroleum Institute*, 448 US 607 (1980). There are more ways in which the feasibility constrained could plausibly be interpreted. For another similar case, consider *Bromley London Borough Council v. Greater London Council* [1982] 1 All ER 129, in which the question was whether reducing public

In those cases where the public meaning warrants more than one interpretation, we can say that the judge complies with the protected reason to enforce the public meaning if she enforces *any* one of the interpretations that the public meaning warants.[184] Since the public meaning does not provide grounds for selecting one interpretation over another, and since the judge is able to comply with the protected reason if she enforces any of these, it seems that it would be permissible for her to simply pick at random which one of these interpretations she prefers. However, this inference would be unwarranted.

To see why, recall that the *non-invalidating* preemptive reason which binds the judge does not render invalid the grounds or the reasons to bring about the balance of reasons. This is so, as we have seen, even when these reasons support actions that the preemptive reason prohibits. (Recall that the non-invalidating preemptive reason does not deny that the fact that a scheme is closer to the balance of reasons is a valid reason or ground for bringing about that scheme, even while it prohibits bringing about that scheme.) But if so, then it follows *a fortiori* that the reasons to bring about (the scheme

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transport fares by 25% and compensating for the resulting loss by fiscal means was a measure that promoted '*economic* transport facilities and services'. The public meaning also seems to support more than one interpretation in *United States v. Locke*, 471 U.S. 84 (1985). The author of a text that states that some claims must be filed "prior to 31 December" could reasonably be taken to have intended to mean the claims must be filed on or before 30 December, just as they could reasonably be taken to have intended to mean the claims must be filed on or before 31 December. Similarly, in *Niz-Chavez v. Garland*, 593 U.S. _ (2021), "a notice to appear" could reasonably be interpreted as referring to either a single document or a notification in multiple instalments.

[184] Of course, nothing in my argument depends on denying that there may be cases in which there is *only one* reasonable interpretation of the public meaning, even if the literal meaning may diverge from this interpretation. This might be the case in *Cernauskas v. Fletcher*, 211 Ark. 678, 201 SW 2d 999 (1947)(where the drafter meant that only the laws in conflict with the provisions of the statute, and not all the laws of the state, are repealed), or in *R v. Liggets-Finlay Drug Stores Ltd* [1919] 3 WWR 1025 (where the drafter who wrote that "all drug stores shall be closed at 10 p.m." meant that the drug stores be closed until morning, not only 5 minutes past 10 pm).

that is closest to) the balance of reasons remain valid for those actions which the preemptive reason *allows*. Since enforcing any of the interpretations that are warranted by the public meaning is allowed by the protected reason, it follows that, among these interpretations, the reasons that the judge has to select that interpretation which is closest to the balance of reasons, remain *valid*.[185]

The judge will have a non-preempted valid reason to select that interpretation which is closest to the balance of moral reasons.[186] She will have a *valid* reason to do so because she has a more general reason to act on the balance of moral reasons (or to bring about that scheme that is closest to the balance of reasons) – and this reason is *not* invalidated by the preemptive reason to enforce the democratically enacted statute. And

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[185] Compare the principle, sometimes applied in the British legal system, that in cases where a statutory provision bears more plausible meanings, the court should enforce the one that is more just. See S.G.G. Edgar, *Craies on Statute Law* (London: Sweet and Maxwell, 1971), pp. 86-87, 94-95.

[186] Note that this account, on which judges are morally required to enforce that interpretation of public meaning that is closest to the balance of moral reasons is distinct from other accounts, such as Dworkin's, on which moral principles figure in the application of statutes. On Dworkin's account from *Law's Empire* (London: Fontana, 1986), chap. 9, the ideal judge reads statutes in light of those moral principles that best justify the enactment of the statutes by the legislature. There are at least three differences between Dworkin's account and my account. First, on Dworkin's account, the moral principles serve as a way of 'reading' or 'interpreting' the statute. I make no similar claim. On my account, enforcing that interpretation of the statute that is closest to the balance of moral reasons is not itself a way of 'reading' or 'interpreting' the statute. It is rather simply a freestanding moral requirement. Second, for Dworkin, the moral principles in light of which the statute is to be read must fit the particular history of the legal community and must cohere with the purposes that led the legislature to enact the statute. By contrast, on my account, the moral reasons that the judge is bound by are simply moral reasons, and they have a validity that is independent of the past decisions and purposes of a legal community or of the legislature. Third, on my account, the 'trigger' for bringing the moral reasons to adjudicate between competing interpretations is when the *public meaning* of the of the text of the statute is unclear. There is no similar 'trigger' on Dworkin's account. On his account, the reading of statutes in light of the moral principles that best justify them is operative even when the statutes in question have a clear public meaning (see *ibid*., pp. 351-352).

she will have a *non-preempted* valid reason, because choosing *either* interpretation of the public meaning of the statute could count as a way of enforcing the statute that she has a protected reason to enforce.

The balance of reasons that a judge should use in identifying which interpretation to enforce is that balance of all moral reasons that are relevant to, or bear on, the decision going one way rather than another. If, in our example above, the balance of reasons supports not applying an increased fine to the defendant, then the interpretation of the public meaning that the balance of reasons supports enforcing is the one under which 'in a park' qualifies only the last element of the series. So, the claim that an interpretation is supported by the balance of reasons is simply the claim that the (in)action or decision that amounts to enforcing that interpretation produces results that are closer to the balance of reasons.[187]

So, to conclude: democratic authority entails that the judge is bound by a non-invalidating protected reason – a first-order reason to enforce the public meaning of the text of the statute, coupled with a non-invalidating preemptive reason that makes it impermissible to enforce reasons that conflict with the requirements conveyed by the public meaning. This kind of preemptive reason does not render invalid, however, the reasons to enforce the balance of reasons (or whatever is closest to that balance), even

[187] The moral considerations that go into the balance of reasons are only considerations isolated to the individual case that is being adjudicated. A practice of treating the interpretation that a superior court chose to enforce in a case as binding for other cases falling under the same statutory provision does not seem in conformity with the balance of reasons, since there is no guarantee that the interpretation whose enforcement secures the morally best result in one case would also secure the morally best result in another case. If there is a practice of this sort, then the judge will have a moral obligation to disregard the practice, and rule in accordance with what the balance of reasons supports in a given case. If, however, it is foreseeable that judges in next cases will treat one's decision to enforce one interpretation as binding, then, of course, the moral considerations that go into the balance of reasons in deciding what interpretation to enforce is not limited only to the considerations of the individual case that is being adjudicated.

while it preempts them, and makes such an enforcement impermissible in cases in which this enforcement conflicts with the public meaning of the statute. This sort of protected reason implies, as we have seen that (i) when the public meaning of the statute is clear, the judge ought to enforce it, and (ii) when the public meaning warrants multiple interpretations, the judge ought to select that interpretation which is closest to the balance of moral reasons.

4. Convergence with the Other Accounts of Democratic Authority

We have seen so far that the fallibility argument for democratic authority entails that the judge ought to enforce the assertive content (or public meaning) of the text when this is clear, and that interpretation of the assertive content which is closest to the balance of reasons when the assertive content is unclear.

Now, I want to argue that this result is not in conflict with what the other accounts of democratic authority could say about legal interpretation. (Note that I take no position on whether these accounts are true or not.) It is not clear whether these accounts – as formulated – are able to *entail* something as specific as the claim that what judges ought to enforce is the assertive content, when this is clear, and that interpretation of this content which is closest to the balance of reasons, when this content is unclear. Nevertheless, I want to argue that they are *compatible* with this claim, or that they do not contradict this claim. In other words, they do not warrant any contrary claim, such as, for instance, the claim that judges ought to enforce the intentions of the majority (however characterised).

One note before we proceed. The fallibility argument for democratic authority was an argument for democratic authority understood as 'giving a non-invalidating protected reason'. The accounts of democratic authority that I am now going to consider do not necessarily rests on a similar understanding of 'democratic authority'. Nevertheless, what

they take to be democratic authority is in the conceptual neighbourhood of what I take to be democratic authority. They do not necessarily ascribe the term 'authority' to the 'law' as such, but rather to the democratic institutions that enact the law (in which case, such institutions are said to possess a moral claim-right to make law, or else, a moral power-right to create, by the enactment of the law, new moral obligations and other moral deontic statuses for citizens and officials).[188]

4.1. Christiano's Account

Christiano argues that the democratically made law has authority in virtue of the fact that such a law realizes or determines in a public manner what justice requires.[189] In very condensed form, his argument runs as follows: even if there is a truth about justice (which, on his account, requires equality of interests), and even if people agree at a very general level about what justice requires, there is disagreement at a more specific level.[190] This will imply that people will have, in the absence of some relevant intervention, difficulties in coordinating on actions in a way that allows them to discharge their more general duty to treat each other on terms of justice.[191] In addition, their disagreement about justice makes justice, to a certain extent, non-public.[192] Christiano argues that the requirement of the publicity of justice – which is a requirement to treat someone on terms

[188] Christiano defines the relevant authority primarily as a claim-right to rule (which is correlative to the relevant individuals' duty to obey). See Christiano, *The Constitution of Equality*, pp. 240-243. Estlund defines authority as "the moral power of one agent (emphasizing especially the state) to morally require or forbid actions by others through commands". See Estlund, *Democratic Authority*, p. 2.

[189] Christiano, *The Constitution of Equality*, chap. 6.

[190] *Ibid*., pp. 53-56.

[191] *Ibid*., pp. 237-238.

[192] *Ibid*., pp. 58-60, 76-77, 251-252.

that she can see to be just[193] – is itself a requirement of justice.[194] This implies that the failure to treat another in terms that the other fails to see as just and which are therefore non-public is itself a failure in achieving justice, and thus a failure to fully comply with the requirement of justice.[195]

Christiano argues that the only way in which individuals can, in the context of *disagreements* about what justice requires, discharge their duty to treat others on terms of justice is by complying with the requirements of *democratically* made law.[196] This is because by complying with democratic law, individuals *publicly* treat others on terms of justice,[197] and thus satisfy the requirement of publicity of justice, and thus satisfy, in turn, the more general requirement of acting justly. Democratically made law can make them satisfy the publicity of justice because it is the result of a procedure in which individuals' judgments about what justice requires are treated equally.[198] A law made on these terms achieves publicity of justice to a higher degree than a law which is unilaterally imposed on them.[199]

Now, if the primary moral reason which justifies democratic authority is the publicity of justice – or the capacity of seeing that justice is done – then, it seems that, all else being equal, what has moral authority is something that could not fail to secure publicity of justice. If we take 'democratic authority' to mean, as Christiano does, 'the

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[193] *Ibid*., pp. 47-48.

[194] *Ibid*., pp. 51-52, 56, 66, 71-74.

[195] *Ibid*., pp. 69, 249.

[196] *Ibid*., p. 252 (". . . only by obeying the democratically made choices can citizens act justly").

[197] *Ibid*., pp. 78, 95, 101-102, 250.

[198] *Ibid*., pp. 89-91, 93-95.

[199] However, even if democratic law makes justice more public, it does not make it fully public, since disagreements about what justice requires persist after law-making. See *ibid*., pp. 68, 71-72, 97.

claim-right to rule' of the legislature,[200] then this is just to say that what the democratic legislature has a moral right to enact as binding is something that could not fail to be public in the relevant sense. If the public meaning (or the assertive content content) of the text of the statute is public in the relevant sense – i.e., if its determination or specification of what justice requires is transparent and clear, so that people can see that justice is done – but if the intention of the legislature, or of the majority (whatever its nature) is not public in the same sense, then it seems that what the democratic legislature has the moral right to adopt as binding is only the public meaning or assertive content of the text of the statute, and not also its or the majority's intentions.

(The same goes, of course, if we take 'democratic authority' to mean 'moral power to create new obligations' – the obligations that the democratic legislature could have the moral power to create would be only those conveyed by the assertive content of the text of the statute, and not those intended by the majority or by the legislature.)

But, even if we assume that the majority's or the legislature's intentions (or, at least some of them) could somehow secure publicity of justice, it suffices for our purposes that the assertive content, as we have just seen, could also secure it. By treating this content as binding, judges would not fail to make justice public.

Christiano's account is also compatible with the claim that, when the assertive content is unclear, judges ought to enforce that interpretation that is closest to the balance of moral reasons. Because the content is, by assumption, unclear, enforcing either interpretation would not damage the publicity of justice.

So, it is safe to conclude that even if the publicity of justice gives the democratic legislature a moral claim-right to rule (as Christiano argues), that fact does not interfere

[200] See Christiano, *The Constitution of Equality*, pp. 240-243.

or conflict with the non-invalidating protected reason that judges have (in virtue of some facts *other* than the publicity of justice) to enforce the asserted content of the statute, and the interpretation that is closest to the balance of moral reasons, when this content is unclear.

4.2. Epistemic Proceduralism

Let us now turn to Estlund's epistemic proceduralist argument for democratic authority. For Estlund, moral authority is the moral power to create an obligation to obey.[201] So, presumably, whatever moral obligations judges could have with respect to the application of statutes, these are given through the exercise by the democratic legislature of the moral power that characterises authority.

On Estlund's epistemic proceduralist theory of democratic authority, the democratically made law has moral authority in virtue of its being the product of an epistemically valuable procedure.[202] Even if a given law is substantively unjust, it is still morally binding, because it is the product of a procedure with epistemic value.[203] The epistemic value of the democratic procedure consists in the fact that it tends to produce substantively just decisions, at a rate that is better than random.[204] Estlund gives the authority of jury verdicts as an analogy. Even if a given jury verdict may be substantively wrong, it is still morally binding, and this is so because it is the product of a procedure with epistemic value – one which is better than random at returning correct verdicts.[205]

But what makes it the case that substantively unjust laws can be morally binding simply in virtue of being selected by epistemically valuable procedures? Estlund's

[201] Estlund, *Democratic Authority*, pp. 42, 118, 127.

[202] *Ibid*., chap. 6 and 8.

[203] *Ibid*., p. 110.

[204] *Ibid*., pp. 102-107.

[205] *Ibid*., pp. 156-58.

argument runs, in very condensed form, like follows: we begin with the notion that an institution has authority when it is morally wrong for an individual not to consent to it.[206] We then consider the situation in which an individual is in the state of nature, but she has to choose whether to consent to an epistocratic institution, i.e., an institution where the decisions are made only by those who are experts in what substantive justice requires. Given that there is disagreement about what substantive justice requires, and thus also about who counts as an expert, such an institution would be met with what Estlund calls "qualified objections":[207] people with opposing views of what justice requires (but where such opposing view are "qualified" ones) would object to it on the grounds that this makes invidious comparisons between individuals.[208] In this context, Estlund argues that it would not be morally wrong for an individual not to consent to the epistocratic institution.[209] By contrast, a democratic procedure would not be met with "qualified objections". Even though the democratic procedure does not yield only what one qualified point of view would regard as substantively just decisions (if it did, then that would meet with the objections of other qualified views), the democratic procedure is able to yield, at a better than random rate, decisions which each qualified point of view would be able to regard as just. This factor (together with the need to replace the private justice of the state of nature with a system of public justice)[210] makes it morally wrong for individuals not to consent to the authority of democratic procedures.[211]

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[206] *Ibid*., chap. 7.

[207] The notion of "qualified" used by Estlund is intended as a replacement of Rawls' notion of "reasonable", which unlike Rawls' notion, does not carry controversial substantive commitments. See *ibid*., p. 44.

[208] *Ibid*., pp. 33-36

[209] *Ibid*., p. 139.

[210] *Ibid*., p. 146.

[211] *Ibid*., pp. 152, 157-58.

This argument does not rule out that the authority to which it would be wrong for individuals not to consent to is the authority or the moral power to create an obligation to follow the assertive content of the statute, rather than the intentions of the majority. There is nothing in Estlund's argument that suggests otherwise. If this is so, then it is compatible with Estlund's argument to say that what judges have an obligation to obey (which, presumably, must be the obligation that follows from the exercise by the democratic institutions of a moral power to create such an obligation) is the assertive content of the statute.

Likewise, there is nothing in Estlund's argument that could run counter to the claim that, when the public meaning or assertive content of the statute is unclear, what judges have an obligation to do is to enforce that interpretation that is closest to the balance of moral reasons. After all, if the exercise by the democratic institutions of a moral power to create obligations gives judges an obligation to enforce the assertive content, and if, in the situation where this content is unclear, enforcing *either* interpretation of the content counts as enforcing the content, then judges are able to discharge the obligation to enforce the assertive content if they enforce that interpretation that is closest to the balance of moral reasons.

So, we can conclude that, even though Estlund's account does not entail the claims that my account entails for how judges ought to apply statutes, it is nevertheless compatible with (and allows) the practices of statutory interpretation and application that my account of democratic preemptive authority entails.

Conclusion

This thesis had as its subject-matters the justification of democratic procedures and the authority of democratically made law. More specifically, it investigated whether majority rule is justified on egalitarian grounds, and whether democratic authority – in both its content-independent and preemptive aspects – can be vindicated by egalitarian considerations, or if not, whether it can be vindicated by other sorts of considerations, such as those of moral fallibility. In addition, this thesis has investigated the question of whether the arguments for democratic authority have any bearing on questions of statutory interpretation and/or application.

In the first part of the thesis (chapters 1 to 4), I have considered both the question of what justifies majority rule and the question of democratic authority from an *egalitarian* perspective. Does equality justify majority rule, and does it also entail democratic authority?

Chapter 1 briefly examines the main arguments from the literature for majority rule and concludes that they fall short of justifying majority rule, and that, in addition, the proposed egalitarian justifications of majority rule fail.

Given this state of the literature, my aim was to give an egalitarian argument for majority rule. My argument, which is developed in chapter 3, is that there are two distinct principles of equality, whose conjunction entails the requirement of majority rule. The first principle of equality is the equality expressed in the claim of non-subordination – which is clarified and delineated from neighbouring egalitarian considerations in chap. 2. The second principle of equality is what I call arbitral equality, and which is presented in

chap. 3. Arbitral equality is violated when A's moral judgment is treated as a moral judgment, but B's moral judgment is treated as a mere preference.

Chapter 3 provides the egalitarian justification for majority rule. I argue that arbitral equality, in conjunction with equality of opportunity for negative control (which – as I argue – is an interpretation of the egalitarian requirements expressed in the claim of non-subordination), entails two further principles, namely Pareto and Substitutability, and that the conjunction of these two principles requires in turn majority rule.

Chapter 4 turns to the question of democratic authority. More specifically, it considers the argument, proposed by Kolodny, that social-egalitarian considerations of the sort captured by the Subordination Complaint entail that the democratic provenance of the law provides officials (and ordinary citizens) a reason to comply with the law. I argue that, even if we accept all the premises of this social-egalitarian argument, the conclusion still does not follow. As an alternative, I argue that arbitral equality (which, recall, captures a dimension of equality that is distinct from the one captured by the Subordination Complaint) is able to provide an argument for the claim that the democratic provenance of the law provides a reason to comply with the law.

In the second part (chapter 5), I explored a non-egalitarian ground that could provide an argument for democratic authority. I argue that considerations of moral fallibility and the wrong of imposing a moral risk – which I call the Wrong of Neglecting Fallibility – provides the starting point for such an argument. I argue, more specifically, that such considerations – for reasons elaborated in chapter 5 – give judges and other officials a first-order reason to follow the democratically made law, and a special kind of preemptive reason, which I call non-invalidating preemptive reason, and which, unlike other preemptive reasons, preempts a first-order reason without denying its validity or relevance as a ground for a decision.

Then, in the third part (chapter 6), I turned to the question of whether there is anything interesting that follows from all the preceding discussion about the moral authority of democratically made law for the problem of statutory interpretation. I argue that the argument for democratic authority given in chapter 5 supports the claim that what is morally authoritative, more specifically, is the assertive content of the statute (to be defined in chap. 6). This entails in turn that what the judges ought to enforce is the assertive content. At the same time, however, from the preemptive nature of authority that is supported by the argument of chap. 5, it follows – as I argue in chap. 6 – that, when the assertive content is unclear, judges ought to enforce that interpretation of the assertive content that is closest to the balance of moral reasons.

In addition, in chap. 6, I argued that this set of conclusions is compatible with – even if not entailed by – the egalitarian argument for democratic authority that I give in chap. 4, and, moreover, that is compatible with – even if not entailed by – some other arguments from the literature for democratic authority.

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