EPISTEMIC THEORIES OF DEMOCRACY, CONSTITUTIONALISM AND THE PROCEDURAL LEGITIMACY OF FUNDAMENTAL RIGHTS

Yann Allard-Tremblay

A Thesis Submitted for the Degree of PhD
at the
University of St Andrews

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Epistemic Theories of Democracy, Constitutionalism and the Procedural Legitimacy of Fundamental Rights

Yann Allard-Tremblay

This thesis is submitted in partial fulfilment for the degree of PhD
at the
University of St Andrews

05 October 2012
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The overall aim of this thesis is to assess the legitimacy of constitutional laws and bills of rights within the framework of procedural epistemic democracy. The thesis is divided into three sections. In the first section, I discuss the relevance of an epistemic argument for democracy under the circumstances of politics: I provide an account of reasonable disagreement and explain how usual approaches to the authority of decision-making procedures fail to take it seriously. In the second part of the thesis, I provide an account of the epistemic features of democracy and of the requirements of democratic legitimacy. I develop a revised pragmatist argument for democracy which relies on three presumptive aims of decision-making: justice, sustainability and concord. In the third and last section, I first argue for the desirability of constitutionalism. I then explain why constitutionalism, as it is usually understood, is incompatible with my procedural epistemic account of democratic legitimacy. In the last chapter, I offer a two-pronged solution to the apparent incompatibility of constitutionalism and epistemic democracy. I first argue for the appropriateness of political constitutionalism, as opposed to legal constitutionalism, in understanding the relationship between rights and democracy. I then provide an account of rights protection and judicial review compatible with epistemic democratic legitimacy. Finally, I use the notion of pragmatic encroachment to explain how constitutional laws can achieve normative supremacy through the increased epistemic credentials of the procedure.
FOREWORD AND ACKNOWLEDGEMENTS

I was told by one of my influential professors that a foreword belongs to the author even more than the rest of his text. The author can write almost whatever s/he wants and as many words as s/he can muster. He even told us about a student who submitted a term paper with a foreword which consisted of a tea bag. One is left pondering on the significance of the tea bag. I do not intend to be that poetic in my foreword even though I shall allow myself a modicum of rhetorical flourish.

It is essential to express my gratitude; firstly to Rowan Cruft, my supervisor, who has always demonstrated extreme availability and who has always read (the multiple versions of) my thesis with great care. I have enjoyed working with him and he has made the experience of the PhD much more palatable. I should also thank the other members of the departments at the University of Stirling and at the University of St Andrews, especially Sandra Marshall who acted as my supervisor for a few months, Ben Saunders who acted twice as my annual reviewer, Tim Mulgan who acted as my second supervisor, and all the others who provided me with comments and advices in the course of my PhD.

I would also like to thank Noah Friedman-Biglin for the many hours spent philosophising; Brian Kin Ting Ho for our attempts at not philosophising; Bryan Butterwick for his constant support; my mother, father and sister, whom I have missed intensely along these years; Carina Hemmers, Amanda Kerzman, Andrew Pickin, Sandra Reisinger, Amy Sansom, Caitriona Walsh; and all those I cannot name for it would be too long and too tiresome. Note, however, that not being named is not a sufficient condition of ingratitude.

Previous versions of parts of this thesis have been presented at the following conferences, I would like to thank the audiences for their comments: The Northern Political Theory Association Conference, the Pavia Graduate Conference in Political Philosophy, the Association for Legal and Social Philosophy Conference, the Brave New World Conference and the Nature of Law: Contemporary Perspectives Conference. I would also like to thank the audiences at the various internal events at which I presented, either in St Andrews or Stirling.

I also acknowledge the financial support of the Fonds Québécois de Recherche sur la Société et la Culture and of the St Andrews and Stirling Joint Programme in Philosophy without which this research would not have been possible.

A substantially longer version of the arguments developed in section 5.3 has been published under the title ‘The Epistemic Edge of Majority Voting over Lottery Voting’ in Res Publica ©: 2011 Yann Allard-Tremblay. The final publication is available at http://www.springerlink.com/content/704512086x327982/
Parts of chapter 6 (mainly 6.1.3) and chapter 7 (mainly 7.1.4, 7.1.5, 7.1.6) have been accepted for publication under the title 'Proceduralism, Judicial Review and the Refusal of Royal Assent' in The Oxford Journal of Legal Studies ©: 2013 Yann Allard-Tremblay Published by Oxford University Press on behalf of the Faculty of Law in the University of Oxford. All rights reserved.

I hope you enjoy the reading; I enjoyed most of the writing. It has been said that my style can be archaic and even biblical. I have tried to remove all the instances of ‘unto’, ‘medicament’, ‘habilitated’ and similar English words which are English only inasmuch as they were present on some lexicographer’s report. In any case, I have not tried to emulate the style of the King James Bible even if, in my own humble opinion, the reading would have been much more interesting this way. Now, I suggest you grab a margarita or have one ready for after you finish reading this; you will probably look like someone who needs one.
The plebiscite went against Jesus. Everyone cried out, saying: “Not this one, but Barabbas.” But the chronicler adds: “Barabbas was a thief.”

Perhaps one, perhaps the faithful, the political faithful, will argue that this particular example speaks against democracy rather than for it. And this argument must be accepted, but only on one condition: of their political truth, which must, if necessary, be imposed by political force, the faithful be as sure as was the son of God.

Hans Kelsen

*On the Essence and Value of Democracy*

1929 (2000)
In *The Concept of Law*, Hart makes a brief remark about democracy: “One of the great justifications of democracy is that it permits experimentation and a revisable choice”. (1994, p. 184) This justification can historically be associated with the American pragmatist tradition of Charles Sanders Peirce, John Dewey and William James. (Westbrook, 2005) It is not surprising, assuming the aims of *The Concept of Law*, that Hart does not discuss further the relations between democracy and law. Democracy is not essential to the understanding of what law is or to how law can be binding; it is not part of the concept of law.

Nonetheless, democracy entertains a very close relationship with law since it is a normatively appealing law-making procedure. Even if it does not affect the core elements of the concept of law, the recognition of democracy as a normative standard impacts various aspects of jurisprudence: e.g. why law is morally binding, what conditions of legal validity are implied by democracy and who has legitimate authority. In this thesis, I focus on democracy as a set of desirable institutions and procedures designed to achieve decisions. I do not discuss democracy as a form of social life or as a political culture since, in my view, it is democracy *qua* decision-making procedure that has the biggest impact on our understanding of law.

In recent years, many theorists have adopted a position similar to the one mentioned by Hart. Such defences of democracy are classified as epistemic arguments since they regard democracy as having a necessary connection with important aspects of knowledge production or acquisition or simply because they regard democracy as good for achieving correct answers. Some versions of the epistemic argument for democracy are more liberal – they accept that democracy can provide good decisions within the limits of liberal rights – some are more formal and adopt the Condorcet Jury Theorem (List & Goodin, 2001), while others like the pragmatists are more concerned with the conditions of inquiry.

I aim to develop a distinctive epistemic argument for democracy and to reveal its implications for different aspects of political and legal theory. In the current literature, few amongst those who adopt an epistemic argument for democracy provide an explanation of its consequences for actual law-making procedures or for various types of laws. In contrast, I am particularly interested in the impact of the epistemic argument for democracy on constitutional laws. There appears to be an obvious inconsistency between the epistemic argument for democracy and what constitutions are designed to achieve. If we regard constitutions as designed to remove some options from the regular day-to-day functioning of democracy; and if we regard this regular day-to-day functioning of democracy as having the capacity to achieve right or correct answers, we can then wonder why we should be concerned with removing some considerations from the day-to-day functioning of democracy.

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1 Here is a non-exhaustive list: Anderson (2006); Estlund (2008); Knight and Johnson (2011); List and Goodin (2001); Misak (2000); Ober (2008); Peter (2009); Talisse (2009a); Westbrook (2005).
The relationship between democracy and constitutionalism is not a new subject. The Federalist Papers first published in 1787 and 1788 already address some of the issues. (Hamilton, Madison, & Jay, 2009) However, there is no thorough assessment of the relationships between epistemic democracy and constitutionalism. In this thesis, I provide an assessment of the epistemic democratic legitimacy of constitutional laws. The significance of this question can be seen in the importance that constitutional laws have taken in contemporary political and legal theory and practice: such laws have become the hallmark of good government. Accordingly, it is essential to understand what the impacts of the epistemic theory of democracy on constitutional laws are.

A first possibility is that constitutionalism and epistemic democracy are incompatible. If that is the case, we can doubt the plausibility of the epistemic argument for democracy. This is because constitutionalism plays a desirable role in the political life of our societies: it allows, for instance, the expression of legal principles and the protection of some important considerations from the possible errors of democracy. A second possibility is that constitutionalism and epistemic democracy are compatible. One of the aims of my thesis is to explain precisely how they are compatible and what type of constitutional requirements – such as entrenched, special amending procedures, judicial review – can have legitimacy. I will essentially contend that a new understanding of constitutionalism along the lines of what has been called ‘political constitutionalism’ – but with an epistemic twist – is required.

If we are to understand the democratic legitimacy of constitutional laws, there is a lot of ground to be cleared. It is first important to understand in which context the question of the legitimacy of constitutional laws is asked. As I maintain, we have to ask this question within the circumstances of politics and this impacts on the type of requirements that are available for epistemic democratic legitimacy and on the accounts of authority that can be provided. Furthermore, if we are to assess the democratic legitimacy of constitutions, we must be cautious to disentangle democratic legitimacy from liberal legitimacy – as I explain below. To better understand the task before us and how the rest of the thesis is structured, I first present some of its basic tenets. I explain what I mean by the circumstances of politics and what I see law’s function to be. I then explain what I understand by authority and legitimacy. Finally, I present the different sections and chapters of this thesis.

1.1 The Circumstances of Politics and Law’s Function

I offer here an overview of various related notions, which I will develop in further detail in the following chapters: law’s function, authority, and legitimacy within the circumstances of politics. I contend that the circumstances of politics affect the type of account of democratic authority that can be provided and that this in turn affects democratic legitimacy. Put differently, we need to look at the

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conditions under which the law can adequately (i.e. legitimately) stand as a binding solution (i.e. as an authoritative solution) to our deep disagreements on what ought to be done collectively. The completion of this argument will span several chapters.

Agents disagree extensively and reasonably about what ought to be done. According to Waldron: “the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are the circumstances of politics.” (1999b, p. 102) I will assume that these circumstances obtain: there are no, or very few, normative notions over which we agree and this prevents us from agreeing on what ought to be done even though we still aim to act together.

Politics is accordingly about deciding what ought to be done collectively.³ It aims to resolve, or at least, to provide us with a temporary solution to our disagreements. If we accept this picture of politics, democracy, then, is first and foremost a decision-making procedure. Through deliberation, citizens set the agenda, discuss the merits of different options and through voting, they settle on a course of action that claims to be binding for all those subject to it. This settled course of action more often than not takes the form of a law. Government, and democracy, through laws, achieve coordination understood under a very loose definition: “Coordination is [...] adverbial⁴ in the sense that it qualifies the pursuit of any common goals by making them focused and unique, whether these goals are directly or only indirectly coordinative.” (Besson, 2005, p. 201)

If the law is to achieve its aim of coordinating behaviour, it is essential for it to bridge our disagreements about what ought to be done collectively. What interests me here is how this coordinative function of law points towards its role within morality. There are two main reasons why we can see law as playing a role within morality. Firstly, when agents disagree about after how many weeks abortion should be illegal, for instance, they often disagree on moral grounds. When law settles that matter, it acts as a coordination solution about what is morally desirable: if it is to succeed in coordinating, obedience to the law must trump other moral considerations⁵ or in other words law must bridge disagreement. This moral function of law is illustrated by what Honoré calls the “connection between law and critical morality”: “The proposed interpretation of every law in every legal system can legally be challenged on the ground that it is not morally defensible”. (2002, p. 494) Put

⁴ Citations contain the original emphasis unless specified otherwise.
⁵ For Besson, coordination is law’s main function. (2005, pp. 197-203) Law can also be seen to track morality when it forbids some universally objected practice like murder or rape. This is not inconsistent with what I am claiming: in circumstances where there is agreement on some desirable ends, it is by coordinating our behaviour through law that such an end can be served. It should be noted, however, that such circumstances are very limited. Our agreement about murder and rape do not run very deep. There will be disagreement at the margin and issues of coordination (such as how best to deal with a murderer) will arise.
differently, law will fail to trump our other moral considerations if it cannot be seen as correct and morally defensible; seeing law as morally defensible is close to necessary in order to achieve coordination. Alexy (1989) adopts a similar position when he holds that law necessarily makes a claim to correctness. We can hardly imagine a legislature claiming that a law is valid and at the same time claim that it is incorrect. These two connections (between critical morality and correctness) are necessary if law is to be seen as settling what ought morally to be done.\(^7\)

The second reason why law can be seen as playing a role within morality is the fact that it provides determinations of more abstract principles of justice: it sets out what morality leaves out by determining what we are legally bound to do. Law provides the conditions for most of our obligations of justice to obtain. For instance, we can claim that murder is wrong and that it should be punished or that we ought to redistribute income in some way. We can agree on many abstract principles of justice or morality. These principles are not, however, determinate. Morality does not tell us what to do about murder or even what exactly ought to be considered murder: “Morality on its own is incomplete and cannot provide a viable guide to what we are required to do in particular situations.” (Honoré, 1993, p. 2) Honoré goes on to claim that morality is more like an ‘outline’ from which details are missing. Laws, then, act as determinations\(^8\) of these obligations of justice; they spell out what is required by morality and make it possible for these obligations of justice to obtain.\(^9\) To summarise: law’s main function is coordination in face of disagreement. It achieves coordination by claiming correctness\(^10\) and acting as a determination of justice. With this in mind, I discuss how to adequately (legitimately) achieve a binding (authoritative) decision.

1.2 Authority and Legitimacy

Authority, in the technical sense in which I use it, should be differentiated from its everyday use which refers to any entity issuing orders. By authority, I mean moral authority and not simply political authority. In broad terms, authority qua moral authority refers to the moral bindingness/mandatoriness of the directives of a ruler or decision-making procedure. Authority is often understood as a right to rule (Raz, 2006, p. 1012) and, accordingly, as implying a duty to obey. There are in fact different reasons why one ought to act according to what the law commands. As Raz

---

\(^{7}\) Unless one relies on purely prudential considerations. It would be awkward, however, to claim that the only reason one has to obey the law is the prevention of some greater harm. Prudence provides reasons for obedience but it is not exhaustive of law’s capacity to guide action: if law is to be obeyed for moral reasons, it ought to trump other moral considerations and play a role within morality.

\(^{8}\) “A determinatio is the act of setting a more concrete and categorical requirement of a principle for a specific class of cases, that is guided both by a sense of what is practically realisable and by a recognition of the risk of conflict with other principles of values, themselves concretised by other determinations. As such, the determination of rules constitutes the way to solve conflicts of conceptions and opinions about those rules by making a particular rule salient and by coordinating on a single and commonly acknowledged focus\(^{9}\).” (Besson, 2005, p. 177)

\(^{9}\) See Waldron (1999b, p. 105) and Murphy (1999).

\(^{10}\) See my discussion of rational motivation §3.1.1.
(2006, p. 1004) and Buchanan, amongst others, rightly point out, “we can have decisive reasons (prudential, religious, and moral) to comply with the law, indeed we can have a weighty obligations to do so, without it being the case that we owe obedience to anyone”. (Buchanan, 2002, p. 697) In contrast, authority consists in the existence of an obligation to obey simply out of the fact that some ruler or procedure issued a directive. For democracy to have authority, we would have to establish that there is an objective obligation to obey the decisions made through this decision-making procedure.

This is not, however, what I aim to establish; as I will argue, we do not need to establish the moral authority of democracy to discuss its legitimacy. This is even if authority is an important notion to establish the conditions required for legitimacy. In this section, I define authority and legitimacy as I will use them, but I will come back on these notions at the beginning of chapter 6.

I will claim that we have indicative reasons to regard democracy as able to achieve over time correct determinations of justice, that is, to regard its laws as intrinsically normative. By this, I mean, broadly, that the law can be seen as providing us with a reason for action in itself, without relying on any unrelated moral obligation or prudential reasons – democracy could then be seen as having authority. Edmundson offers this definition:

An intrinsic reason for action is one that reflects the action’s inherent value, or the value of a whole of which the action is an essential component. An intrinsic reason for action is to be contrasted with a merely instrumental reason for action11, where the action has no value in itself but would lead to or promote something else that is valuable in itself, if perhaps only by a chain of further events and actions. (2010, p. 184)

This is how I will understand authority: a power to issue intrinsic reasons for actions which creates an obligation to obey. I will not, however, aim to explain whether democracy has authority.

An indicative reason – or epistemic reason (Edmundson, 2010, p. 184) – “is a fact that matters because it is evidence12 for the existence (or non-existence) of some fact that constitutes an intrinsic reason.” (Regan, 1990, p. 5) In the present case, if democracy is seen as able to achieve correct determinations of justice and correct decisions over time, we might not have any actual intrinsic reason for action, because democracy may be mistaken. At the same time, however, the democratic procedure provides us with indicative reasons to regard the laws it produces as intrinsic reasons for

---

11 Instrumental approaches to the obligation to obey the law do not need to explain the authority of the law-maker: e.g. approaches based on fairness hold that it is because one has an obligation to be fair to one’s fellow citizens that one ought to obey the law. It is not the law in itself that provides the reason for action, but the pre-existing obligation of fairness. I argue against such approaches in §3.4.

12 These are defeasible evidence: “they cease to matter, not only when an agent is fully informed, but even when an imperfectly informed agent has better evidence available on the relevant issue.” (Regan, 1990, p. 7) This proves useful in discussing the illegitimacy of law §6.1.3.
This is a particularly interesting account of the reasons provided by democracy in the circumstances of politics. This is because in such circumstances, we cannot assume that there will be agreement on what counts as an intrinsic reason for action or on which ends are valuable and what the best means to achieve these ends are.

I will argue that the intrinsic normativity of law can be inferred from the fact that the procedure through which law was produced (and is maintained) provides us with indicative reasons to regard this law as a correct determination of justice. Thus, the supposed normativity of the law does not come from unrelated moral obligations – I ought not to obey the law because it is part of a duty of fairness I owe to my fellow citizens – but from the evidence that one has that the law is part of morality. In other words, it would be epistemically reasonable for the agents to infer that the law has authority – i.e. it can be seen to provide us with intrinsic reasons for action – because it is what, through the procedure, we have identified as required by fairness or justice or as instrumental towards some desirable goal. Whether or not it is actually required by fairness, for instance, is not as important as whether it can be inferred to be. This is why I will concentrate on legitimacy rather than authority.

Legitimacy is often seen, as with the Razian account, as qualifying authority: it makes authority de jure rather than de facto. This makes the capacity to issue intrinsic reasons for action – authority – central to the assessment of legitimacy. We first have to explain authority before providing an account of legitimacy. As I see it, there are problems associated with the applicability of this account to the selection of which decision-making procedure we should adopt, especially under the circumstances of politics. The main question is then whether or not we can identify who has legitimate authority in a way that will bridge disagreement. As will become clear in the next chapters, it is inappropriate to bridge disagreement by relying on notions over which the agents disagree. Hence, if we explain the authority of an agent by relying on the service conception of authority (Raz, 2006), we need to know – if we are to voluntarily coordinate – who in fact will allow us to best act according to the reasons which already apply to us. However, this is often what the agents disagree about. Authority, on Raz’s account, cannot be used by agents to decide on who will resolve their extensive disagreements. This is because they cannot rely on the ability of their political institutions to help them act in accordance with the reasons which already apply to them when they disagree precisely about such reasons. Raz’s account is helpful, as a moral argument and from a third-person point of view, to understand when authority is objectively legitimate; it is not, however, a political argument which helps to resolve

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13 Democracy could also provide us with epistemic reasons for the instrumental value of law – if we all agreed on a desirable end, democracy can provide us with evidence for the instrumental value of the means to achieve this end. I will concentrate on intrinsic reasons but this should be read as covering instrumental reasons as well.

14 There is not much agreement on what is meant by authority and legitimacy in the literature and I want to avoid getting entangled in the various accounts available. See Buchanan (2002); Edmundson (2010); Raz (2006); Sadurski (2008) and Simmons (1999).
disagreements by providing recognisable/accepted reasons to each reasonable agent involved in the disagreement.

Furthermore, with the standard Razian account, it is difficult to imagine how a decision-making procedure can be legitimate without as well having authority since legitimacy, under this account, only explains when a claim to authority is justified. In this sense, it is difficult to morally describe the power of a king who is reasonably regarded/accepted as the appropriate issuer of directives by his subjects but who is objectively and systematically mistaken in his directives. This king would not have authority in the sense in which I am using the term – his decisions could not be intrinsic reasons for actions – but I maintain that his political power has a moral quality which a tyrant’s would lack. The main issue then is that if one is to explain legitimacy – in the standard Razian sense – one must as well explain authority, that is the power of the commanding entity to issue intrinsic reasons for action. In my view, this is too strong a requirement to understand what is required of a decision-making procedure. Rather, through the reasonable acceptance of his subjects, the king should be seen as having a justified moral power to issue directives, which is what I will call legitimacy.

Accordingly, rather than seeing legitimacy as qualifying a right to rule – which would entail an obligation to obey – I maintain that “legitimacy is a kind of moral power,\textsuperscript{15} the power to create and enforce nonmoral (or perhaps I should say not yet moral) prescriptions and social facts.” (Applbaum, 2010, p. 222)\textsuperscript{16} Under this account, legitimacy and authority come apart as two distinct moral notions.\textsuperscript{17} This explains how the king in my example above can have legitimacy without having any right to rule. The king could have a morally justified power to issue directives without having a right to rule, i.e. there could be no (objective) obligation to obey his directives simply in virtue of the fact that they were commanded by him. He could nonetheless act as the appropriate/legitimate issuer of directives; agents could reasonably believe themselves to be under an obligation – they would have a reasonable subjective duty.

In my view then, legitimacy does not only qualify a right to rule or a moral power; it is itself a moral power, the exercise of which, properly affects what the agents can regard as their obligations. Legitimacy is hence more about the obligations agents justifiably accept than about the obligations they in fact have. A moral account of legitimacy would build a lot into the ‘justifiably’ clause, while a sociological account would remain entirely descriptive so as to cover whatever the agents in fact accept. My own account falls between the two and aims to remain morally neutral while avoiding normative neutrality by relying on epistemic commitments. This will become clear in the next two chapters. At this point, it suffices to see how legitimacy differentiates politically valid exercises of

\textsuperscript{15} A de jure, not just a de facto.
\textsuperscript{16} Applbaum relies on Hohfeld (1964, p. 36).
\textsuperscript{17} See Dworkin (1986, p. 191); Peter (2010, 2.3) and especially Garthoff (2010).
power from bare power: it tells us when agents can/should regard the exercise of a power as putting them under a moral \(^{18}\) obligation rather than only obliging \(^{19}\) them. This covers cases of proper Razian legitimate authority – which are those when the obligation is real – but also cases where legitimacy and authority come apart like the king who rules without authority – cases when the obligation is only subjective. Accordingly, legitimacy must be seen as “a virtue of political institutions and of the decisions […] made with them.” (Peter, 2010) It establishes a distinction between those laws which are only purporting to affect our obligations and those which we can justifiably regard as affecting our obligations – without having to say anything about which obligations agents objectively have. It follows from this account that, rather than having to explain how agents are in fact under a moral obligation, all that needs to be explained is how it can reasonably be assumed that the agents have an obligation. We can explain legitimacy without having to explain actual authority. In other words, we have to explain why the agents are liable or how they can come to see their normative situation affected rather than why they have a real duty to obey the law. (Applbaum, 2010, p. 222)

There are similarities between my account and the liberal principle of legitimacy, which holds that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” (Rawls, 2005, p. 137) The structure of both accounts is similar in keeping legitimacy and authority apart. They also both define legitimacy as what the agents can reasonably accept/endorse; in other words they both aim to identify the conditions that must be met for the citizens to be or to see themselves as ‘liable’ to a change in their purported normative conditions. However, the two accounts differ in substance inasmuch as Rawls relies on liberty and equality to identify the conditions that must be met for legitimacy to obtain. As I will argue later, too much is built into the notions of liberty and equality so as to explain legitimacy within the circumstances of politics. My own account aims to elicit the underlying structure of legitimacy and to avoid its liberal content. This is why I mentioned that it is important to disentangle democratic and liberal legitimacy. This is essentially why I avoid discussing Rawls in great detail even though a lot could be said about his views. This, however, does not prevent some of my conclusions from being very close, as I discuss later \(^{20}\), to those achieved by liberalism.

With this account of legitimacy in mind, we can ask what must be assumed, within the circumstances of politics, of an entity for it to be seen as entitled to exercise such a moral power so as to require action. I contend that it suffices for legitimacy to obtain that the commanding entity can provide us with indicative reasons to regard its laws as proper determinations of justice or, when there is less disagreement, as properly instrumental to the achievement of some end. In the first case, proper

\(^{18}\) The ‘moral’ is important to distinguish legitimacy from ‘validity’.

\(^{19}\) See Hart (1994, p. 82).

\(^{20}\) §5.2.4
determinations of justice are to be regarded as being part of morality and therefore as intrinsically normative. In the second case, democracy provides us with epistemic reasons to regard its laws as adequately instrumental and therefore as conducive to morality. In any case, we do not need to explain the capacity of a commanding entity to, in fact, issue intrinsic reasons for action before explaining legitimacy nor do we need to assume agreement on some desirable end. The conditions under which an entity can reasonably be regarded as issuing intrinsic reasons for action are sufficient in the determination of the requirements of legitimacy. This is because such conditions establish when agents can be provided with indicative reasons.

What I will argue in the following chapters is that democracy has legitimacy when it can be seen to provide us with indicative reasons for the existence of intrinsic reasons. Whether or not there are actually intrinsic reasons for actions is the question we aim to resolve and we cannot rely on this in the first place. That is, we cannot claim that we have, e.g., reasons of fairness to obey the law since this is often what we disagree about. Authority, in this sense, is secondary. It should be seen as the regulative idea of legitimacy: we organise our institutions so as to approximate a situation under which such institutions would have authority, but it does not have to be the case that they objectively create obligations. What is required is that we can infer that there is an obligation to act according to their directives and that we see ourselves to be liable to their directives. What we should be concerned about is not if in fact one is actually under an obligation to obey but whether one can reasonably assume that one is under an obligation to obey. Legitimacy, then, under my account explains when one can reasonably infer that one is liable to have one’s legal and moral situation changed. This, under the circumstances of politics, is mainly possible when the law can be seen as a correct determination of justice and as instrumentally valuable to achieve some agreed upon end.

This is where an epistemic argument for democracy becomes useful as it helps us to understand how a decision-making procedure can be seen to achieve correct determinations of justice over time. In the following chapters, I will use this understanding of law’s function and of authority and legitimacy to make a case for the epistemic argument for democracy and to assess the legitimacy of constitutional laws.

1.3 The Content of the Thesis

This thesis is divided into three sections of two chapters each. The first section, Why an Epistemic Argument, explains the circumstances of politics and the type of arguments that are called for to establish the legitimacy and the authority of a decision-making procedure within these circumstances. This section explains why democratic legitimacy should be understood in epistemic terms rather than by relying on substantial moral notions like equality or fairness. In chapter 2 Disagreement, I first explain what disagreement consists of and what a reasonable disagreement is. I further explain why it
is important to take disagreement seriously and why we cannot simply assume that other agents are mistaken when they disagree with us. In chapter 3 *Disagreement, the Obstacles of Coordination, and the Usual Justifications of the Democratic Decision-Making Procedure*, I explain why the usual arguments supporting democracy fail to meet two challenges: disagreement and rational motivation. These two challenges are those which any decision-making procedure should aim to meet if they are to succeed in coordinating behaviour within the circumstances of politics.

In section 2, *The Epistemic Features of Democracy*, I provide my own epistemic argument for democracy and explain how it meets the challenges I raise in chapter 3. In chapter 4 *A Revised Pragmatist Approach*, I support a pragmatist and deliberative approach to democracy. I identify three presumptive aims of decision-making in the circumstances of politics: justice, concord and sustainability. These aims are then shown to be met by a democratic decision-making procedure involving political equality, freedom of speech and conscience and other democratic features. This chapter provides arguments to regard these features of democracy to be essential if we are to assume that democracy can achieve correct determinations of justice. In chapter 5 *The Constructive Function*, I explain how democracy is able to achieve correct determinations of justice over time through information pooling and what is called the constructive function. This chapter also explains how democracy can be seen to achieve the aims of decision-making even in cases of irresolvable disagreements. Together, these two chapters provide the elements necessary for us to understand epistemic democratic legitimacy.

In section 3, *Epistemic Democracy and Constitutional Laws*, I apply my account of democratic legitimacy to constitutional laws. In chapter 6 *Constitutional Laws Within an Epistemic Account of the Legitimacy of Democracy*, I explain the tensions between epistemic democratic legitimacy and constitutionalism. The tensions lie mainly in the fact that constitutional laws are removed from the day-to-day regular democratic process. It is not clear how, within the circumstances of politics, they can achieve their special status in a way that respects democratic legitimacy. Nonetheless, constitutionalism remains a desirable feature of a democratic polity. This is because democracy is an imperfect procedure and it will in some instances misfire. There are considerations which are deemed more important in morality and in law and such considerations would better be protected against these possible errors. In chapter 7, *A Purely Procedural Epistemic Account of Constitutional Laws*, I offer a two-pronged solution to the tensions set out in chapter 6. I first argue that we should adopt a political understanding of constitutionalism and explain how such an approach can still ensure rights protection. I then explain how constitutional laws can achieve normative supremacy. What this chapter offers is an account of how a polity can commit itself to constitutional laws while respecting the requirements of purely procedural epistemic democratic legitimacy.
SECTION 1

WHY AN EPISTEMIC ARGUMENT
CHAPTER 2: DISAGREEMENT

Within the circumstances of politics, any attempt to justify a decision-making procedure on moral grounds is bound to fail as it would only reproduce the disagreement the procedure is supposed to bridge in the first place. If we disagree extensively about normative considerations, we cannot rely on these considerations to explain why a specific procedure should be preferred. It follows that authority is a problematic notion to explain. As is apparent, disagreement plays a central role in this challenge to authority.

Disagreement influences the notion of authority by explaining, firstly, the need for law and, secondly, the relevance of an epistemic democratic decision-making procedure. The relevance of the epistemic function of democracy is related to the fact of disagreement in at least two ways: (A) the epistemic features of democracy can be seen as reducing, when not eliminating, disagreement and providing us with evidence for the correctness of the decisions made; (B) the epistemic function of democracy can be seen as providing a solution to a central obstacle of coordination. This obstacle is that there is deep moral disagreement on which coordination solution is the best or the correct one. Accordingly, it is not sufficient to claim that agents prefer having a solution than none to explain why agents have reasons to coordinate. They must also have reasons to hold a decision to be a correct solution to what their disagreement is actually about. Otherwise there is a chance that coordination will only be prudential or that agents would prefer to exit rather than keep coordinating. We could not, then, differentiate law from simple threat. In this chapter, I provide an account of disagreement that underpins these considerations.

I first explain the sources of disagreement. I mention the burdens of judgement and different forms of disagreement. I then discuss reasonableness. I defend a basic epistemic notion of reasonableness which can be seen as ‘reasonableness as competence’ rather than ‘reasonableness as fairness’. (McMahon, 2009, p. 19) I then turn to an explanation of the need to take disagreement seriously and why it cannot simply be ignored based on the limitation of moral epistemology, on the phenomenology of disagreement, on the need to find justice, and on the need for a justification of political power.

2.1 The Sources of Disagreement

It is important not to conflate the notion of disagreement with the notion of conflict. It is possible for two agents to be in agreement on normative matters while still being in conflict regarding their interests. The converse is also true. (Besson, 2005, pp. 20-21) Agent A and agent B can be competing for some limited resources they think the state ought to provide, such as a subsidy. In this case, A and B are in conflict without disagreeing. The notion of disagreement I am interested in is one about values and normative judgements. What matters is disagreement about what ought collectively to be
done. These are not only conflicts about preferences; they are rather disagreements about what the agents genuinely claim, according to their best judgement, to be preferable, just, or fair.

Even if conflicts of interests are essential to what a political decision-making procedure aims to resolve, they are not those with which the justification of a decision-making procedure must primarily be concerned. This is because disagreement, more than conflict, can endanger the existence of a common political arena. Since people disagree about conceptions of justice or of the good, they must be provided with reasons to uphold the political entity even when this political entity goes against their own conception of justice or of the good. This is what Talisse calls the problem of deep politics: “What reasons can be offered for upholding democratic commitments at the expense of other, perhaps more important, values?” (2009a, p. 22) I therefore restrict ‘disagreement’ to these disagreements about what ought to be done (collectively). That is, to disagreements about values and about justice and the good.

I explain what makes it possible for agents to be disagreeing in their judgements about what their common political entity ought to do. This is a survey section: I first mention the ‘burdens of judgement’ as formulated by Rawls. I then mention, following Besson (2005), verbal, conceptual and normative disagreements before dividing disagreement in two types: moral and political.

**The Sources of Disagreement**

Rawls famously maintained that disagreement is the unavoidable consequence of the exercise of reason in a free society. With his burdens of judgement, he aimed to provide an explanation of how agents can come to hold diverging judgments while each being justified. Larmore summarises them:

1. The empirical evidence may be conflicting and complex.
2. Agreement about the kinds of considerations involved does not guarantee agreement about their weight.
3. Key concepts may be vague and subject to hard cases.
4. Our total experience, which shapes how we assess the evidence and weigh values, is likely in complex modern societies to be rather disparate from person to person.
5. Different kinds of normative considerations may be involved on both sides of a question.
6. Being forced to select among cherished values, we face great difficulties in setting priorities. (1994, p. 76)²¹

This collection of reasons for disagreement is not systematic and complete. It does not include the possibility of incommensurable conflicting moral values. Neither does it mention that agents can disagree not only on normative matters but also on empirical knowledge: what our empirical evidence warrants is not always limpid since scientific evidence can be inconclusive thus preventing agreement. (McMahon, 2009, p. 13) With regard to the organisation of the burdens of judgement, the

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complexity of the situations and the limitations of human understanding, for instance, could be combined as they are related. To systematise these sources of disagreement, I closely follow Besson (2005, pp. 47-57) who provides a more detailed explanation which appeals to verbal, conceptual and normative disagreements.

Agents can disagree firstly due to verbal (or semantic) disagreement. (Besson, 2005, p. 47) This is when agents are not referring to the same concept despite using the same words. (Besson, 2005, p. 48) Two agents can disagree on what ought to be done, if for instance, they do not share their understanding of the word tax. Agent A might be arguing that a specific social service should be paid by tax, meaning that it should be paid through income tax, while agent B understands tax as sales tax. These agents are not properly disagreeing. Rather, they are talking past one another. However, since the questions under scrutiny by a political entity can be very complex and involve many different concepts, verbal disagreement is a distinct possibility. It is important to make sure that such disagreements do not impede the possibility of finding the real zone of disagreement. By the real zone of disagreement, I mean the disagreements that are not simply related to misunderstanding of one another’s positions. (McMahon, 2009, p. 93)

The second source of disagreement is conceptual. I present a view defended by Besson, however there are alternatives.\(^\text{22}\) She mentions two types of conceptual disagreement: one is borderline and the other one is pivotal.\(^\text{23}\) When agents agree on the core reference of a concept, though they disagree that some cases should fall under it, then we face borderline disagreements.

In cases of borderline disagreements, agents have a shared understanding of what the concept refers to. For instance, agents know that when they talk about the notion of authority, they are broadly talking about the moral power of an entity to put another entity under an obligation to obey. However, even if they share this core understanding of the concept, which ensures that they are not totally talking past one another, it is possible for them to disagree conceptually because of the concept’s “ambiguity, vagueness and abstractness.” (Besson, 2005, p. 50) By being ambiguous, vague or abstract, the concept is open to diverse interpretations and applications and the exact limit of what a concept covers can be put into question. This is why these are known as borderline disagreements.

For example, authority can be regarded as an abstract concept which can be the object of borderline disagreements. This is because the definition of authority itself relies on concepts which are ambiguous, abstract and vague and the exact limits of ‘authority’ depend on the other concepts involved in it. Authority can be defined with the notions of ‘moral power’ and ‘obligation’ and limit

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\(^{22}\) McMahon (2009) offers a nominalist version.

\(^{23}\) See Dworkin (1986, pp. 41-42).
cases can easily arise if one understands ‘obligation’ as ‘prima facie obligation’ rather than ‘all things considered obligation’.

Agents can also disagree about the proper reference of a concept and what should be the core understanding of it. (Besson, 2005, p. 51) These are pivotal disagreements. (Besson, 2005, p. 49) Even though the agents share a minimal pre-theoretical understanding of the concept, which makes it possible for them to speak about the same concept, they can still disagree about what the concept ultimately ought to refer to. (Dworkin, 1986, pp. 65-66, 75) According to Besson, there are two types of pivotal disagreement. One is criterial and the other one is properly pivotal.

By criterial disagreement, Besson means a disagreement in “which people share only imperfectly the common rules or criteria for the correct application of a concept and therefore disagree about its correct application.” (2005, p. 52) That could be the case when people fail to share common paradigmatic examples of a concept or when they fail to properly apply the rules of these paradigmatic examples. For instance, an agent’s paradigmatic example of justice could be the proper distribution of goods between equally deserving people whereas another agent could share the same paradigmatic example while failing to apply the concept properly: e.g. she might not be applying the ‘deserving’ clause and simply applying the ‘equally’ one. In such cases, the agents are not yet disagreeing about what the concept of justice ought (or not) to include but their disagreement cannot be reduced to a simple verbal disagreement. This is because the agents share sufficiently to be disagreeing about the same concept. Rather, this type of disagreement should be associated with mistakes about the rules of application of the concept since it is difficult to understand how agents can disagree without making an error in the application of a concept if they share the same paradigmatic examples.

It is also possible to disagree on the core reference of a concept without making errors. This is when agents disagree about the proper paradigmatic examples or when they “put into question any preconception of a correct and shared application of the concept.” (Besson, 2005, p. 52) These disagreements are properly pivotal, as they completely shift the reference of a concept. Such properly pivotal disagreements are at the core of Dworkin’s (1986) understanding of legal disagreement. He maintains that it is possible to disagree about what the law requires/is without talking past one another and without making a mistake. Similarly, we can easily understand that agents are disagreeing about what justice ought to be when they advocate forward or backward looking justice. Their disagreement is not verbal or due to a mistake about the rules of application of the concept: they are rather advocating a specific conception of the same concept.

Finally, some disagreements can be called normative disagreements. They relate to “the actual application of normative concepts and the evaluations they imply.” (Besson, 2005, p. 47) It is possible
to share a concept and to understand what it is about, and still disagree about what ought to be done. For example, suppose agents A and B share the concept of distributive justice. They understand that it is about the distribution of goods in the face of limited resources. However, it is still possible for a range of reasons that A holds that more resources should go to agent C and that B holds that more resources should go to D. This type of disagreement is not due to different conceptions of justice. It is due to a disagreement on the “normative evaluation of a situation.” (Besson, 2005, pp. 52-53) There are two general types of possible normative disagreement: epistemic and metaphysical.

Agents can encounter different impediments in their appraisal of a situation. I mention three epistemic reasons why agents might arrive at different conclusions without making any mistakes. The first reason is related to our finite understanding and capacities, the second to the availability of factual and empirical knowledge, the third, supporting the first two, is related to social pluralism.

Human understanding is limited. The appraising of a situation demands the evaluation of a multitude of facts and the use of many concepts. People can come to different conclusions based on the same mass of information inasmuch as they can put the emphasis on different aspects of it. There might also be limitations in their capacity to process a mass of information or in their understanding of all relevant aspects of a situation. Furthermore, there can be limitations in the agents’ own capacities (Besson, 2005, p. 53): not everyone is equally able to resolve mathematical formulae for instance. Such disagreements are not as such related to mistakes and nothing indicates that they cannot be resolved. What one cannot achieve alone may be achieved by many working on the same problem.

The second epistemic source of disagreement is related to the limited availability of empirical knowledge. An agent appraising a situation, apart from normative considerations, must also possess sufficient empirical information regarding the situation. Someone who holds that inflicting pain is morally wrong might appraise abortion differently depending on the factual information available about when the foetus starts feeling pain and how much pain is inflicted by the abortion. Furthermore, empirical facts can be inconclusive and disagreement can arise depending on their interpretation. Hence, epistemic limitations are not only related to our “limited understanding’ of political morality”. (Besson, 2005, p. 53) They are equally related to our limited understanding of empirical facts and to the availability of information: it can reasonably be assumed that some information might simply be unavailable or so dispersed that it is difficult to access. Once again, this type of disagreement does not seem to be entirely irresolvable.

Likewise, Gaus holds that “it is, other things equal, always plausible to conjecture that any given disagreement is an instance of inconclusive reasoning, resulting from the complexity of the issues and our inability to declare victory for our view.” (1996, p. 156) This is not just because information is difficult to access but also because: “Belief systems are vast and complex; our standard
epistemological situation is an overabundance, not a paucity, of reasons.” (1996, p. 155) There is in fact so much information and reasons available that we may fail to resolve disagreement not because the disagreement is genuinely irresolvable, but simply because we lack the capacity to make conclusive arguments.

The third source of epistemic disagreement relates to how social pluralism increases the chances of agents arriving at different appraisals of an identical situation. (Besson, 2005, pp. 53-54) This can be explained due to the high number of perspectives present in contemporary society which find their sources in different cultures, ways of life and more generally in different social positions. The idea is that from their different perspectives, agents will judge the information available to them differently and, crucially, will have different information available to them. Ober (2008) makes clear that even in ancient Athens (which stands obviously as a non-liberal society) relevant knowledge could be widely distributed so as to reproduce, to some extent, the social pluralism under question here. Relevant factual knowledge might be more readily available to some people because of their social situation. For instance, a farmer from Attica knows best the time of the year to raise an army so as not to disrupt crop production and a sailor from Piraeus knows best when to set sails. This demonstrates just how much one’s position in society influences the availability of relevant information. Furthermore, social positions influence how one assesses the relevant normative features of a situation. Again, the farmer and the sailor might have different perspectives on the prospect of raising an army. The farmer may look for what is relevant for his crops while the sailor may look for what is relevant for his business. These different perspectives can be based in interests or simply in the fact that one has become accustomed to look for some relevant features of an issue. It follows that the fact of social pluralism provides additional support for the two preceding epistemic disagreements.

The second type of normative disagreement is metaphysical and is probably more contentious than those presented up to this point. According to this view: “it is morality, and not society, that is pluralistic and heterogeneous when it asserts the validity of a plurality of irreducibly distinctive and competing values.” (Besson, 2005, p. 54) Larmore presents a distinction, founded in Berlin’s work, between monism and pluralism which supports the idea of metaphysical disagreement. By pluralism, he means “a deep and certainly controversial account of the nature of the good, one according to which objective value is ultimately not of a single kind but of many kinds.” (Larmore, 1994, pp. 62-63) It is opposed to monism in which there is only one correct account of the good.24 To this account, we need to add that some values are incompatible and incommensurable. (Besson, 2005, p. 55) Note, however, that we do not need to endorse the truth of moral pluralism to understand how it can still be

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24 That which again is different from those who say that there is only one type of things that is good.
a source of disagreement. It suffices that agents can be *justified* in holding incompatible and incommensurable conceptions of morality, whether their conceptions are true or not.\(^{25}\)

With this view of moral pluralism in mind, we can maintain that agents would arrive at conflicting judgements since the values which they involve do not justify one unique answer. Different incommensurable values can be involved in moral judgement and inasmuch as these values cannot be compared or ordered we can face irresolvable disagreements. Citing Raz, Besson claims that: ‘This makes of moral pluralism a “permanent moral state, arising not because of moral [epistemic and contingent] (sic) disagreement but as an *inescapable aspect of sound morality*.”’ (2005, p. 54) The precise nature of normative concepts makes it unavoidable that different values will enter into their application. Since these values can be incompatible and incommensurable, disagreement will arise, even if we prevent the previous types of disagreement from happening.

This type of metaphysical disagreement formulates disagreement under its strongest version. Agents can therefore disagree for different reasons and their disagreements can be more or less meaningful. Not all types of disagreement ought to be taken seriously and it is important to identify those which ought to be taken into account when deciding upon a decision-making procedure.

*The Types of Disagreement*

We should not be concerned with the full-fledged set of disagreements present in society when deciding upon a decision-making procedure. Rather, only disagreements which we can call *political*, i.e. disagreements about “how political cooperation morally ought to be organized”, are of interest for the task at hand. We should further restrict our concern to only *reasonable* disagreements, i.e. when “every proposal can be reasonably rejected by somebody.” (McMahon, 2009, p. 4) I distinguish between moral and political disagreements so as to make clear what is relevant for the justification and the legitimation of a political decision-making procedure. This distinction should not be seen as exhaustive and exclusive.

Moral disagreement “reflects a difference of *value judgements*; these may concern questions pertaining to the good, the nature and the meaning of life or the right.” (Besson, 2005, p. 22) They are too inclusive, however, for the purpose of an inquiry into the legitimation of a decision-making procedure. One may well hold a belief about what constitutes the good that is different from someone else’s without holding that one’s own view ought to be extended to everyone: some vegetarians can be seen as involved in a moral rather than a political disagreement. It is only when agents hold that their beliefs should be enforced by a political entity that they take on a special significance. It is therefore a subset of moral disagreement that is relevant for our purpose.

\(^{25}\) See Wedgwood (2010) and my remark about Talisse on p. 22.
This subset is composed of political disagreements which are disagreements “over fundamental principles of justice and the right” (Besson, 2005, p. 22) and in which the different parties maintain that the political power should enforce their beliefs. They do not include those disagreements which are about justice but which are not held as having to be acted upon by the political power. (Besson, 2005, p. 21) In that case, there would be a disagreement but it would be a moral one. It might be meaningful to take such a disagreement into account when deliberating about the proper conception of justice to adopt but since this belief has no political bearing, it does not give rise to a need for justification.

An agent might not make her disagreements political for different reasons: there might be other reasons of justice or moral reasons – such as a duty of tolerance adopted by the agent – to believe that the political entity should not act on her conception of justice. (Besson, 2005, p. 21) I leave aside the precise reasons why disagreement may remain moral rather than political. The core of my claim is that meaningful disagreements are those which are properly political since they are those which require a justification to be provided to the agents who disagree: the agents who do not see their political beliefs acted upon must somehow be provided with a reason to explain why the political entity can act in a manner they hold to be genuinely unjust. Hence, I focus on these disagreements. It is still important nonetheless to restrain this field to those disagreements which can be held to be proper disagreements. I hold that only reasonable disagreements are those we should be concerned about.

2.2 The Reasonableness of Disagreement

In this section, I provide a minimal account of reasonableness that can either be understood as agent or belief relative. The essence of the notion of reasonableness I want to develop is a general responsiveness to reasons and evidence. Such a notion should exclude those disagreements which prevent us from identifying the real zone of disagreement, that is those disagreements which are not related to mistakes and misinformation. The aim then is to achieve a non-question-begging political notion of reasonableness so as to ultimately explain which decision-making procedure should be preferred.

Obviously, the task of providing a non-objectionable account might prove difficult. However, I show that without that account of reasonableness, it is impossible to identify the proper zone of disagreement. It is therefore a presupposition that is necessary to make sense of proper disagreements; one which allows differentiating between situations where agents are talking past one another and situations where they are properly disagreeing. I first explain what constitutes reasonable disagreements and how they generally can be identified. I then explain what makes a disagreement
reasonable. I argue for an epistemic understanding of reasonableness before responding to two objections.

Before this, I want to draw a distinction between *prima facie* reasonable disagreement and *ultima facie* reasonable disagreement. By *ultima facie* reasonable disagreement, I mean a disagreement that is in fact reasonable and which we ought to respect because it is reasonable. By *prima facie* reasonable disagreement, I mean a disagreement which might not be in fact reasonable but which appears to be reasonable and as such it ought to be respected as well. This is because the phenomenology of reasonable disagreement does not allow proper reasonable disagreements to be identified with certainty. There is always a lot of uncertainty as to whether the conflicting parties are indeed equally justified in holding incompatible views. In this sense, I dress the picture of *ultima facie* reasonable disagreements as those which should be respected but our incapacity to differentiate between *prima* and *ultima facie* reasonable disagreements extends our respect for reasonable disagreement to *prima facie* reasonable disagreements as well.

**What is Reasonable Disagreement**

Firstly, meaningful disagreement does not refer to every type of disagreement. One would not hold that a special justification must be given to someone who holds a different view due to a verbal disagreement. Similarly, one would not hold that a disagreement caused by a lack of information ought to be taken seriously, particularly if the agents would change their mind when presented with the relevant piece of information. This is because such disagreements are related to errors and to improper justification: the agents involved are not equally justified. Hence, I contend that meaningful reasonable disagreement is properly to be understood as genuinely irresolvable disagreement within a set context, i.e. the agents involved in the disagreement are equally justified in holding different and conflicting views. (Goldman, 2010a, p. 189)²⁶

It should be noted that there are disagreements that are not resolvable but that cannot qualify as reasonable disagreements. This is because, for instance, one of the agents involved in the disagreement could have some epistemic defect. This is why the word *genuinely* is important. Genuine disagreements emerge when the agents involved can be seen, roughly, as ‘epistemic peers’. By epistemic peers, I mean agents who share *some form of evidential equality*, that is “A and B are evidential equals relative to the question whether $p$ when A and B are equally familiar with the evidence and arguments that bear on the question whether $p$” and *some form of “Cognitive equality: A and B are cognitive equals relative to the question whether $p$ when A and B are equally competent, intelligent, and fair-minded in their assessment of the evidence and arguments that bear on the*...
question whether $p.$” (Lackey, 2010, p. 302) These are idealised conditions but they make clear that the irresolvability of a disagreement must not be caused by cognitive deficiencies or by different and unshared evidence.

Consequently, verbal disagreements cannot count as proper reasonable disagreement since the disagreements in question can easily be resolved or refined. Similarly, conceptual disagreements could be resolved or refined if the agents revise their concepts through deliberation. Even normative disagreements do not, a priori, give rise to reasonable disagreement since it is possible that through experience agents will come to revise their judgements and attain agreement. It emerges that reasonable disagreement, to be properly identified, must be the outcome of some deliberation: “Reasonable disagreement is disagreement that survives the best efforts of a group of reasoners to answer a particular question – that is, to find a unique answer that is required by reason.” (McMahon, 2009, p. 2) To be reasonable, the parties must have tried to eliminate the sources of misunderstanding, misinformation, misconceptualisation and errors. This ensures that the disagreement is genuine. Only in that case do we feel the need to take it into account. As Waldron explains: “Respect has to do with how we treat each other’s beliefs about justice in circumstances where none of them is self-certifying, not how we treat the truth about justice itself (which, after all, never appears in politics in propria persona, but only – if at all – in the form of somebody’s controversial belief.)” (1999b, p. 111) This respect for each other’s beliefs cannot, in my view, emerge unless we first attempt to make sure that we are not facing errors and unjustified beliefs.

Reasonable disagreement is a contextual notion that depends on the agents’ position and not on the assessor’s position. Suppose we evaluate a disagreement between agents $K$ and $L$. They disagree because they miss some piece of empirical information. Even if I am in possession of that piece of information, and I know that as a result agent $K$ is wrong, I cannot claim that the disagreement, as it stands, is unreasonable. The reasonableness of a particular disagreement depends on its context; $K$ and $L$ can both be justified within their context to hold diverging beliefs but if I was to provide them with the piece of information, the disagreement could become unreasonable. This is because: “Disagreement which has been reasonable may cease to possess this character if new considerations capable of guiding all competent reasoners to a definite conclusion become available.” (McMahon, 2009, p. 2) Reasonable disagreement includes disagreement which in context $C_1$ cannot be resolved but which with relevant evidence in $C_2$ could be resolved.

Accordingly, what makes disagreement important is the fact that, despite their best collective efforts to resolve it, agents are still justified in holding their own beliefs. This is despite the possible resolvability of the disagreement from the God-like point of view. It is not the objective irresolvability

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27 Note that some authors deny that there can be any such (irresolvable) reasonable disagreement amongst epistemic peers, such as Feldman (2006, p. 235) referenced by Lackey (2010, p. 305).
of the disagreement which makes it reasonable, but the fact that it is irresolvable relative to a context. Hence, one does not have to hold moral pluralism true to see how reasonable disagreement is possible:

One can acknowledge moral pluralism while being committed to the final, objective, universal truth of one’s own moral doctrine. All that moral pluralism requires\textsuperscript{28} is that one countenance the possibility of what might be called honest moral error – sincere, informed, and rational agents doing their epistemic best can still wind up with false moral beliefs. (Talisse, 2009a, p. 14)

Talisse’s last sentence presents us with material to understand what makes a disagreement reasonable: ‘sincere, informed, and rational agents doing their epistemic best.’ These indeed allow us to claim that our disagreements are not due to an easily corrigible error. At this point, I have only identified what is meaningful reasonable disagreement. I now turn to what makes disagreement reasonable.

\textit{What Makes Disagreement Reasonable}

The concept of reasonableness can apply to beliefs or to agents. It can also be a substantial or a mechanical notion. I contend that reasonableness ought to be understood as a mechanical feature of an agent’s reasoning. By using ‘mechanical’ rather than ‘procedural’, I aim to emphasise the dispositional nature of reasonableness. It is not only a process by which a belief is produced but also a disposition to respond to evidence. It is not then a belief as such, or its content, that is reasonable. A belief can be said reasonable only inasmuch as in coming to hold a belief the agent will have exemplified, and remains disposed to exemplify, some minimal epistemic requirements. This minimal epistemic conception does not preclude the use of other accounts of reasonableness for other purposes. We often use ‘reasonable’ to refer to what generally can be expected from any normal agent; e.g. it seems unreasonable to expect someone to save a stranger over her own child. This is a correct use of reasonableness but not the one which is relevant here.

A minimal epistemic account of reasonableness is designed to identify which disagreements ought to be taken into account without substantially presupposing what justice and the right are. That is, it does not exclude beforehand conceptions of justice which might seem unreasonable within particular theories of justice. Thus, compared to substantial notions of reasonableness, it allows for a wider range of conceptions of the right to be politically meaningful.

To illustrate this, I mention McMahon’s two conceptions of reasonableness. The first is reasonableness as competence – which I retain and call mechanical –:

\begin{quote}
    a party to a disagreement is reasonable if and only if it is or could be the product of competent reasoning. Reasoning is competent when it is carried out in awareness of all
\end{quote}

\textsuperscript{28} We should read: ‘all that reasonable disagreement founded on moral pluralism requires’.
the relevant considerations, the cognitive capacities exercised in extracting conclusions from the relevant considerations are appropriate, and these capacities are functioning properly. (2009, p. 8)

The second conception is reasonableness as fairness: “A reasonable view then becomes a view of the appropriate pattern of concessions that a person who is reasonable, in the specified sense, could hold.” (2009, p. 19) Accordingly, a politically reasonable belief is one which is compatible with a framework of concession. One does not always win in a political process and one must be ready to sacrifice some aspect of one’s conception of the good if one is to live in a polity. However, I doubt we can define a priori ‘the appropriate pattern of concessions’ as this is context dependent. Furthermore, reasons must be given to explain why one ought to keep cooperating since it would not do to simply state that one is not reasonable when one refuses to cooperate.

This substantial account of reasonableness is not significantly different from that of Rawls. For him, reasonableness has, built into it, some substantial notions; it includes “the ideas of equality, fairness, and cooperation.” (Misak, 2000, p. 24) It incorporates Rawls’s basic premises for his theory of justice: ‘the reasonable “is an element of the idea of society as a system of fair cooperation”’ (Misak, 2000, p. 24) amongst free and equal citizens. The issue with substantial accounts of reasonableness like this one is that they exclude disagreement on some notions – in this case, freedom and equality – so as to ensure that a specific theory of justice will obtain. Weinstock is clear on this: “Rather than defining an independent conception of reasonableness, liberals view as reasonable those who at the end of the day form their beliefs in a way that predisposes them toward ethical liberalism. Ethical liberalism is therefore tacitly held constant.” (2006, p. 242) Substantive accounts of reasonableness fail to respect disagreement since they ‘smuggle in’ objectionable substantive notions.

Thus, I maintain that to identify the zone of disagreement, we ought to adopt a mechanical epistemic notion of reasonableness. Following Talisse and Misak, my conception of reasonableness is the disposition to properly assess the truth of our beliefs: we ought to be concerned with “‘the degree to which one is willing to subject one’s view to rational scrutiny” (Talisse, 2005, p. 114). Being reasonable is a matter of being willing to engage in the process of justification.’ (Misak, 2009, p. 38) A belief can be held reasonable if, and only if, when presented with conclusive evidence an agent reliably updates her credence in the belief, either up or down – or adjusts her belief-system – depending on the evidence presented. In other words, reasonableness is a disposition to be responsive to evidence and reasons. Hence, a reasonable individual will be “thinking and conversing in good faith and applying, as best as one can, the general capacities of reason that belong to every domain of

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30 See Knight and Johnson (2011, p. 216).
inquiry.” (Larmore, 1994, p. 74) To further detail my account, I discuss in turn what is meant by aiming for truth, good faith in inquiry, and finally the logic of inquiry.

Agents ought to aim at truth for their beliefs to be reasonable since truth is a normative standard for beliefs. It is possible to maintain this even if some agents do not aim at truth but rather at the satisfaction of their interests or preferences when forming a belief; I agree that the claim that agents “value the truth” can be rejected. (Festenstein, 2009, p. 77) However, the problem at hand is what makes a disagreement reasonable. I contend that we cannot make sense of the idea of meaningful disagreement without the idea that reasonable beliefs ought to be achieved by agents who aim at truth. Furthermore, good faith in inquiry is also essential. It implies that, in a disagreement, one must faithfully express one’s beliefs.

The fear is that if we are to respect beliefs not held in good faith and which do not aim at truth, law would fail to properly fulfil its role within morality. This is because without good faith and truth-aiming, we can doubt that agents are genuinely concerned about finding correct determinations of justice. We would therefore have reasons to doubt that a law designed to respect these beliefs would constitute a correct determination of justice since, as Cohen explains about theories of justice, we would be building “accommodation [...] to the power of those who believe the false and spurn the good.” (1999, p. 57) Good faith in inquiry and truth-aiming ensure that we are not simply giving in to power, but that we have identified a genuine disagreement. Without it, we cannot make sense of why reasonable disagreement should be respected: parties that cling to their beliefs or who build their political positions solely on their interests rather than on their beliefs about the right cannot provide us with reasons to regard a law shaped by their views as a correct determination of justice or as fulfilling its role within morality.

Another reason to hold truth-aiming as a feature of reasonableness is that proper reasonable disagreement arises when each party holds the other parties to be mistaken. This cannot be the case if the agents do not aim for truth. What allows us to disagree is that we both aim for correct beliefs. Otherwise, we are simply in conflict. It is only when I see us both in a process of truth-aiming that I can make sense of the fact that when we disagree I hold you to be mistaken rather than simply holding a different belief. (Misak, 2000, pp. 68-69) Truth-aiming is hence a necessary feature of any meaningful disagreement if we are to hold law as a determination of justice and if we are to make sense of disagreement, rather than conflict, on normative matters.

The idea of the ‘logic of inquiry’ can be found in McMahon, Misak, Talisse and Larmore who all rely on a version of the idea that for a belief to be reasonable, one must exhibit proper reasoning. One can

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31 “belief’s basic norm or standard of correctness is truth” and this is a “constitutive or essential fact about belief.” (Lynch, 2009, p. 229) See Engel (2004) and Wedgwood (2002).
tell different stories to explain what are the general capacities of reason or the proper logic of inquiry. I do not provide a thorough account of what proper reasoning is; there are different valid ways to inquire into a matter and there is a wide range of what counts as good reasons. What I rather argue for is a general framework of rational belief.

I contend that for a disagreement to be reasonable, it must be based on rational beliefs. A rational belief is a belief that – through competent reasoning and based on our best evidence and reasons – comes out as the best conclusion. It is also a belief which remains open to revision as new information is acquired. As Misak explains: “Although we are never in a position to judge whether a belief is true or not, we will often be in a position to judge whether it is the best belief given the current state of inquiry.” (2000, p. 57) Furthermore, the process of reasoning does not have to be something solitary and the “initial reasoning of the parties need not be highly competent.” Competent reasoning “is rather the outcome of shared deliberation”. (McMahon, 2009, p. 95) By saying that competent reasoning is a condition of the reasonableness of disagreement, we ensure that what is at stake is not the result of random decisions or of the improper assessment of evidence. From this account of rational belief, we have to conclude that for a disagreement to be reasonable “at least two of the opposing positions could be supported by reasoning that is fully competent.” (McMahon, 2009, p. 1) This reinforces the need not to dismiss disagreement too easily.33

In this section, I have presented an epistemic notion of reasonableness. This notion claims that reasonableness applies to a belief that is responsive to reasons and evidence. It ought to be the upshot of an agent’s competent reasoning which is conducted in good faith and that aims at truth. In the next section, I discuss different objections to the idea that reasonableness can be construed epistemologically.

Disagreement on Reasonableness

There are two major objections to the idea of reasonableness I defend; the first states that disagreement can be reproduced at the level of reasonableness. The second targets more directly my epistemic approach and claims that the epistemology underlying it is itself founded in an objectionable conception of the good. I show that the first objection applies to substantial but not to mechanical accounts of reasonableness. I then argue that a mechanical epistemic account can resist disagreement.

Before doing so, let me be clear about what I mean by resisting disagreement. It would be impossible to provide an account of any abstract or normative concept that is beyond any actual or possible

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32 See, above, McMahon’s definition of reasonableness as competence. (2009, p. 8)
33 The position I uphold here is similar to what Gaus (1996) calls ‘open justification’. I refer the reader to Gaus for a thorough account of justified beliefs.
disagreement. However, my claims are located within the circumstances of politics: we recognise that we have obligations of justice but we disagree on them. The fact that we disagree extensively only tells us that we should avoid relying on what we disagree about to justify a decision-making procedure; it does not mean that each and every disagreement that is possible will also be meaningful. The problem of political decision-making in the face of disagreement – the circumstances of politics – sets a framework and it is within this framework that my notion of reasonableness applies. So, when I say that my notion of reasonableness can resist disagreement, what I claim is that this notion of reasonableness is the only one which makes sense of what the agents are aiming for within the circumstances of politics: that is for coordination on a correct determination of justice which respects disagreement. In other words, my notion of reasonableness cuts across disagreement since it is the only one to which every agent is committed if all aim to resolve their disagreements with an eye on truth while respecting disagreement.

Reidy maintains that Rawls’s burdens of judgement entail “reasonable second-order or meta-disagreements about how exactly the line running between simple and reasonable disagreements itself ought to be drawn.” (2007, p. 256) In other words, reasonable disagreement would apply to the notion of reasonableness itself. With regard to my claim that reasonableness is a minimal epistemic notion, the objection would be that agents would reasonably disagree with that account as well.

Firstly, I agree with Reidy that it is possible to have reasonable disagreement about reasonableness. Yet, I hold that this depends on which notion of reasonableness we adopt and what we build into it. What Reidy seems to oppose are substantial notions of reasonableness such as those which incorporate commitments to freedom and equality. But this is precisely why I avoided substantial notions and adopted a mechanical conception of reasonableness.

Secondly, Reidy says that a disagreement can be discarded:

when it is best explained by reference to a systematic bias or prejudice on the part of one party or a dogmatic refusal to consider relevant evidence. But persons of high intelligence and manifest good will may themselves reasonably disagree over when refused evidence is relevant, or when a refusal to consider relevant evidence is dogmatic, or when a particular chain of reasoning is infected by systematic bias or prejudice rather than, say, merely impolite generalizations or an overly cautious disposition. (2007, p. 256)

In this sense, even a basic epistemic notion of reasonableness would be objectionable. Reidy’s argument shows why it is difficult to provide a complete epistemic account of good reasons and of proper reasoning. Yet, his argument is limited to epistemic conceptions of reasonableness which are too substantial. My own account of reasonableness is general and mechanical. It is open to different conceptions of what counts as good reasons and as proper reasoning; it relates to a general disposition rather than to a specific type of reasoning. Accordingly, it should resist second-order disagreements as Reidy conceives them.
Weinstock presents a stronger argument against epistemic notions of reasonableness. He argues that the epistemological conception underpinning my account can be associated with a particular conception of the good. Hence, founding a conception of reasonableness on the responsiveness of beliefs to reasons and evidence is not something which is beyond disagreement.

Weinstock’s argument is directed against the possibility of arriving at a neutral conception of reasonableness by relying on epistemic notions. He raises objections against two necessary features of my conception of reasonableness.

The first is that it is appropriate to think of that which in most people’s minds lies at the basis of their political preferences and opinions simply as beliefs. Let me call this the “Rationalist Assumption”. The second, linked to the first, is that a conception of reasonableness can be specified which is neutral among allowable conceptions of the good life, which is, as it were, purely procedural rather than substantive. Let me call this the “Neutrality Assumption”. (2006, p. 238)

Against the ‘rationalist assumption’, Weinstock claims that people’s conceptions of justice cannot always be identified only with a belief. Rather, agents can hold their political views as an essential part of their ‘way of life’. Since it is part of their way of life, it cannot be assessed “in abstraction of the role that such a belief might conceivably play in a way of life.” (Weinstock, 2006, p. 241) What Weinstock claims therefore is that we assume our own ‘protestant’, as he calls it, and disagreeable position when we claim that political disagreements are founded on beliefs and that we can separate them from the good.

Against the ‘neutrality assumption’, Weinstock claims that “one of the things which distinguishes conceptions of the good from one another has precisely to do with the way in which they define epistemic virtues and rules.” Some “emphasize trust in tradition and authority as a way of forming beliefs” while some “stress the role of the individual knower in assessing the evidence for and against different propositions”. (2006, p. 241) Relying on an epistemic argument for reasonableness would be doomed to reproduce the disagreement which the decision-making procedure is supposed to bridge. In response, I explain: (1) Why political reasonable disagreements cannot be dissociated from beliefs and; (2) That within the circumstances of politics not all disagreements on epistemic virtues and rules are meaningful.

Firstly, I contend that agents cannot maintain conflicting conceptions of the good as ways of life which would partially escape the epistemic requirements of beliefs if their disagreements are to be meaningful. Even if we agree that views about the ‘right’ can be more or less integrated in a conception of the good,\textsuperscript{34} it does not imply that they are ‘views’ and not ‘beliefs’ and that such views ought to be insulated from the epistemic requirements which apply to beliefs in general. I admit that

\textsuperscript{34} \textit{See} Waldron (1999c, pp. 78-79).
agents might not want to revise their political views and wish to maintain their validity in the face of counter-evidence as they hold them essential to their ways of life, but this does not warrant the idea that they are not beliefs or that they should be maintained despite counter-evidence. Such beliefs remain defective *qua* beliefs. One way to make clear that beliefs are involved when faced with conflicting conceptions of the good is to show that political disagreements are nonsensical without them.

Suppose a political disagreement between agent *O*, who relies on tradition, and agent *P*, who relies on evidence. I maintain that there cannot be such a disagreement without any beliefs being involved. This is because a disagreement is a cognitive state: through their disagreement, agent *O* and *P* presuppose a correct answer.\(^{35}\) We cannot make sense of the fact that they disagree, that they hold one another to be mistaken, if there is no belief involved or at least a mental state which has truth as a normative standard. One could nonetheless argue that agent *O* and *P* are simply conflicting in their ways of life or preferences without supposing a correct answer. Even if agents conflict in their ways of life it is possible to identify their disagreement with a second-order belief such as ‘when ways of life conflict, the polity ought to do X’ or ‘I ought to pursue the satisfaction of my preferences’. Otherwise, it is not clear why they would care about the solution to their conflict: “If there is no explanation of the fact that you and I disagree, no appeal to the idea of a mistake, then we are left with the looming possibility that there is nothing we could get right or wrong. And if there is nothing to get right or wrong, then there seems no reason against pursuing our own preferences.” (Misak, 2004, p. 20)\(^{36}\) The ‘rationalist assumption’ is therefore warranted.

Secondly, Weinstock holds that founding reasonableness on a specific epistemic conception – such as one which supports inquiry and assessment – would make it objectionable to those who adopt a different epistemic conception – such as those who support authority and tradition. In contrast, I propose that agents are already committed to the account of reasonableness I put forward since they hold beliefs that have truth as a normative standard:

> when I believe *p*, I commit myself to saying what could speak for or against *p* and to giving up *p* in the face of sustained evidence and argument against it. A belief, in order to be a belief, is such that it is responsive to or answerable to reasons and evidence. That is a very part of what is to have a belief – it is a *constitutive norm* of belief. (Misak, 2004, p. 12)

If a belief has truth as a normative standard – and by definition it does – it ought to have been reached in good faith through proper reasoning, which is the account of reasonableness given. In other words, my claim is that there is only one correct (general) way to fix a belief in order to direct it towards

\(^{35}\) See Misak’s position on bivalence: it “is required if we are to make sense of doing what we do by way of inquiry and deliberation.” (2000, p. 69)

knowledge. Weinstock, on his part, claims that ways of life have radically different conceptions of proper ways to fix beliefs and choosing between these different ways is not beyond disagreement.

According to Peirce, there are four ways to fix a belief\(^{37}\): (1) “tenaciously clinging to it and attempting to cut ourselves off from any evidence that might call it into doubt”; (2) “appealing for its protection from doubt to authorities charged with the task of regulating opinion”; (3) “deriving it from shared a priori preferences or tastes”; (4) “participating in inquiry into its warrants by a community of competent inquirers.” (Westbrook, 2005, p. 4) Weinstock’s claim is that the process of belief fixing can be founded in conceptions of the good and holding one of the four options as the right one would make our conception of reasonableness objectionable. However, accepting this would be self-defeating for the role we want reasonableness to play. In political decision-making, we are not only concerned about fixing beliefs; we are rather concerned about achieving knowledge – true justified political beliefs – of what ought to be done. An account of reasonableness must accordingly eliminate those views which cannot recognisably be seen as knowledge-oriented. It follows that only 4, which underwrites my account of reasonableness, stands as a non-question-begging account of epistemic reasonableness: 1, 2 and 3 are clearly implausible epistemic dispositions to recognisably guide, in the face of disagreement about what ought to be done and on who knows best, the agents towards true beliefs. Even 2 has to be supported by assessable reasons for the authorities to be seen as truth-conducive. Hence, there cannot be reasonable disagreement on my minimal epistemic account of reasonableness within the circumstances of politics since only 4, which supports it, makes clear which disagreements should be respected when we are concerned about the correctness of the outcomes.

To sum up, I explained that reasonable disagreement is best understood as the genuinely irresolvable upshot of truth-directed deliberations conducted by all parties in good faith according to the proper logic of inquiry. I argued that this minimal epistemic and mechanical account of reasonableness can resist disagreement. In the next section, I argue for the need to take disagreement seriously.

2.3 Respecting Disagreement

Even if we accept the existence of reasonable disagreement, it is not clear yet why disagreement in general ought to be respected; one could simply hold that other agents are mistaken. My aim is to explain why disagreement should play a role in the determination of our decision-making procedure and why it should be taken into account in our political pragmatic deliberations. I offer two arguments to this end; the first claims that we are simply unable to resolve, by definition, reasonable disagreement. Hence, since we are concerned about finding justice, it is good epistemic practice to take disagreement into account. The second argument mentions the idea of justification and why it is important to offer an account of political power that is widely acceptable.

\(^{37}\) With this argument, I follow other pragmatists, like Talisse who argues for the resilience of his arguments to disagreement. (2011, pp. 562, 564-566)
The Incapacity to Resolve Disagreement

In the face of genuine reasonable disagreements, the parties involved are each justified in holding conflicting views. In addition, none of the views are faulty or mistaken – even if it appears differently to the agents involved. There are two main reasons why such disagreements ought to be respected: (1) The nature of our moral epistemology and the need to find justice and; (2) The nature of morality. These two reasons support a general fallibilist, though not non-cognitivist, attitude.

None of our moral judgements are “self-certifying.” (Waldron, 1999b, p. 111) When we disagree on a moral matter, one cannot point to the fact and say: ‘don’t you see that this is unjust’ so as to resolve the disagreement as this is precisely its object. Furthermore: “There is nothing equivalent in morals [to the scientific method], nothing that even begins to connect the idea of there being a fact of the matter with the idea of there being some way to proceed when people disagree.” (Waldron, 1999b, p. 178) If indeed we had a method to resolve our disagreements we would not in fact disagree. But we have no more agreements on such procedures than we have on substantial matters. Hence, we cannot fall back on a procedure or method to identify the right thing to do. Raz supports this idea when he claims that: “there are no moral experts. There is no moral science, no hidden, yet-to-be-discovered bits of moral evidence.” (1988-1989, p. 771) It is this highly undetermined nature of moral epistemology that makes reasonable disagreement so ubiquitous but it is also precisely why disagreement should be respected. Where no position can conclusively be shown wrong, not respecting disagreement would amount to assuming the correctness of one’s own view or at least the correctness of a range of options that one is ready to accept. Inasmuch as one is concerned with the correctness of one’s position, one must also assume that “mine is not the only mind working on the problem in front of us, that there are a number of distinct intelligences, and that it is not unexpected, not unnatural, not irrational to think that reasonable people would differ.” (Waldron, 1999b, p. 112) Hence, if we are concerned about achieving the right decision, respecting disagreement is necessary. Not taking it into account demonstrates overconfidence in one’s own view on justice, a confidence which is not warranted with regard to the vagueness of our moral epistemology.

Furthermore, even if only reasonable disagreements should be respected, it is in fact often not possible to distinguish between prima and ultima facie reasonable disagreements. This is because “one does not occupy the God’s-eye point of view with respect to the question of who has evaluated the evidence correctly and who has not.” (Kelly, 2010, p. 138) In consequence, we should offer respect to a wide range of disagreements even if these might not be in fact ultima facie reasonable.

Some of the sources of disagreement, in this case the plurality and the underdetermination of morality, can also support the idea that we should respect disagreement. Regarding the plurality of morality, I stated that there could be diverse, incompatible and incommensurable values. (Besson,
If it is the case that there are genuine moral conflicts, the presence of a moral disagreement makes it even more difficult to simply state that one of the parties is mistaken. This is because different incompatible views could be each supported by incommensurable values.

Even if one does not acknowledge moral pluralism, one can still acknowledge the underdetermination of morality and that many political views are inconclusively justified. By underdetermination, I mean that more than one solution is warranted by morality. By inconclusiveness, I mean that there is only one correct solution, but our arguments fail to establish what this solution is in an overly convincing way. (Gaus, 1996, p. 153) In the previous chapter, I referred to Honoré’s idea that morality is not determinate and that law can play a role in the determination/specification of our moral obligations. (1993) If morality is indeed more like an outline, respecting disagreement acknowledges the various possible ways in which morality can be completed and at the same time, it ensures that we can realise when political views are not conclusively justified.

We can conclude from the nature of morality and of our moral epistemology that we ought to adopt a general fallibilist approach to morality and justice. Fallibilism is the only acceptable attitude in the face of the conditions of knowledge and of our moral epistemology. It is this fallibilist approach which warrants the need to respect reasonable disagreements and to take it seriously into account. There is a further argument for the respect of reasonable disagreement that is based on the idea of justification of political power.

**The Idea of Justification**

There is a pervasive idea in political philosophy according to which legitimate political power should be justified or acceptable to its addressees. This connection between acceptability and legitimacy is famously associated with the liberal principle of legitimacy. (Sadurski, 2008, p. 28) This need for an acceptable justification is not only and strictly liberal. Following Williams, McMahon holds the idea that “unmediated coercion is everywhere an injustice”, whether in a liberal state or not. It is a fundamental law of any political organisation. (2009, p. 161) Equally, any democratic theory supports the need for justification. As Rosanvallon explains: “Popular uction of those governing is for us the principal characteristic of a democratic regime” as “the people are the only legitimate source of power.” (2008, p. 9) It is essential for democratic legitimacy that power should express or be compatible with the will of the people – however we define it. Hence, democratic legitimacy must necessarily appeal to this notion of acceptability. Since my concern in this thesis is about the justification of epistemic democracy, it becomes even clearer that taking genuine reasonable disagreement into account is required.

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39 Translation is my own. See also Webber (2009, p. 19).
However, justification is not strictly democratic. There is also a more general reason, along Williams and McMahon’s line. Besson, following Gaus (1996, p. 121), argues that: “moral commitment, especially beliefs about justice, call (sic) for public justification and reason because they combine two features: demandingness and culpability.” (2005, p. 108) By demandingness and culpability, she means that public morality incorporated in the law is a system of demands and requirements and that “if people fail to comply with their moral requirements, they can be blamed” (2005, p. 108) and punished or coerced under some conditions. If demands and blame can be attached to a public policy, one must avoid a “suspicion of subjection; to do this, we must take the standpoint of other into account and only that which could be simultaneously accepted by all.” (2005, p. 109) Under my epistemic conception of reasonableness, the fear would be that otherwise political power would appear as the instrument of one’s own interests and could not be recognised as the expression of what is truly required by justice or the right. This provides a further epistemic argument for why disagreement ought to be respected.

To summarise this chapter, I explained the sources of disagreement. I mentioned verbal, conceptual and normative disagreement. I also mentioned the important distinction between moral and political disagreement. I then provided an account of what counts as reasonable disagreement and defended my account against two objections. I claimed that agents are committed to my minimal epistemic account of reasonableness inasmuch as they are involved in a political disagreement and care about achieving a correct solution. Finally, I explained that it is relevant to take disagreement seriously based on the limitations of our moral epistemology but also on the need to avoid the suspicion of subjection. In the next chapter, I explain the problems with the usual justifications of democracy; particularly their failure to take disagreement seriously.

Having established the importance of taking reasonable disagreement seriously, I can now turn to the consequences this has on the justifications of decision-making procedures. I maintained that law’s function is mainly coordinative. In this respect, I mention how disagreement stands as the main challenge to coordination since it prevents justifying a decision-making procedure on notions which are already the object of disagreement. I then explain how there are various obstacles which a decision-making procedure should overcome if it is to achieve coordination.

These obstacles, along with the fact of disagreement provide a strong argument against the usual justifications of democracy. I will argue that most of these either: (A) Reproduce the disagreement they are supposed to bridge in the first place or; (B) Fail to overcome the obstacle of rational motivation, that is to explain how a decision-making procedure provides one with reasons to coordinate on what one holds to be a correct solution. I will review some of the main arguments for democracy: (1) The aggregative function; (2) Autonomy; (3) Fairness; (4) Knowledge. I do not think that these approaches are totally mistaken. For instance, I think that Christiano offers a good account of what equality implies on the organisation of democracy but that his arguments fail to meet the challenge of disagreement. There are qualities in these approaches and it is important to learn from them and to understand how and where they are lacking so as to provide a strong argument for democracy. Ultimately, this chapter should establish why an epistemic argument for democracy fares better than competing normative justifications since it can respect disagreement and provide rational motivation.

3.1 Disagreement and Coordination

I argued in the preceding chapter that agents disagree on normative matters for multiple reasons. I also argued that their disagreements must be respected inasmuch as they are founded on reasonable beliefs. Disagreement is pervasive: one only has to look at academic philosophy to appreciate the extensiveness of this disagreement. This is the first fact we need to keep in mind if we want to provide a justification for democracy as a decision-making procedure.

Decision-making procedures are called for when agents do not agree on what ought to be done collectively, or on who ought to decide, and when they still hold that it is better to act together than separately. We can associate these circumstances with coordination problems. Common solutions are called for by a variety of problems such as the organisation of commerce, education, criminal law, etc. Some of these coordination problems are pure coordination problems, such as which side of the road one must drive on. Some are partial conflict coordination problems. Some others are coordination problems where agents think it is better not to coordinate at all on an unjust solution than to coordinate, but they still hold that it is better that everyone coordinates on what they hold to be the
just solution. These are what Talisse calls the problem of deep politics (2009a, pp. 37-38) and can be observed in the debate on abortion. This need for coordination is the second fact we need to keep in mind.

The fact of disagreement and the fact that we need to coordinate on a common solution explain why a decision-making procedure is called for: we are in need of a decision-making procedure that will bridge our disagreements and provide us with a coordination solution. From there, it is important to make clear why democracy is the precise decision-making procedure that is called for by these two facts. Furthermore, the arguments for democracy must explain why democracy qua decision-making procedure for day-to-day politics and not simply qua popular sanction of the political power in constitutional moments is called for. Most approaches to democracy do not pay attention to these two moments of political life and such lack of attention makes some of these unable to explain why democracy is called for on a day-to-day basis.

Another problem is that some approaches to democracy base their arguments on substantial moral considerations such as: “freedom, autonomy, dignity, liberty, or equality”, but these “are essentially controversial – no elaboration of the details of their content can win widespread and sustainable agreement.” (Talisse, 2009a, pp. 3-4). If we are to bridge disagreement, we cannot justify a decision-making procedure by relying on a notion which is the object of widespread and sustained disagreement. In addition, the fact that we need to achieve coordination also restricts further the type of arguments that are available for decision-making procedures. If the only thing that was called for was coordination per se, there would, it seems, be no need for more than, e.g., a random decision-making procedure, such as coin-tossing. There is, however, more to coordination than making one coordination solution salient; the obstacles of coordination must also be addressed. Not enough attention is paid to these: I hold that this is the main problem with some accounts of democracy that are rightly concerned with disagreement, such as those of Waldron and Besson.

The Obstacles of Coordination

There are two general types of obstacles to coordination: factual and normative. The first relates to information and knowledge available to agents while the second relates to the reasons for coordination. Some of these obstacles can be dealt with through institutional design, especially the factual one, and need not be addressed by a normative argument for a decision-making procedure. The position I defend is that an epistemic conception of democracy can better deal with the normative obstacles of coordination, especially in cases of partial conflict coordination dilemma and in cases of

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40 Knight and Johnson (2011) pay attention to this distinction and offer an argument for the primacy of democracy in deciding about how to decide.
deep politics. To understand better the role of the obstacles of coordination, I explain three types of coordination dilemma.\textsuperscript{41}

Firstly, pure coordination problems are often associated with the question of which side of the road agents should drive on. In such a situation, agent \( X \) and agent \( Y \) hold that it is better to coordinate than not – they judge that it is better to each drive on the opposite side of the road – but they do not have any preference as to which coordination solution is the best – whether they should drive on the right or the left. This is a simple coordination problem and may not require an epistemic procedure to be resolved. Tossing a coin in such situations seems acceptable.\textsuperscript{42}

Secondly, partial conflict coordination problems can be associated with disagreements in which the agents maintain that it is best to act together on one option but where they disagree as to which option is preferable. Such a coordination problem can be illustrated by disagreements about when abortion should be made illegal. E.g.: agents \( X \) and \( Y \) hold that abortion is morally acceptable but disagree about the precise number of weeks after which it should be made illegal. In other words, \( X \) and \( Y \) hold that it is better overall to coordinate and to make abortion legal but they disagree on whether it should become illegal after, for instance, either 24 or 20 weeks. In this case, coin-tossing does not seem appropriate since agents prefer, according to their best judgements, one solution over the other.

Finally, suppose that agents \( X \) and \( Y \) prefer to make abortion legal while \( Z \) prefers to make it illegal. In such a case, \( Z \) does not want to coordinate on abortion and \( X \) and \( Y \) do not want to coordinate on not having abortion. There is no solution in which the agents have some shared views. They do, however, prefer that everyone acts in the same way: \( Z \) wants abortion to be illegal for all and \( X \) and \( Y \) want it to be legal for all. This is a case of deep politics as ‘exit’ seems to be what at least one agent would prefer were we to coordinate on any of the options.

Law must be able to provide solutions to these three types of coordination problems. According to Besson there are four obstacles to this end: “lack of incentives to cooperate (problem of motivation), the absence of knowledge of others’ pattern of interaction (problem of identification), the moral disagreement about which pattern is the best (problem of certainty)\textsuperscript{43} and, finally, the lack of assurance that others will cooperate (problem of compliance).” (2005, p. 183)

Regarding the problem of motivation, there are two aspects to consider. Firstly, I postulated that agents would rather coordinate than not within the circumstances of politics. This problem does not

\textsuperscript{41}See Besson (2005, pp. 168-176).

\textsuperscript{42}It is important, however, to explain how the agents arrived at their judgements. One must keep in mind that deliberation is already called for to ensure the reasonableness of the judgements involved in the disagreement. Without this deliberation, what I claim later about the aggregative justification for democracy applies here as well.

\textsuperscript{43}I call this a problem of rational motivation.
apply therefore to pure coordination problems and partial conflict coordination problems. One must nonetheless explain why a decision-making procedure like democracy can provide motivation to cooperate even for cases of deep politics. This is the normative side of this obstacle to coordination. Secondly, there are costs associated with coordination and with democracy: e.g. people need to discuss and share information. Such costs are problematic if agents do not have the incentive to bear them. Ober discusses this problem with regard to ancient Athens and claims that it overcame this coordination obstacle by, e.g., providing pecuniary incentives. (2008, pp. 119-120) This second type of motivation obstacle can be dealt with through institutional design and it does not bear much on the normative arguments for any decision-making procedure. Hence, I will not discuss it further.

The problems of identification and of compliance are related factual problems as they relate to the distribution of two relevant types of information to the agents. The first type is information about what the coordination solution involves. The second type is evidence that other agents will actually coordinate. In the case of driving, there are many other rules than which side one must drive on: “The complex coordination demanded by driving in traffic is achieved by adding other procedural rules, and by establishing common knowledge of those rules among drivers.” (Ober, 2008, p. 175) To solve the problem of identification, it is therefore important to ensure that agents know what the rules of the coordination solution are. If we are to solve the problem of compliance, some knowledge about one’s fellow coordinators must also be provided.

I follow Ober’s four steps of coordination to further clarify the issue:

1. The members of a group each intend that they together promote a certain goal.\footnote{Problem of motivation.}
2. They each intend to do their assigned part in a salient plan for achieving that goal.\footnote{Problem of identification: i.e. the salience of the plan.}
3. They each form these intentions at least partly on the basis of believing that the others have formed similar intentions.
4. This is all a matter of common knowledge, with each believing that the first three conditions are met, each believing that others believe this, and so on.\footnote{3 and 4: the problem of compliance.} (2008, p. 7)

The central issue here is that coordination demands knowledge that others will coordinate. Ober gives different examples of how ancient Athens succeeded in doing so: a public oath, taken by all new epheses, that they would meet in arms if required by the Assembly, provided the citizens with common knowledge that others knew the rules and that they were willing to follow them. (2008, p. 179) If one does not have evidence that others are aware of the rules, one would lack motivation to coordinate. Returning to the driving example: I would lack reasons to keep going at a green light if I had no evidence – such as that provided by the fact that one needs a driver’s licence and that one will be removed from the road if caught without one – that other drivers know the rules of the road. It is
therefore important that the rules are made public, but it is equally important to make public the fact that the rules are known. The democratic procedure might, through publicity, make the type of information in question easily available. Nonetheless, this capacity to distribute relevant information has more to do with institutional design than with intrinsic feature of decision-making procedures; it is not impossible for non-democratic procedures to resolve these problems of coordination.

The last obstacle is the problem of certainty or, hereafter, of rational motivation. This type of coordination obstacle is normative as it relates to the perceived desirability of a coordination solution. There can be two types of disagreement affecting rational motivation. The first type of disagreement is about the best means to attain some shared aim. Following Goodin’s example, suppose that agents share the aim of going from point A to point B but disagree as to which route is the best. This can be because the agents perceive things differently and through deliberation it might be possible to pool information so as to resolve “those differential perceptions of what is required by public reasons and the public interest.” (Goodin, 2003, p. 79) What such a disagreement implies is the need to provide agents with a “rationally grounded decision”. They want more than a “bare agreement as to what they should do. They want their collective action itself to be based on some collectively agreed view as to why they are doing it, as to exactly how that action is supposed to work to produce the end in view.” (Goodin, 2003, p. 80)

Agents must have reasons to see a coordination solution as providing a correct solution to their disagreement. It is not sufficient to select one route; agents must also assume that the selected route would allow them to get to point B. Furthermore, this need for rational motivation also implies that it is important for the decision-making procedure to be responsive to the agents’ beliefs and to their commitments. Otherwise, it would be unsuccessful in identifying coordination solutions based on “ends that all believe to be desirable and that are in fact achievable.” (Ober, 2008, p. 177) Taking the agents’ judgements into account is essential in providing them with a coordination solution they can hold to be desirable. If the decision-making procedure is not responsive to their judgements, there is a risk that agents will not coordinate as they will not hold the solution decided upon as a correct/desirable one.

The second type of disagreement is about the ends that are worth pursuing themselves. Consequently, it is essential to provide agents with reasons to coordinate on a solution selected by the decision-making procedure even if they hold it to be less desirable than some other solution. This is a problem of rational motivation since agents must be provided with a reason to hold the coordination solution ‘as if it was true’ for the time being. (Goodin, 2003, p. 87) This explains, partly, why coin-tossing is not the best decision-making procedure for partial conflict coordination dilemma and cases of deep politics. One must explain how, apart from making a solution salient, a decision-making procedure also makes it authoritative (Besson, 2005, p. 186), or more precisely how it allows the agent to infer
that it is authoritative. This is a necessary step to explain how a selected solution, even if it is not the one judged by some of the agents to be the correct one, can morally be action guiding. Simply making a coordination solution salient is not sufficient since agents do not only need to find how to coordinate; they disagree on the correctness and on the justice of the coordination solution. This is often the coordination obstacle that is not taken sufficiently into account by usual accounts of democracy. And when it is, moral elements are often used to explain the authority of the procedure, but disagreement prevents such approaches; a reason must be given to accept the solution of the decision-making procedure that does not rely on something we already disagree about. With these obstacles of coordination and with the fact of disagreement in mind, I examine different arguments for the justification of democracy in order to show how an epistemic account of democracy fares better.

3.2 Democracy and Aggregation

Normative social choice theory, famously inaugurated by Arrow (1963), centres its argument for democracy on voting and aggregation functions. A voting procedure can be legitimate if the results of the procedure can be associated with the results of a normatively attractive aggregative function. In detail, we assume, as in the coordination dilemma presented earlier, that agents have different preferences of various intensity. The claim is that it is possible to find an aggregative function of the preferences which will identify the solution that can be seen as the social choice: i.e. as the solution which ought to be preferred were we to aggregate all the preferences. Arrow provides four criteria necessary for an appropriate aggregative function: “Unrestricted Domain (condition U)”, “Independence of Irrelevant Alternatives (condition I)”, “weak Pareto principle (condition P)”, “Non-Dictatorship (condition D)” (Peter, 2009, pp. 10-11) These criteria are jointly meant to “capture democratic values.” (Peter, 2009, p. 10) I do not intend to discuss these criteria in detail since all that is important to keep in mind here is that an aggregative function is held to provide the criterion by which to judge a decision-making procedure. As Estlund explains, it is the aggregation of the agents’ preferences which is essential to this justification of democracy, not the nature of the procedure: “Social choice theory evaluates rules of aggregation from individual orderings to collective orderings, not actual procedures, which might or might not conform to those rules.” (2008, p. 74) By doing so, it provides a “procedure-independent outcome standards.” (Estlund, 2008, p. 66)

Whether or not such an aggregative function can be found, the main problem I see with it, following Peter, is that:

47 I will not discuss Habermas (1996) on the topic of deliberation, procedural rationality or legitimacy although his work is very important. I have been convinced by Estlund (2008, pp. 88-89) who argues – as against aggregative approaches – that Habermas, by evaluating the legitimacy of a law by judging whether it could have been produced by an ideal speech situation, is in fact relying on a procedure-independent standard. Based on the fact that I am concerned by a procedural account of legitimacy and for reasons of space, I believe that I can leave aside a discussion of Habermas’ theory.
Arrow makes no further substantive assumptions about the origin and nature of these preferences. This implies that his interpretation of the aggregative account of democracy treats individual preferences as given and as independent of the specific environment – both of the social states and of the decision-making process itself. (2009, p. 9)

In other words, there is an assumption that the agents’ preferences ought to be respected. Yet, since nothing in this account explains why they would be reasonable it is unclear that they actually ought to be respected. There is no evidence that the different preferences present in the disagreement have not been caused by errors and insincere judgments. Hence, there is something lacking in this account; evidence that the preferences are reasonable is essential if we are to solve the problem of rational motivation. This is because agents must be able to hold the decision ‘as if it was true’ and since the procedure only aggregates preferences, it does not provide any additional reason to act contrary to one’s best judgments unless we assume that agents already have reasons to respect the aggregate of preferences. We can easily see that in the case of abortion, agent Z would have no reasons to hold the common preferences of agent X and agent Y ‘as if true’, if Z did not have evidence that X and Y did not form their preferences based on false empirical knowledge. Hence, if we are to address the problem of rational motivation, some form of deliberation is called for to ensure that errors are removed and that disagreements can be seen as reasonable.

### 3.3 Democracy and Autonomy

Rather than focussing on the mechanical aspect of the decision-making procedure, some argue for democracy based on its moral superiority. One of these approaches justifies the democratic decision-making procedure by relying on the ideas of self-rule and autonomy: at the foundation of democracy would be the recognition of the value of people as equal and “self-originating sources of claims” and the “recognition of the authority of people to set their own ends.” (Anderson, 2009, p. 223) Hence there would be an intrinsic good in the idea that people decide the laws for themselves rather than having the law decided by a dictator; such a law “would not have the same authority for the community as a decision with exactly the same content that it had reached for itself through democratic procedures.” (Anderson, 2008, p. 136) Autonomy aims to explain how the decision made by the people can have authority over them: since the decision is made by the people rather than by an external decision-maker, it is supposed to have intrinsic value as an expression of their self-determination. It would therefore bridge their disagreement inasmuch as autonomy is a fundamental value that ought to be respected.

This approach provides an answer to an important question: why is a coordination solution, with exactly the same content as another one, more preferable if it has been achieved democratically? Nonetheless, it does not tackle the obstacle of rational motivation. It only provides a moral reason – which is not necessarily shared by all, as I explain below – to regard a democratic procedure as preferable to a different procedure given that it allows people to decide themselves what they should
do. It does not explain why agents should coordinate on solutions they hold to be unjust or incorrect. In other words, it does not provide a reason to see a coordination solution achieved democratically as more rationally motivated then one achieved by a dictator. This is especially the case if the dictator is a benevolent one who takes into account the views of his people. Anderson (2006) is conscious about this and it is why, I believe, she also puts forward an epistemic argument to support rational motivation. But then, it is no longer autonomy that is doing the argumentative work.

Moreover, relying on autonomy to justify democracy cannot explain how a decision trumps the agents’ other moral considerations. For this, there would need to be an agreement on the fundamental value of autonomy, i.e. on the fundamental ‘value of people as equal and self-originating sources of claims’. However, this agreement is not available. It would be possible to claim, e.g., that this is an over-rationalist approach and that people cannot actually set their own aims. As I already explained, respecting disagreement is essential based on our moral epistemology and based on the importance of justifying political power. A decision-making procedure whose justification relies on moral notions over which there is reasonable disagreement will fail to provide a reason to every agent which trumps their other moral considerations. It follows that holding autonomy as a fundamental value fails to provide a proper political justification for democracy which explains how disagreement can be bridged.

Furthermore, even if there was agreement on the value of autonomy, there would be disagreement on its implications: why should self-determination take the form of a democracy? There could be better ways to allow people to express their own ends than providing them with authoritative decisions, that which seems contradictory.\(^{48}\) There can be deep reasonable disagreement on the type of procedure implied by autonomy: e.g. why would autonomy require conducting day-to-day politics democratically? We could have a democratic decision-making procedure only in constitutional moments along with an easy procedure of constitutional reform. The day-to-day political institutions could then take whatever form the people decide, thus preserving self-rule without needing democracy on a daily basis. An argument for democracy \textit{qua} decision-making procedure must make clear why democracy ought to be a feature of the daily functioning of politics, and autonomy cannot explain this unless one adopts a contentious account of it. Furthermore, as I will explain below in greater detail when discussing Christiano’s approach, a decision-making procedure must also be connected with what the agents disagree about. There is a disconnection between autonomy and why a decision-making procedure is called for, as if autonomy could bridge each and every one of the disagreements democracy is meant to resolve. Accordingly, autonomy does not provide an adequate foundation for a political justification of democracy as a decision-making procedure.

\(^{48}\) See Wolff (1999).
3.4 Democracy and Fairness

Another common justification of democracy relies on ‘fairness’. I mention two general conceptions of fairness: I reject the first since it does not take disagreement seriously; and, in following Estlund, I support the second. I then discuss ‘fairness as equality’ and ‘fairness as respect’.

We can distinguish between a substantive and a procedural conception of fairness. “Substantive fairness [is w]hen each (relevant) individual has no more or less (of the relevant goods) than he or she ought to have, or is due.” (Estlund, 2008, p. 69) This type of fairness could apply to democracy in different ways: one could argue that democracy is apt to distribute goods in a better way than any other procedure, or that democracy distributes political power in the best possible way.49 I disagree with a justification of the democratic procedure which relies on this conception of fairness since the proper distribution of goods is precisely what we disagree about. We cannot rely on these highly contestable notions to justify the procedure which is supposed to bridge the disagreements we have about these matters. Substantive fairness must be excluded.

The second conception is “Intrinsic procedural fairness: the nonretrospective nonprospective fairness of the procedure whether or not it is properly run.” (Estlund, 2008, p. 70) Fairness, then means: “Full anonymity: A procedure is fully anonymous if and only if it is blind to personal features: its results would not be different if any features of the relevant people were changed.” (Estlund, 2008, p. 80) This defines a totally unsubstantial and mechanical procedure. This conception of fairness can be seen as a minimal account of what is required to respect disagreement since it does not pre-judge how to treat any position. Even if this account of fairness seems able to resist disagreement, can we argue that it justifies the need to vote and to deliberate, hence justifying democracy?

If the only thing we are concerned about is fairness, we could select any other fair decision-making procedure: “Why not flip a coin from among possible decisions? This would be not only blind to features of people other than their votes, but also blind to all features of people.” (Estlund, 2008, p. 82) Some substantial consideration is needed to make clear why voting and deliberation are necessary. Without this substantial notion, strict procedural fairness does not imply democracy. We must make clear, why, even if we are concerned about fairness, we do not only want to flip a coin to make a political decision. Fairness does not capture the fact that disagreement is about what ought to be done and that simply taking all views fairly into account, per se, does not provide any reason to regard the decisions made to be correct determinations of justice. Pure procedural fairness cannot meet the challenge of coordination while substantive fairness cannot meet the challenge of

49 “The instrumentalist accounts of Richard Arneson (2003) and Steven Wall (2007), for example, refer to some ideal egalitarian distribution.” (Peter, 2009, p. 63)
disagreement. Christiano holds that we should turn to equality to understand why we should care about democratic procedures.

**Democracy and Equality**

Christiano’s account is complex and well argued for. For brevity, I concisely mention the essential features of his argument for democracy before explaining why I take his account to be unsatisfactory. Christiano is very conscious of the fact of disagreement and he is also aware of what I call the obstacle of rational motivation. This is why he devotes an important chapter of his 2008 book to the justification of the authority of democracy. I think, however, that by relying on a substantial notion like equality, he fails to see that some of his arguments would work better with an epistemic conception of democracy and thus leaves himself open to disagreement.

For Christiano, equality plays the central justificatory role for the democratic procedure. Equality, here, “means that the interests of each member of this constituency should receive equal consideration in collective decision-making”. (Peter, 2009, p. 36)\(^{50}\) And equal consideration, for Christiano, implies an equal-say. The equality of interests of all individuals is based on their equal status as person which is founded in the agents’ status as authorities in the realm of values: they can appreciate values and bestow values upon things. (Christiano, 2008, pp. 15-16) Respect for this type of being is what is called for. From there, Christiano argues that we have fundamental interests that need to be respected equally, especially when, in society, we face the facts of disagreement, diversity, cognitive bias and fallibility. Democracy is called for since it is the only procedure which can publicly express equality, thus respecting these interests. (Christiano, 2008, p. 88) The argument also holds that one must not only be treated as an equal; one must be seen as being treated as an equal. One must also not be subjected to another’s judgement and, for this, one must be able to express one’s views so as to correct everyone’s cognitive bias towards their own interests. One must also be able to shape one’s world as to feel at home in it. All this can only be achieved through an open decision-making procedure like democracy.

My first claim is that Christiano’s approach is open to reasonable disagreement. If we agree that equality is the most fundamental notion of justice, it is unclear why its proper expression must be through giving an equal say to everyone. Christiano argues that this is based in our fundamental interests and in the fact that this is a clear public expression of equality. He is also aware of the highly contentious nature of equality. (2008, p. 58) He maintains, however, that his account of equality is still acceptable for two reasons. Firstly, it realises equality in a public way. Everyone can see that they are being treated as equal and that their interests are advanced equally. Secondly, Christiano retreats slightly on the importance to grant to disagreement:

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\(^{50}\) Referring to Christiano (1996, p. 53).
it is not necessary that there is agreement on the principle of equality itself. All that is required is that people can see that they are being treated as equals. This is because a requirement of consensus would impose an impossible burden on principles of justice. Theories simply cannot get off the ground if they require agreement on principles themselves as a condition of justice. They push the respect for judgment to a point that undermines justice and eventually defeats itself. (2008, p. 68)

The importance of taking disagreement into account, however, is not that we should have total actual agreement – some agents will certainly unreasonably disagree. Rather, I maintain that we should base our justification of a decision-making procedure on some notions which we do not reasonably disagree about in the first place: if we want a decision-making procedure to decide what is meant and required by equality, we cannot rely on a notion of equality to justify this decision-making procedure to those who are involved in a reasonable disagreement about equality. Hence, Christiano does not have much to say to someone who rejects equality such as a Schmittian or someone who values liberty more than equality. He can only tell her that she fails to recognise equality, even though this is precisely what people reasonably disagree about.51 The issue here is that equality is open to severe reasonable disagreement. Even when everyone agrees that equality is desirable we still disagree about the precise specification of equality. We cannot therefore rely on equality to found a decision-making procedure that would bridge disagreement.

On a different but related point, Christiano justifies authority as follows: “because all citizens have rights to an equal say and because the democratic assembly is the institutional method by which these equal political rights are exercised, the democratic assembly has a right to rule.” (2008, p. 248) If agents disobey or do not act according to the assembly’s decision, they take power in their own hands and do not offer equal respect to every citizen’s interests. They act so as to grant more value to their own interests and judgements. (Christiano, 2004) The authority of democracy relies on the idea that equal respect for everyone’s interests is more fundamental than other aspects of justice: “citizens never have a duty to violate public equality. The duty to promote and act in accordance with public equality is their most fundamental duty.” (Christiano, 2008, p. 265) Democracy is authoritative since the duty to respect public equality trumps other duties of justice.

The idea of equality does all the argumentative work here. The second claim I make relates to this ‘trumping’ feature of public equality; the same applies to the arguments based on autonomy I mentioned above. Problematically, a gap is left between our disagreements and the reasons why we decide democratically. What Christiano says is that treating people according to public equality trumps other reasons of justice but this reason has nothing to do with the reason why we disagreed in the first place. This fails to provide “ends that all believe to be desirable” or that they can see to be

51 Whereas my approach, following Misak, can offer a response: “If the Schmittian claims to have beliefs or claims to aim at truth, then one can criticise him on the grounds that he has adopted a method of inquiry that is unlikely to reach the truth.” (2000, p. 147) I come back to this later.
desirable. (Ober, 2008, p. 177) For Christiano, whatever the procedure decides is more desirable than any alternative resolution of our disagreement since it incorporates one’s most fundamental duty of justice, i.e. equality. It follows that agents are not provided with reasons to desire the decision of the procedure as a correct resolution of their original disagreement but with overriding/trumping reasons relating to equality. Hence, the authority of democracy does not tackle the rational motivation of the agents in relation to their original disagreement: they are not provided with reasons to see the decision made as being properly connected with their judgements about what ought to be done. Instead, they are provided with a new reason – respecting equality – to put their disagreements aside and this reason is always the same for each of their disagreements. Whether they disagree about after how many weeks abortion should be made illegal or about the right amount of tax to be paid, ultimately they ought not to obey the law because it can be seen to correctly resolve their disagreement, but because disobedience would be disrespecting equality. This is where the gap is: between the reason why a decision-making procedure was called for in the first place and the reason that is provided to hold the decision as authoritative. I contend that if we are to provide an argument for the authority of a decision-making procedure, we ought to be concerned about why the agents disagree. Otherwise, we fail to connect with their reasons. Even if Christiano’s arguments are sound, they fail to address disagreement and to tackle rational motivation properly. In perspective, the epistemic argument for democracy will seem more solid than his.

Democracy and Respect

Waldron and Besson base their respective accounts of democracy on the idea of respect for the agents’ views. I contend that they fail to provide a solution to rational motivation in a decisive way. Both Waldron and Besson start their justification of democracy from the idea of disagreement and the need to coordinate. They also see law as a form of authoritative coordination solution.

For Besson, the authority of law is connected with “the need for a common solution” and with the “respect for the fair conditions in which the common solution was arrived at”. (2005, p. 476) In other words, we first acknowledge that we have a duty to coordinate. From there, we can regard some coordination solutions as authoritative if they have been achieved appropriately: “democratic procedures not only constitute good coordination procedures, but amount to the fairest and hence to the most legitimate coordination procedures in circumstances of reasonable disagreement.” This fairness is founded in the right to an equal say since this equal say shows respect for everyone’s beliefs about justice. (Besson, 2005, p. 505) Since democracy respects everyone’s view, the law should stand “for the time being in the name of the whole community” (Waldron, 1999b, p. 101) and should be respected and deferred to.
I object that this account overemphasises our duty to coordinate, thus disregarding the obstacle of rational motivation. As with Christiano’s account, it seems as if the reasons why agents disagree do not play any role in the reasons why they should coordinate on a specific solution. The respect owed to the law trumps reasons why agents disagree in the first place. In other words, the need to coordinate is assumed to be more important than the reasons why agents disagree. I do not disagree that the need to coordinate is important: it is better to have a law on murder than none. There is no need, however, to say that any solution will do as long as we respect everyone’s view on justice. More needs to be said to the agents who genuinely hold, for instance, that 20 weeks is the appropriate number of weeks after which abortion should be illegal. It is not only respect for the agents’ views that is important but also responsiveness to their reasons and arguments and if that is the case, there is room for more than an argument based on respect. What Besson and Waldron fail to argue for is a proper reason to act upon a coordination solution ‘as if it was true’. Making a solution salient in a fair way is not sufficient to provide moral reasons to see the coordination solution as a proper determination of justice. Fairness might be essential to an account of a correct decision-making procedure, but more needs to be said if we are to act upon the solutions it provides. With Christiano’s, Waldron’s and Besson’s accounts, it is as if the most basic requirement of justice was to treat one another equally or with respect but equality and respect are too contentious and too disconnected from our disagreements to be able to bridge them. An epistemic argument can address these issues.

3.5 Democracy and Knowledge

There are different conceptions of the role knowledge plays in the argument for democracy. In this discussion, I adopt the distinction Peter draws, following Rawls, between rational proceduralism and pure proceduralism. (Peter, 2009, p. 66) The first emphasises the role of the procedure in the achievement of some procedure-independent standards; it is the capacity of the procedure to attain these standards which justifies it. The second is mainly concerned with the evaluation of the procedure itself – e.g. its fairness – rather than the value of the decisions it makes. I will discuss: (1) Rational epistemic proceduralism; (2) Pure epistemic proceduralism and; (3) Pragmatic epistemic democracy. I do not attempt to prove these approaches wrong but only to bring into light some of their deficiencies. In the next two chapters, I aim to reorganise/combine their arguments to better meet the challenges of disagreement and of rational motivation. I think that if we are to properly understand democratic authority, democratic legitimacy and the reasons to support democratic arrangements, we need to look at the different accounts of epistemic democracy and see how they can be reorganised to overcome their individual deficiencies.
Rational Epistemic Proceduralism

Rational epistemic proceduralism justifies the democratic procedure through its ability to attain predefined procedure-independent just or good results. For instance, one could argue that human rights are presumptive elements of any proper theory of justice. A procedure which would have a tendency to respect human rights, in a perfect – i.e. all the time – or imperfect way – i.e. most of the time – would be legitimate. Peter mentions that such a justification of democracy “rests on a veritistic social epistemology and links democratic legitimacy to the truth-tracking potential of democratic decision-making.” (2009, p. 74) The epistemic features of the process do not matter: what matters is the instrumental capacity of the procedure to get the procedure-independent right (and known) answer. Procedural standards, like fairness, matter only inasmuch as they help to attain the right answer. One must assume that “there exists, independently of the actual decision-making process, a correct decision”. (Peter, 2009, p. 111) Furthermore, one must also assume that this correct decision is identifiable procedure-independently and that we can infer that the procedure can attain it.

This first understanding is problematic with regard to disagreement and it is usually the main argument raised against the use of knowledge in the justification of democracy. As Waldron says, we cannot say that the results of a procedure are authoritative as long as they respect justice or people’s rights. To argue that a court’s judgement is good because it respects justice is wrong since this “would reproduce exactly the controversy that the Court was called upon to determine in the first place.” (Waldron, 1999a, p. 221) We rely on a decision-making procedure because we do not agree about what we ought to do collectively. By relying on objectionable procedure-independent standards to justify the procedure, one misses the point of providing a justification. If we are to prevent the reproduction of the disagreement at the level of the justification of the decision-making procedure, we would be better to rely on a second understanding of rational epistemic proceduralism.

Under this second understanding, adopted by Estlund, democracy is apt at attaining truth, “whatever it might be”. (2009, p. 18) Accordingly, he does not define what constitutes a right answer. He does, nonetheless, give some elements of what may constitute bad decisions and claims that if democracy is apt at avoiding them, we might have reason to hold it apt to attain good decisions in a better-than-random way. (2008, p. 160) These bad decisions are what he calls primary bads. They are presumptive bads for society and no one could reasonably hold them to be good: “war, famine, economic collapse, political collapse, epidemic, and genocide.” (2008, p. 163)

Estlund does not define clearly what in the democratic process makes it epistemically better than other approaches. To be clear, he does not argue that democracy is the epistemically best procedure. He only argues that it is better than random. (2008, p. 98) Such minimal epistemic capacity explains why we
should prefer democracy to any other fair (as anonymity)\textsuperscript{52} decision-making procedures, like coin-tossing.\textsuperscript{53} Furthermore, by being mute as to what a good answer is, this approach can also satisfy a general acceptability criterion. This criterion holds that a procedure, to be legitimate, ought to be generally acceptable: e.g. a procedure which would be epistemically better than democracy but which would give more votes to the educated would not be legitimate since there could be reasonable disagreement about who ought to have more votes. Since democracy is a procedure that avoids “invidious comparisons” (Estlund, 2008, p. 36), it can be generally acceptable. It is because it is an acceptable epistemic procedure that democracy can have legitimacy, not only because it is apt to get the right answer. The function of this general acceptability criterion is to limit the types of procedure that can be legitimate.

Democracy’s epistemic features explain its authority; that is why one would have a duty to act according to its decisions. They do not give reasons to believe, but rather reasons to obey. (Estlund, 2008, pp. 106-108) To explain this, Estlund relies on the idea of normative consent. He holds that non-consent to an epistemically fair procedure would be null – agents would be wrong in not consenting – as it would go against some humanitarian duty, and that the authority situation could obtain just as if someone would have consented to it. (Estlund, 2008, chap 7 and 8) In this case, it is not the outcome of the epistemic procedure that is judged, but the procedure itself: this procedure is preferable over other procedures inasmuch as it has these epistemic features. It is not the correctness of the outcome that plays the justificatory role regarding what one ought to do: one has an obligation to act according to the result of the procedure simply because it was issued by the procedure.

Estlund associates the epistemic function and the authority of democracy to those of a criminal jury. It is the tendency of the procedure, and of the jury, to attain correct outcomes that explain why they have authority. In a specific instance, one does not have to obey the decision of a jury because it is correct, but simply because this is what the jury issued. However, the fact that the jury has a tendency to get things right in a fair/acceptable way, just like democracy, explains why such a procedure should be selected. The structure of this argument is called epistemic proceduralism. It “does not limit itself to procedural values but brings in, in addition, a prospective epistemic value to democratic procedure – a tendency to produce decisions that are better or more just by standards that are independent of the actual temporal procedure that produced them.” (Estlund, 2008, p. 97)

I agree with and share most of Estlund’s framework.\textsuperscript{54} Nonetheless, I share some concerns with Anderson. The real argumentative work in Estlund’s account is done by the general acceptability

\textsuperscript{52} §3.4

\textsuperscript{53} See Saunders’s discussion of the role of fairness in Estlund’s arguments. (2010a)

\textsuperscript{54} The most notable difference is my account of authority. Overall, I believe that his idea of an epistemic proceduralism is accurate.
criterion. It explains why epistemically better procedures are not acceptable and why democracy has legitimacy. The acceptability requirement “is not an epistemic criterion at all. Its foundation, like the closely related principle of public reason, lies rather in a commitment to civic respect for citizens who hold a plurality of reasonable moral, theological, and philosophical ideals”. (Anderson, 2008, p. 135) Anderson’s objection is that the epistemic argument, in Estlund’s account, is not the only procedure-independent criterion. Estlund’s approach is still vaguely liberal and only uses the epistemic argument to explain why democracy is preferable over other decision-making procedures within that liberal framework. As Peter says: “he uses the epistemic argument only as a selection device, not as part of the defense of democratic procedure”. (Peter, 2008, p. 41) I agree with Estlund’s framework – epistemic proceduralism – that we must justify the legitimacy of democracy procedurally and that we can rely on its general tendency to attain the truth to do so. However, I contend that we ought to focus on the epistemic features of democracy rather than on its general acceptability. I hold that it is possible to make sense of fairness/acceptability through an epistemic argument, that which would prevent us from relying on Estlund’s general acceptability criterion. We might then be able to call the approach purely procedural as legitimacy would be wholly dependent on the epistemic features of the procedure.

**Pure Epistemic Proceduralism**

Peter holds that a decision is “legitimate if it is the outcome of a decision-making process that satisfies certain conditions of political and epistemic fairness.” (2009, p. 3) The justification of the democratic procedure does not rely on its capacity to attain any procedure-independent good. Rather, what matters are “‘the intrinsic merits of intellectual practices to judge [the] epistemic worth [of the procedure]’”. (Peter, 2008, p. 45) Following Longino’s procedural social epistemology, Peter defends that nothing more is required for the epistemic worth of the procedure than “critically engaging with each other in transparent and non-authoritarian ways.” (2009, p. 124) Knowledge should be defined as the outcome of such an epistemically fair social procedure and accordingly we do not need “a procedure-independent idea of truth.” (2008, p. 46)

Peter mentions four conditions that a procedure ought to satisfy to be seen as knowledge-producing: (1) “publicly recognized forums for the criticism of evidence, methods, and of assumptions and reasoning”; (2) the “uptake of criticism”; (3) “publicly recognized standards by reference to which theories, hypotheses, and observational practices are evaluated and by appeal to which criticism is made relevant to the goals of the inquiring community” and finally; (4) “tempered equality... of intellectual authority”. (2008, p. 46) When these conditions obtain, the procedure in question can

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55 Estlund mentions that his approach might be seen as an “undogmatic substantive” version of political liberalism. (2008, p. 57)

56 As I argued in the previous chapter, there is an epistemic argument to support acceptability or respect for disagreement.
produce legitimate outcomes since it is politically and epistemically fair.\(^{57}\) (Peter, 2008, p. 51) Such an account is purely procedural. In my view, Peter offers a very good account of how we can incorporate epistemic considerations in a procedural account of the legitimacy of democracy without supposing knowledge of procedure-independent standards and I aim to remain as close as possible to pure proceduralism in my own account.\(^{58}\)

Nonetheless, I am unclear why, under Peter’s account, agents should be committed to an epistemic procedure or why they should care about fair conditions of knowledge production. Estlund and Dewey’s accounts, to which Peter responds, make clear why it is important to have an epistemic argument. For Estlund, it is because it allows getting procedure-independent correct decisions; for Dewey, the epistemic function ensures that we increase welfare; but for Peter, we can dismiss “the focus on correctness as normatively misleading.” (2008, p. 50) But if this is right, then truth is not what explains the desirability of the fair epistemic features of the procedure. These fair epistemic features are rather, in a sense, one and the same thing as knowledge production and intrinsically desirable. Yet, if we speak of processes of knowledge production, truth is already present in the picture and explains, partly, why such conditions are desirable: if fair conditions of knowledge production are valuable, and if agents should care about them, it is because they allow them to achieve *some form* of *correct* resolutions of their disagreements. It is right that truth might be achievable only procedurally, but we do not need to equate truth with whatever a procedure issues. It is by relying on the idea of truth as a guiding aim, whatever it might be, of our procedure that we can explain the *authority* of democratic laws. The problem I mention here is only one of incompleteness rather than a truly problematic one: insufficient attention to truth prevents this approach from explaining how there can be a perceived obligation to obey democratic laws. Hence, we should be more attentive to truth when establishing the authority of democratic laws.

This is essentially because having truth/knowledge as the rationale of the procedure’s features explains rational motivation. The procedure-independent standard of truth is necessary to make sense of the capacity of the procedure to achieve coordination: if one does not have reasons to see the results of the procedure as possibly correct one cannot be rationally motivated to act upon the results of the procedure. We need to connect the results of the decision-making procedure with what the agents disagree about. This does not change much to Peter’s account as we can still rely on a purely procedural account while claiming that nonetheless these fair epistemic features are those necessary to ensure that the decisions will be good, at least, in a better-than-random way. In other words, we must link truth and the process by which it must be achieved without equating truth with whatever the

\(^{57}\) Peter maintains that “political and epistemic fairness are just two sides of the same coin.” (2009, p. 135)

\(^{58}\) Based on her discussion of Estlund, Peter (2009, pp. 130-131) would certainly hold that my approach is more appropriately a form of ‘rational epistemic imperfect proceduralism’.
procedure achieves – the aim is to reconcile Estlund’s epistemic proceduralism and pure epistemic proceduralism. This is a step which, I contend, is necessary to make sense of how a decision can be seen to be authoritative and of why precisely we should be concerned about the legitimacy of a procedure. The pragmatist argument for democracy can help to complete this account by providing a proceduralist epistemology suitable for pure epistemic legitimacy and explaining the reasons agents have to support democratic procedures.

Pragmatist Accounts

As an epistemic theory of democracy, the pragmatist account addresses a different question than the two previous approaches. Estlund’s and Peter’s accounts are concerned with the authority and the legitimacy of the democratic procedure: they discuss the conditions that need to be met for the democratic procedure to rightfully wield political power or to create obligations. The pragmatist epistemic account of democracy, on the other hand, is rather concerned with providing an argument that explains why agents are committed to decide democratically. It shows that democracy is required to achieve our epistemic commitments. In this sense, it explains why agents, based on their status as belief holders, have strong reasons to carry on coordinating within a democracy even when they strongly disagree with the decisions made. As Talisse recognises, the “folk epistemic justification of democracy does not provide a theory of legitimacy. It shows only that despite our deep moral differences we each have a reason – the same reason – for upholding democratic commitments even in the light of democratic outcomes that strike us as morally unacceptable.” (2009b, p. 51) These democratic commitments are simply that agents ought to keep coordinating, if they are concerned with truth, in a society involving the usual liberal democratic rights.

In further detail, the pragmatist account of democracy holds that political decisions can be true or false. This is something I mentioned earlier: if agents disagree about what ought to be done, they are already claiming the correctness of their own view or, at least, the incorrectness of their opponent’s view.59 Once we acknowledge that agents involved in a political disagreement are committed to the truth or correctness of their position, we can provide an argument for deliberation and an open public sphere. This is because according to the pragmatist, having beliefs implies certain normative requirements on the belief holder. (Misak, 2000, p. 46)

This is where the strength and cogency of the pragmatist argument reside. I claimed that most approaches of democracy rely on objectionable moral arguments to justify democracy. The pragmatist account proceeds differently. It finds a common ground shared by everyone. This common ground is the fact that agents all hold beliefs and therefore they are all committed to the truth of their beliefs. This “is something which cuts across whatever divides us from others.” (Misak, 2000, p. 105) Hence,

59 FN 35
60 I use both indifferently.
we may disagree about a decision and feel that ‘exit’ is the best option. However, we do have beliefs and having beliefs commits us to truth. Truth can only be attained in a democracy, goes the argument. Hence, one has a reason, that is not a moral reason and that one is already committed to, to keep coordinating even in cases of deep politics.

This commitment to truth explains why decision-making should involve some form of deliberation. This is because beliefs, to be reasonable, must be responsive to reasons and experiences: “A legitimate procedure must be answerable to reasons – it must be capable of paying attention to the reasons that matter. […] Since reasons come out in debate and deliberation, a legitimate procedure must be one that proceeds by debate and deliberation.” (Misak, 2000, p. 106) If agents are committed to the truth of their beliefs, they are therefore also committed to a decision-making procedure which involves deliberation and reason-exchange. This commitment is based on a shared commitment, thus avoiding the problem of disagreement. Talisse formulates the argument as follows:

(I) To believe some proposition, \(p\), is to hold that \(p\) is true.
(2) To hold that \(p\) is true is generally to hold that the best reasons support \(p\).
(3) To hold that \(p\) is supported by the best reasons is to hold that \(p\) is assertable.
(4) To assert that \(p\) is to enter into a social process of reason exchange.
(5) To engage in social processes of reason exchange is to at least implicitly adopt certain cognitive and dispositional norms related to one’s epistemic character. (2009a, pp. 87-8)

Talisse and Misak then argue that this process of reason and experience exchange can only take place in a society which includes, for instance, “the protections and liberties associated with freedom of thought and expression.” (Talisse, 2009a, p. 122) Broadly, usual liberal rights associated with a free society would be called for inasmuch as they allow the expression of diverse reasons and the possibility of various experiences. This social order is only possible in a democracy.

I am, however, unconvinced that democracy qua decision-making procedure is warranted. I agree with most of the pragmatist account: deliberation is warranted by the fact that we aim to get things right. It is also clear that getting things right cuts across disagreement and that it provides a good argument for the obstacle of motivation in the face of deep politics. However, what the pragmatist account justifies is an open society, one where experiences and reasons can be expressed. It does not explain why the decision-making procedure should take the form of deliberation followed by a vote. Nor does it explain why people should obey the decisions made by the procedure and it leaves open why one ought to act according to the decision of a specific decision-making procedure. In this sense, it does not address rational motivation; it only explains why certain features of democracy are necessary for proper beliefs to be achieved. I contend that the pragmatist argument only justifies democracy as a social world, one which involves liberal rights, but not necessarily democratic rights.

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This is because the link between the epistemic argument and the need for a decision-making procedure is left open. The pragmatist argument for democracy ought to explain the legitimacy and the authority of the democratic decision-making procedure rather than only why one is committed to a process of reason-exchange. This is why Talisse acknowledges that “[t]he folk epistemic view and Estlund’s epistemic proceduralism are complementary.” (2009a, p. 137) This is also why I aim to combine the various epistemic arguments in the next section.

To conclude this chapter, I have explained different obstacles to the justification of democracy: disagreement, motivation, identification, rational motivation and compliance. I claimed that most usual approaches of democracy either fail to take disagreement seriously or fail to explain rational motivation. The usual epistemic arguments for democracy do not escape these two problems. Amongst the three epistemic approaches presented, the pragmatist account explains better why an epistemic argument for democracy is called for: since it relies on something which cuts across the agents’ disagreement, it provides a foundation for the justification of a decision-making procedure which can withstand disagreement. However, as I just explained, it is also incomplete and needs to be revised so as to address the questions of democratic authority and legitimacy. My aim in the next chapters is to revise the pragmatist argument so as to provide a strong justification for democracy.
SECTION 2

THE EPISTEMIC FEATURES OF DEMOCRACY
CHAPTER 4: A REVISED PRAGMATIST APPROACH

The three epistemic approaches to democracy I presented individually fail to provide a complete theory which would explain the authority of democracy, its legitimacy, and the reasons agents have to uphold democratic arrangements. This is firstly because insufficient attention to the epistemic features of democracy affects our capacity to provide a proper account of democratic legitimacy. For Estlund, the epistemic features of democracy are less central to legitimacy than the ‘liberal’ general acceptability criterion. In this sense, his account does not distinguish clearly between liberal and democratic legitimacy. Secondly, insufficient attention to the notion of authority prevents a clear explanation of rational motivation. This is the problem I saw with Peter’s account, in which truth/correctness as a normative standard is evacuated. Thirdly, insufficient attention to both authority and legitimacy prevents an explanation of rational motivation and of the structure of the decision-making procedure. This is the problem I saw with Misak’s and Talisse’s accounts, since they do not provide an argument explaining why agents should obey democratic laws or how to organise democratic institutions.

In view of these shortfalls, but also in view of the fact that these approaches can be seen to complement one another, I maintain that we should revise and combine the different epistemic arguments in order to benefit from their strengths and to compensate for their deficiencies. By combining and restructuring the epistemic arguments, in this chapter and the next, I aim to explain in one overarching approach the authority of democracy, its legitimacy and the reasons we have to uphold democratic procedures. I firstly present the relevant epistemic features of democracy. Secondly, I argue for the (assumed) authority of the decisions made by a procedure that incorporates such epistemic features. Accordingly, my aim is to provide an account of the features of a decision-making procedure that are necessary if one is to regard the decisions made by that procedure to be authoritative. These features will then provide a pure procedural account of democratic legitimacy since the legitimacy of a procedure is to be associated with its capacity to provide agents with indicative reasons.62

This chapter and the next are best understood as a progressive explanation of different, but related, epistemic features. Most of these fall and stand together: without deliberation and collective reasoning, there is no relevant revision process and without a revision process, deliberation cannot be fully realised. In this chapter, I revisit the pragmatist approach to democracy and how it relates to deliberative democracy. I identify three presumptive aims of decision-making in the circumstances of politics. These aims explain the proper role of deliberation and why it can be seen as a form of inquiry. This section also provides an epistemic argument for political equality and freedom of speech.

62 §1.2
and conscience. Finally, I discuss why only democracy, understood as this process of deliberation involving political equality, can be seen as necessary by rejecting, for epistemic reasons, both epistocracy and consultative dictatorship. This chapter provides arguments to regard some features of democracy to be essential if we are to assume that democracy can achieve correct determinations of justice. The next chapter explains in more detail how democracy can actually be seen to achieve correct determinations of justice. These two chapters together provide an account of epistemic democratic legitimacy.

Beforehand, however, it ought to be clear that I am not putting forward a strictly veritist account of legitimacy: “According to such accounts, there exists, independently of the actual decision-making process, a correct decision and the legitimacy of democratic decisions depends, at least in part, on the ability of the decision-making process to generate the correct outcome.” (Peter, 2009, p. 111) I do not deny the first part of the definition: there are procedure-independent correct political decisions; it is as well a pre-supposition of our disagreements.

What I disagree with is a certain reading of the second part according to which there would be a direct relation between an independent standard and legitimacy. We ought not to judge the legitimacy of a decision-making procedure through its ability to attain an independent standard of justice. Such an independent standard would be some substantive notion that is not arrived at procedurally, e.g. a procedure-independent notion of equality. My objection, following Estlund, is that: “We often do not have independent access to the truth by which we can calibrate the epistemic value of some method or process of investigation” (2008, p. 170) and often this independent standard is precisely what we disagree about. Hence, if we are to adopt a ‘veritistic approach’ and avoid disagreement, we need to leave the notion of a correct outcome unfilled: ‘correct outcome’ must stand for ‘whatever the correct outcome might be’. In other words, we acknowledge that there is a correct outcome (at least one) but we refrain from providing any account of what that correct outcome is. Accordingly, my argument will be that the legitimacy of a decision-making procedure depends on its ability to attain some independent truth, or correct decision, whatever this might be, and this can only be explained in a purely procedural way.63 Keeping this notion of a correct outcome in the argument is important since it helps to explain rational motivation and the structure of the decision-making procedure.

In consequence, the notion of an epistemic procedure becomes central to my argument. This is because, by rejecting strictly veritist accounts, “the case rests on making the process of deliberative inquiry – not its outcome – the source of epistemic value.” (Peter, 2009, p. 128) It is the way in which we inquire that explains why a procedure has epistemic value in a way that can withstand

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disagreement. Nonetheless, I still maintain that the correct procedure is correct because it is likely to get the right outcome even if we lack an independent access to what this right outcome is: the actual result of a procedure is not what we aim for but some independently correct resolution to our disagreement.

The pragmatist account of democracy offers the proper framework to understand what this process of deliberative inquiry involves. It provides an explanation of the proper epistemic features that are necessary for a decision-making procedure to be held capable, over time, of attaining correct decisions, whatever they might be. However, the function of democracy is not only to achieve true conceptions of justice. Democracy is a decision-making procedure – not a scientific procedure. Hence, I offer three presumptive aims of decision-making: justice, sustainability and concord. It is in this respect that my approach is a revised pragmatist one. From there, I discuss the different features that democracy ought to exemplify to attain these aims. I first discuss the idea of deliberative democracy and how truth is a regulative idea of deliberation. I then discuss how deliberation can be seen as a form of collective reasoning and mention some of its epistemic features. I then argue for a minimal conception of political equality, freedom of speech and conscience.

4.1 The Aims of Inquiry and of Decision-Making

Within the circumstances of politics, disagreeing agents remain committed to coordinate on a particular course of action. For democracy to appear as the appropriate procedure to achieve coordination, we must make sense of the fact that it is decision oriented. In this sense, deliberation, which is central to most epistemic accounts of democracy, cannot be an aimless exchange of reasons and experiences: it must be located within this framework of democracy as a decision-making procedure. Moreover, democracy must be instituted with the aim of reaching rationally motivated decisions and hence we cannot be concerned only with epistemic considerations. This is because a decision-making procedure will differ from a purely epistemic one – e.g. a scientific investigation – inasmuch as they do not share all the same aims. In this respect, I argue for three presumptive aims of decision-making which are essential to understand the distinction between inquiry and decision-making and why deliberation is only one part, though an essential one, of democracy. Consequently, democratic legitimacy will include more than epistemic considerations; even though they are key elements they do not provide the whole picture of democratic legitimacy.

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64 As I will argue, it is however what we can infer of the outcome – that it is a correct determination of justice – that explains the assumed authority of the decision made.

65 It is by putting the emphasis on this notion that I differ from Misak’s and Talisse’s accounts.
The Presumptive Aims of Political Decision-Making

I hold *justice*, *sustainability*, and *concord* to be the presumptive aims of political decision-making in the face of reasonable disagreement. These aims are those which are presupposed by the fact of disagreement and by the fact that agents try to achieve coordination on a common solution. Relying on the idea of aims of decision-making does not equate the truth of political decisions with whatever satisfies these aims in a given context. As Misak says: “truth is not a matter for some particular community. If a belief is indefeasible, it would stand up to whatever could be thrown at it, by any community of inquirers.” (2004, p. 10) Truth, following the pragmatist approach, can only be asserted in the hypothetical end of inquiry, were there no more evidence, reasons or experiences to be assessed and were there no reasonable disagreement on the proper meaning of the evidence. Relying on these aims of political decision-making explains what is the role of deliberation and what ought to count in favour of a political decision-making procedure. In this framework, an epistemic argument for democracy will maintain that the democratic procedure can satisfy these aims. Furthermore, since, as aims of political decision-making, they are presupposed by the fact of disagreement and by the will to coordinate we can assume that they are not subject to reasonable disagreement. This will become clear once I explain why these aims can be seen as conditions for taking disagreement seriously.

Note first that these aims are restricted to, at least, the circumstances of politics. In cases of political conflicts such as war, these conditions may not apply since in these circumstances one is not primarily concerned with decision-making. Arguably, war is not designed to achieve mutual wilful rationally motivated coordination – though it might achieve compliance. My claim is more precisely that when agents are engaged in decision-making in the face of reasonable disagreement, the aims of decision-making I identify can be assumed as those they want the procedure to achieve. This is why they are ‘presumptive’. Achieving these aims is not constitutive of decision-making. It is possible to have decision-making procedures that do not achieve them without having to claim that the agents are involved in a performative contradiction. Neither is it impossible to imagine decision-making procedures designed, e.g., to balance the supply and the demand. Rather, these aims are those which we can assume to be desirable for any rational agent involved in political decision-making in the face of disagreement. Providing reasons to regard a decision-making procedure as satisfying these aims provides reasons to regard this decision-making procedure as rationally warranted.

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66 I use ‘justice’ loosely so as to designate the truth about how to coordinate. It designates the correct/true solution to any political problem faced by a given community. I prefer to use ‘justice’ rather than ‘truth’ or ‘morality’ to make clear that it is not all truths or any notion of normative action that is aimed at by decision-making procedures. What we aim at is the truth of our social and political arrangements and this can be called justice. I hence often move from justice to truth in the following chapters and the reader should assume that both refer to the – ultimate – correctness of our political decisions.

67 This is meant as an elucidation of the terms and their essential connections rather than as a reduction of truth to a set of necessary and sufficient conditions.
Justice

Political decisions can be formulated in two different ways: “What shall we do?” and “What should we do?” (or ‘What ought we to do?’). (Richardson, 2002, p. 136) Only the second is a cognitive question – I refer to this ‘ought’ in a political context as justice. My claim is that agents, when involved in political decision-making, can be assumed to aim for justice or correct decisions. As I mentioned earlier, disagreement, as opposed to conflict, presupposes the idea that the agents aim to achieve a correct solution. Even political conflicts of interests could ultimately be reduced to a belief that ‘one ought to pursue one’s interests’. As Gaus argues, “practical controversy is based on an epistemological dispute. And because this is so, it seems doubtful that they [the agents] would be satisfied with a dispute resolution procedure that makes no attempt to track the underlying epistemological issue.” (1996, p. 187) If a decision-making procedure is to achieve coordination, it ought to address the agents’ disagreements regarding what ought to be done: the procedure must be seen as able to provide a correct solution to their disagreements.

In this sense, when agents disagree about what ought collectively to be done, it can be assumed that what they aim at when coordinating is not simply to achieve any decision or compromise or to make their interests win out. It is indeed the case that agents might be forced into a compromise by the circumstances or by the partial incompatibility of the different views present in the disagreement. Nonetheless, the compromise, or the decision, thus achieved has to be seen by them as acceptable in some sense. It could certainly not be held to be utterly unjust as otherwise we can seriously doubt that they would agree to freely coordinate. We can also seriously doubt that agents would coordinate on a decision that could be seen to be in place only to satisfy some party’s private interests. This is because, for one thing, if agents are to achieve coordination on a decision, they ought to have some rational motivation. It is not sufficient to make a coordination solution salient; there must also be a reason for this coordination solution to trump one’s own best judgement. Justice, qua truth of the political decision, is what we can assume rational agents to aim at when they disagree and try to overcome their disagreements through a political decision-making procedure.

Is it reasonable, however, to assume that rational agents ought to aim at justice and that they will not only pursue their own personal interests? To be clear, my position is not that it is irrational to pursue one’s own interest. What I claim is that in circumstances where agents disagree about what they ought collectively to do and where they are concerned with a rationally motivated decision, it would be irrational not to try to achieve a correct decision, whatever that might be. This is because, as I said, without aiming at justice, it is unclear how every agent would be rationally motivated to pursue a coordination solution with which they disagree or in which their interests are not being maximised.

§3.1.1
Aiming for justice, whatever it might be, is a more fundamental normative consideration than maximising interests; ‘whatever it might be’ can be seen to include ‘maximising interests’. In this sense, aiming for justice provides a stronger justification for a decision-making procedure than maximising interests.

Furthermore, in response to those who would claim that it is unrealistic to claim that agents can be assumed to aim at truth in politics, I would respond that one must not assume a “pessimistic individualist” approach that “regards individuals as confronting each other in politics from behind the fixed barricades of interests.” (Richardson, 2002, p. 153) That which is a method, methodological individualism, to explain political phenomena^69 must not become an assumption of what is actually the case^70 nor of what ought to be the case.

Justice must be assumed to be the first aim of political decision-making if we are to explain rational motivation. Since justice is associated with the truth about collective decisions, we can assume that, in general, what is necessary to achieve knowledge will also be necessary to achieve justice. However, this is not the sole aim of decision-making in the face of disagreement: “law’s ultimate aspiration may be justice, its proximate aim and defining task is to supply some formal constitutive structure as a framework of practical reasoning designed to unify public political judgement and coordinate social interaction.” (Besson, 2005, p. 124) There are hence two further aims: unification and coordination (that which I regard slightly differently as sustainability and concord). These are part of the aims of decision-making since agents do not only aim to find justice, they also aim to achieve a decision that will stand, for the time being, as what ought to be done. By arguing for these two non-purely-epistemic aims, I strike a clear difference between ‘purely epistemic’ and ‘epistemic decision-making’ procedures.

**Sustainability**

Justice is the overall aim of political inquiry: it explains what disagreement is about and how to achieve rational motivation. However, the democratic procedure, if it is to achieve rational motivation for all, must also aim for sustainability. One can conceive of a properly issued democratic decision with which a group of reasonable agents disagrees too strongly to coordinate on: this would be an unsustainable decision. I contend that if law must ‘unify public political judgement’ it is because a decision-making procedure must achieve a sustainable decision, i.e. one that all can regard as acceptable or not too objectionable. This is not to equate the aim of decision-making with agreement nor with the idea that we must only aim at compromises. Rather, I claim that to succeed in its function, the law must not be regarded by some party as something totally objectionable. To achieve

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^70 See Talisse (2009a, pp. 111-113).
this, the decision-making procedure ought to take the agents’ views into account – to unify public political judgements – so as to avoid those strong objections which would bring about political decay.

In other words, a decision-making procedure must be able to prevent politics degenerating into open conflict. According to Rawls, cited by Raz: ‘The aim [of a theory of justice] is not to direct us towards true, valuable ideals, but to achieve certain practical political goals – to “help ensure stability from one generation to the next,” to secure stability and social unity, and to achieve this through bringing about a consensus on certain constitutional principles.’ (1999, p. 140) In a related but different way, my claim is that a decision-making procedure, even if it does not have to aim for consensus to achieve social stability, must at least aim for sustainable decisions. It is part of the idea of trying to coordinate in the face of disagreement that the decision made should not bring about political decay. A related, but slightly different aim is concord.

Concord

Concord is a political virtue that is not often mentioned currently, even though it has a long history in political philosophy and even though it is a presupposition of political life. Even agonistic societies must involve some form of concord if we are to speak of one society rather than conflicting entities. Upholding the aim of concord does not deny the positive role of conflict in society nor does it imply that it ought to be prevented.\(^{71}\) My claim is that a decision, if it is to act as a proper political decision in the face of disagreement, must be able to achieve wilful coordination and this coordination – rather than forced compliance – is what is called concord. This is only to claim that the decision made by the procedure must be able to achieve the aim for which the decision-making procedure was instituted in the first place. Concord differs from sustainability inasmuch as it emphasises the ‘wilful’ aspect of coordination, while sustainability emphasises the ‘not too objectionable’ one. It is essential in understanding why a coordination solution can be seen as a decision as opposed to an imposed solution. In this sense, it holds that force should not be the ultimate grounds for coordination since we are involved in decision-making rather than in coercion and compulsion.\(^{72}\)

Justice, sustainability, and concord are not open to reasonable objections in the context of decision-making in the face of reasonable disagreement – within the circumstances of politics – inasmuch as they are part of what it is to take disagreement seriously into account. A purely epistemic procedure ought not to be concerned with sustainability and concord since such a procedure is not about achieving wilful coordinated action. Conversely, a political decision-making procedure must be concerned with the acceptability of its justification if it is to carry on existing. The continued

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\(^{71}\) Even Mouffe’s *agonistic democracy* (2000), for instance, is compatible with some form of concord.

\(^{72}\) See Dewey (1976 (1939), p. 228), where concord is present though not named as such.
existence of democracy is something to which we are epistemically committed – if we are to achieve correct determinations of justice, we must ensure the continued existence of democracy. We can only ensure the continued existence of democracy by taking disagreement seriously into account. For instance, an unsustainable decision could be seen as one which fails to take properly into account some very strong reasonable objections. Since these objections are not acted upon by the procedure, it is reasonable to assume that some agents might not agree to coordinate on that decision. Hence, the decision will not be sustainable because it has failed in taking some agents’ disagreement seriously. A decision which cannot achieve concord could be one that fails to provide rational motivation or has disregarded important evidence presented by some agents. If disagreement is to be taken seriously into account, the decision made ought to be rationally motivating and ought not to disregard the agent’s views. If a decision-procedure fails to respect reasonable disagreement, it will fail to achieve one of the aims of decision-making.

Democracy must provide us with reasons to regard its decisions to be just, sustainable and able to achieve coordination. In most cases, an epistemic argument supporting the idea that the procedure is apt to achieve correct determinations of justice would be sufficient. However, there are cases of irresolvable disagreement; this is where sustainability and concord become more important. In these circumstances, it must be clear how epistemic democracy can also achieve these aims. I discuss this issue in the next chapter. At this point, I explain how deliberation is a key element of these three aims. This is because it can be seen as a process of collective reasoning aiming at truth which allows the procedure to take disagreement seriously into account.

4.2 The Idea of Deliberative Democracy

The fundamental aim of decision-making is to achieve justice by keeping in mind that the agents disagree about what justice is. It must first be explained how a democratic decision-making procedure can be truth-oriented. In this respect, I rely on truth as explained by the pragmatist approach:

“The core of the pragmatist conception of truth is that a true belief would be the best belief, were we to inquire as far as we could on the matter. […] ‘best’ here amounts to ‘best fits with all experience and argument.’” And under another formulation: “A true belief […] is a belief that could not be improved upon, a belief that would forever meet the challenges of reasons, argument, and evidence.” (Misak, 2000, p. 49) Truth is essentially related to reasons, arguments and evidence: it is then also essentially related to deliberation inasmuch as deliberation is the proper means to subject beliefs to reasons, arguments and evidence.

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73 §3.5.3
74 One can see this as a minimal notion of truth that makes sense of how knowledge can be achieved based on the various ways a belief can be fixed. This notion should also be stable across various accounts of truth. (Talisse, 2011, pp. 564-566)
Consequently, epistemic democracy cannot be anything but deliberative. To be legitimate, a democratic procedure must involve extensive deliberation, before, during and after decision-making. An account of epistemic democratic legitimacy cannot simply rely on voting: one must have evidence that the judgements involved in a disagreement are reasonable and to be properly reasonable, these judgements must be subjected to deliberation. Simply voting on pre-existing options is insufficient since one does not have any evidence that the different options are reasonable or have been subjected to all relevant considerations. Proper epistemic agency demands an open social world where reasons and experiences are made widely available. To cut across our disagreements, a decision-making procedure must recognisably aim at truth and this cannot be the case if one does not have evidence that the different positions are subjected to reasons and experiences. Deliberation is the necessary means for our decision-making procedure to subject these different views to reasons and experiences and by the same token to aim at truth. Deliberation is hence essentially part of the legitimacy of epistemic democracy.

It ought to be clear that the epistemic features of democracy never provide one with certainty about the truth of the decision. This is because one can never claim that one has reached the end of inquiry; one is never in a position to know that one has achieved knowledge\(^{75}\): “the best that can be secured at any moment […] is well-justified belief, which is not necessarily true.” (Westbrook, 2005, p. 46) This is, however, sufficient for democracy. It only needs to achieve rational decisions\(^ {76}\) in order to achieve rational motivation. A rational decision/belief is, following Misak, a belief that “best fits with the evidence that we currently have.”\(^ {77}\) (2000, p. 57) To make sense of the idea of a rational decision, we must make clear what it is for a decision to best fit with our evidence. To this end, I need to explain the notion of aims of inquiry. These are necessary to make sense of which reasons and experiences should bear any weight in our deliberation and what constitutes a well-justified belief. They explain the direction that our deliberation ought to have. When these aims are satisfied, one can claim that one has reached a rational belief, and were they “to be forever satisfied, then the aim of truth would be satisfied as well.” (Misak, 2004, p. 14)

We can assume some aims of inquiry to be almost essential to any proper account of inquiry: “empirical adequacy, coherence with other beliefs, simplicity, explanatory power, getting a reliable guide to action, fruitfulness for other research, greater understanding of others, increased maturity, and the like.” (Misak, 2000, p. 54) I will not detail what the precise aims of inquiry about justice are

\(^{75}\) I restrict this claim to political and moral questions since, in these fields of inquiry, we do not have a full account of what the relevant evidence is or if we are in possession of it. The case might be different when I aim to achieve knowledge of where I left my watch for instance.

\(^{76}\) There could be more than one rationally motivated decision. §2.2.2

\(^{77}\) Even if a specific decision is not the one that best fits with the evidence, one can still acknowledge that the procedure in place is the one allowing the decision to be corrected so as to better fit with the evidence.
since this is part of what disagreement about justice includes. We can nonetheless regard Misak’s account as providing some of the minimal aims we expect beliefs about justice to satisfy.

This reliance on the aims of inquiry and how truth relates to them makes clear why my approach is essentially pragmatic. The idea of truth involved in my approach is not transcendental. I do not deny that there can be a true account of justice: inquiry is still about finding a true conception of justice and about telling how the world actually is. However, a conception of justice is useless if it is to be isolated from experiences and what we want a theory of justice for. A true conception of justice ought to be assertable and ought to satisfy the aims of inquiry. A ‘true’ conception of justice that would not be accessible by reasons or what agents actually experience in the world would be “spurious”. (Misak, 2000, p. 51) The idea of truth as the satisfaction of the aims of inquiry acts as a regulative idea of deliberation; it explains the structure of deliberation and its direction.

This account of truth is “an ideal that is unrealizable and yet serves a valuable function, in this case that of keeping the road of inquiry open”. (Westbrook, 2005, p. 46) This explains why deliberation must be constant: before, during and after decision-making. Furthermore, truth as defined by the pragmatist and as the object of epistemic democracy is, ‘whatever it might be’ since the content of a true decision remains undefined. Additionally, having truth rather than consensus as the aim of deliberation also explains why even after a decision is made deliberation remains open and why sustained disagreements are not problematic. As Waldron says, we can assume that consensus – trying to achieve one common view on the problem at hand – can be “the internal logic of deliberation” without “stipulating it as the appropriate political outcome.” (1999b, p. 91) Epistemic deliberative democracy does not have consensus as a condition of proper decision-making. All that epistemic deliberative democracy holds is that our deliberations should be organised so as to ensure that they can properly aim at truth: in this respect, I explain in the next section how deliberation ought to be open, inclusive, free, without prejudice, and honest if it is to properly aim at truth by subjecting views to experiences and reasons.

78 “The idea of truth has three importantly distinct aspects or faces: correspondence with the way things are, coherence with the evidence, and acceptance of fallibility.” (Richardson, 2002, p. 133) Even if the pragmatist approach emphasises the role of evidence and the fallibility of our beliefs, it must be clear that true justice is not only what is achieved by a decision-making procedure at a given time. True justice would only be achieved in the hypothetical end of inquiry. Hence, there is still a distinction between the actual results of the procedure and truth, though the pragmatist approach equates the two in the hypothetical end of inquiry. See Misak (2000, p. 57).

79 Keeping the road of inquiry open is valuable only inasmuch as it allows our beliefs and decisions to be subjected to further reasons and experiences, since this ensures that they are truth-oriented. It is not truth that is instrumentally valuable, but the fact that it acts as a regulative idea.
Deliberation and the Aim of Justice

As Misak says: “What we know about truth is that it is what we aim at when we assert, believe, or deliberate.” (2000, p. 60) Accordingly, I maintained that deliberation is essential to the idea of epistemic democracy since it is the proper means to subject one’s belief to reasons and experiences and to achieve rational motivation in a political context. In this section, I explain in more detail how deliberation provides reasons to regard democracy as satisfying the aims of decision-making. More particularly, I explain how deliberation is truth-oriented and how this makes democracy capable of achieving the aim of justice. Furthermore, though I discuss this point less, it should be clear that being a process of reason-exchange, deliberation should make accommodation to other agents’ views possible and therefore should allow for the possibility of sustainability and concord. This is because genuine arguments and evidence can bear on the decision to be made and accordingly we can expect some disagreements to be resolved or at least to be acknowledged: either through compromise or through accommodations.

In chapter 2, I discussed the notion of reasonableness and explained different ways to fix a belief. I argued that the proper way to achieve knowledge is to subject beliefs to reasons, experiences and evidence. I also claimed that if we are to identify the zone of disagreement, it is important to eliminate errors, misconceptions, misinformation and other defects of reasoning from the available political views. The proper means to ensure the reasonableness of our disagreements is to subject them to reasons and evidence. Deliberation, if it is to be truth-oriented, must therefore be a means to subject beliefs and proposal to reasons, arguments and evidence in ways that avoid prejudices and bias.

As McMahon claims: “Shared deliberation conducted in good faith can be expected to eliminate mistakes in reasoning and thus winnow out the unreasonable views.” (2009, p. 92) This is because deliberation is a form of reason-exchange about the relative value of different claims. It “takes the form of the presentation of arguments intended to produce a change of mind about the relative strength of the two claims.” (McMahon, 2009, p. 81) Through it, experiences and diverse views are made available to the public forum. Agents might not always be responsive to reasons and experiences; however deliberation makes these reasons and experiences available to act upon the agents’ beliefs and this is sufficient to ensure the normative value of deliberation. This is only inasmuch as the exchange of reasons “takes places under specific conditions of freedom and equality”. (Knight & Johnson, 2011, p. 118) This is why deliberation ought to be free - agents can set the agenda and do not have to fear a change of mind – inclusive – all relevant views can be expressed in the forum – and open – all can access and participate in the forum – otherwise one cannot infer that

all the relevant evidence is being brought forward or that it is not too distorted to be truth-conducive. Since these are necessary for truth to emerge and since justice is to be associated with the correctness/truth of our political arrangements, these features are necessary for justice to be assessed.

Since democracy ought to be a procedure which can be assumed to aim at justice *qua* truth, it must be clear that what is necessary for this deliberation to take place, that is for reasons and experiences to be made available as widely as possible, will be constitutive of democracy as a decision-making procedure. Hence, “public discussion, a free press, mutual influence, persuasion, debate are constitutive and not merely accidental features of democracy.” (Festenstein, 2009, p. 70) These elements are essential to democracy since they are conditions for deliberation to achieve its aim of reason-exchange and of collective reasoning. It is only under these conditions that democracy can be assumed to be truth-oriented.

A distinction between epistemic democracy’s conception of deliberation and liberal proceduralist’s ones can now be made clear. For instance, Waldron, Besson and Christiano, to a lesser extent, hold that deliberation is essential since it, broadly, expresses respect or equality for the agents’ views. What epistemic democracy claims, rather, is that deliberation is essential because it is an epistemically appropriate form of collective reasoning. The equal expression of views is valuable inasmuch as it directs the political decisions towards truth (in an acceptable way): “What ultimately distinguishes a truly deliberative conception of democracy from one, such as the liberal proceduralist’s, that merely emphasized the importance of properly structured talk is an orientation to truth. Reasoning in general is oriented to truth in the relevant way.” (Richardson, 2002, p. 76) Hence, deliberation as it ought to be included in our account of the legitimacy of democracy must make collective reasoning possible.

Richardson defines reasoning as “intrinsically truth-oriented, for it is thinking that sifts reasons and arguments – jointly, considerations – that bear on the truth of propositions for the sake of determining whether they are true or not.” (2002, p. 135) This is precisely what deliberation and public discussion, when directed to the identification of justice, aim to achieve. This is why deliberation is a form of collective reasoning. Deliberation and public discussion make considerations available to assess the truth of different political views; by making considerations available, deliberation is also essential in assessing and ensuring the sustainability of a decision since strong objections that would prevent coordination can be brought into the arena. Without deliberation, relevant considerations are not available to bear on the truth of the propositions (or on their sustainability). There are many considerations which are relevant to the assessment of justice and of what ought to be done in a particular situation: value judgements, empirical evidence, consequences of particular policies and

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81 If one accepts that it is a necessary means for views to be expressed.
82 Referring to Anderson (2006, p. 12).
even emotions.\textsuperscript{83} These considerations all need to be taken into account if we are to achieve a truth-oriented decision. One cannot assume a decision about the proper redistribution of wealth in a given region to be correct if one does not have the proper factual knowledge about the average income in that region. In this sense, deliberation and public discussion are necessary to assume that reasoning has assessed all the relevant considerations.\textsuperscript{84}

We can further understand the role of deliberation for proper truth-orientation by looking at three epistemic benefits of inclusive deliberation:

(1) Public deliberation, Aristotle suggested, is akin to a public feast or a potluck dinner to which each invitee contributes a different dish; each participant contributes a unique perspective, helping to make up for the one-sidedness of each. (2) In a large republic, as Madison hoped, encouraging public discussion can also help cancel out the various partialities of factions, generating a more impartial basis for decision. (3) Finally, deliberation can help assure that policy is formed on a measure basis and not in thoughtless reaction to the passions of the moment. (Richardson, 2002, p. 77)

The first point is similar to the one I made about deliberation allowing information to be brought forward and to enter reasoning. I want to pursue this idea and explain how this availability of different perspectives can ensure a greater truth-orientation. I shall also discuss this point later when I mention the benefits of diversity and difference.

We can assume, following Richardson’s first and second points, that deliberation can help to reduce the agent’s cognitive biases.\textsuperscript{85} Christiano claims that: “The beliefs that people hold about moral, spiritual, and political matters tend to have a cognitive bias toward the interests of those who hold them.” (2008, p. 142) This helps to explain the different perspectives that social pluralism can create. Since agents experience different social situations and different social positions, they will develop different interests which affect the way they perceive things and the way they form their judgements. It is by allowing the different views to enter the public arena that we can expect the biases to be affected by reasons or experiences that had been disregarded or excluded. Deliberation, hence, apart from making considerations available is also essential to ensure the correction of the agents’ cognitive biases.

Finally, through deliberation and reasoning, agents may come to revise and perfect their valuation of ends. That is, they may review the ends they hold to be valuable or they may come to see some different ends as valuable. They may also realise that some means are preferable for the achievement of their preferred ends. This is because reasoning helps to establish ends “by locating new ones at the intersection of ends to which we are already committed.” (Richardson, 2002, p. 109) The agent may

\textsuperscript{83} See Richardson (2002, p. 190).
\textsuperscript{84} The view I put forward can also be supported by the Millian theory of rational group inquiry. (Moffett, 2007).
\textsuperscript{85} This point may seem obvious; however, it is often under-considered.
not have been aware of the consequences of some of her views or may not have understood properly some facts, that which prevented her from valuing properly some ends. Reasoning and deliberation help the agent to achieve greater coherence in her commitments. (Richardson, 2002, p. 112) Coherence of views is not in itself a guarantee of truth. It is, however, a means by which we can expect one’s views to be progressively made more reasonable: it allows agents to be consistent in their judgements and this is essential to achieve proper reasonable beliefs.

We can then assume that deliberation is an essential feature of any political decision-making procedure that aims to achieve true determinations of justice. This is, to summarise, because deliberation is the proper means to bring reasons, experiences and information to bear on the reasoning of the agents. It is also an essential element for the correction of cognitive biases and to ensure a greater coherence of normative views. Deliberation is therefore essential to provide the agents with rational motivation: that is reasons to regard the political decisions as correct determinations of justice. Without it, one cannot assume that the decisions made are reasonable or that relevant evidence and consideration have properly affected political reasoning. From here, it is important to specify elements that are essential to assume that deliberation and political decision-making can benefit from these different epistemic features.

**Essential Features of Deliberation**

Deliberation ought to be open, inclusive, free, without prejudice and honest. These features are those which are necessary for deliberation to be truth-oriented and neutral – it must not assume beforehand some position to be true – in the face of reasonable disagreement. I explain these features in greater detail: I first discuss political equality, I then mention how deliberation ought to be without prejudice on normative views. Finally I argue that some forms of what are usually held to be liberal rights are essentially part of an account of epistemic democracy.

There is significant disagreement on equality and in explaining how it can stand as an essential feature of deliberation, I must be careful to avoid overly contentious accounts of it. This should not be too difficult since equality, as an essential feature of democratic deliberation, does not need to be very substantial: many specific accounts of equality might satisfy what is necessary for democracy to be truth-oriented and for it to be fair qua anonymity. I maintain a minimal account of political equality for two reasons: (1) I do not need to say more to ensure that democracy is truth-oriented; (2) My aim is to provide elements to assess the legitimacy of democracy that respect disagreement, it makes sense therefore to assess the minimal account of political equality necessary for legitimacy to obtain.

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86 §3.4
The type of equality implied by truth-orientation and the absence of prejudice is a form of political equality as equality of (political) opportunity.\textsuperscript{87} This is because open deliberation warrants the possibility for the agents to bring to the forum their considerations. As Misak says: “if we are to have any chance at getting at truth or the right thing to do, we must provide arenas for people to put matters on the agenda and participate in debate.” (2000, p. 134) Once again, this is because information, reasons and evidence, when deciding what ought to be done, must be brought into the public arena. The only means to bring these considerations into the public arena is to allow everyone to access this forum. If one is to avoid pre-judging what are the relevant considerations, one must allow for all the considerations to be brought forward. Furthermore, the fact of cognitive bias implies that everyone must be allowed to access the decision-making process, under some form or another, if one is to regard the decision as not distorted by some party’s interests. One must at least have the possibility and capacity to take part in the deliberation so as to correct for other agents’ cognitive bias: “any person or group that was not able to participate would have good reason to think that their interests were not likely to be advanced by the collective decision-making of the society.” (Christiano, 2008, pp. 201-202) A restrictive or selective arena may therefore fail to achieve sustainability as well. Hence, one must be able to bring to the forum the considerations that one deems to be relevant: the forum must be inclusive and open.

The epistemic account of democracy explains why political equality is something to which one is committed rather than postulating it as a normative value which would then be up for reasonable disagreement: epistemic considerations require political equality.\textsuperscript{88} Just like Dewey and Putnam argue: “the quality of inquiry is affected by the degree to which that community is inclusive or exclusive of all the potential, competent participants in that inquiry.” (Westbrook, 2005, p. 181)\textsuperscript{89} Political equality as an equal right to participate in the process is hence essential to the legitimacy of a decision-making procedure\textsuperscript{90}: the right to participate is essential for a democratic procedure to be (and to appear to be) truth-oriented.

There are various conditions implied by political equality as equality of opportunity. Sadurski mentions five. Even if not completely beyond reasonable disagreement, they seem nonetheless very plausible if we are to assume that agents have an equal capacity to enter the forum. There must be equality of:

\textsuperscript{87} Knight and Johnson (2011, p. 209) defend a similar position.
\textsuperscript{88} Notwithstanding disagreements on how to specify political equality, under the circumstances of politics, some understanding of it is a necessary feature of decision-making procedures. See Gaus (1996, p. 166) about nested inconclusiveness.
\textsuperscript{89} See also: “The presumption of inquiry is to include.” (Misak, 2000, p. 151) The question of the extension of the demos is one that I cannot address in this thesis. It is certainly part of the overall idea of democratic legitimacy but it is not essential to understand the legitimacy of constitutional laws.
\textsuperscript{90} I defend a similar view in my Masters dissertation but for different reasons. (Allard-Tremblay, 2009, pp. 106-108)
(1) impact upon the agenda-setting, including the capacity to initiate public deliberation about a chosen subject, (2) access to the information relevant to public decision-making; (3) access to the forums of deliberation, and in particular mass media, in the sense that the existing inequality of power and resources do not affect the chances of contributing to a public deliberation; (4) guarantees that the penalties for being converted to one’s opponents’ views are not prohibitive, hence, that it is politically and socially plausible that we may persuade others to our views; (5) ensuring that the procedures of the deliberation are neutral in relation to the different substantive viewpoints, in the sense that a procedure itself does not privilege any particular discussant. (Sadurski, 2008, p. 87)

There is a further implication of political equality discussed by Christiano. He holds that to be properly able to exercise one’s democratic rights, one must have access to an economic minimum. He claims that:

Without a basic minimum a person does not have the means even to present arguments in the public forum, he does not have the means to associate with others, he does not have the means to practice those things that may be required by conscience, and, of course, he does not have the means to engage in private pursuits. (2008, p. 273)

It is certainly the case that an agent who is concerned with survival does not have the means to enter the forum. What precisely is the basic minimum is a question that shall be decided by the procedure itself. However, to be appropriately democratic, a decision-making procedure has to ensure that its members can actually take part in the process of decision-making and that they are not prevented by questions of bare necessity.

If we are to assume that democracy is properly truth-oriented and sustainable, there should be no prejudice on normative views: as Sadurski maintains, the procedures of deliberation ought to be neutral with regard to who is taking part in the procedure. The decision-making procedure ought to be fair qua anonymity and ought not to exclude a priori any reasonable conception of justice. This is not only justified out of a concern for the truth-orientation of the procedure but also through a consideration for the acceptability/sustainability of the procedure in the face of reasonable disagreement. As Estlund mentions, a procedure which would give more votes to some citizens or more importance to some of them would be unacceptable. This is because, in the face of reasonable disagreement: “no invidious comparisons among citizens with respect to their normative political wisdom can pass the appropriate general acceptability criterion”. (Estlund, 2008, p. 36) This is not to say that all views have the same weight or that they are all equally relevant. It is not incompatible with deliberation to take the views of an expert more seriously than those of someone who is totally alien to the field: “it is conducive to truth-seeking to give special weight to physicists in question of physics and special weight to first-person reports in questions of what an agent desires. These are reasons –

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91 See also Pateman (2004) and Knight and Johnson (2011, pp. 245-246).
92 As defined in chapter 2.
93 Recall that the acceptability requirement I put forward, as opposed to Estlund’s, is primarily defended based on epistemic reasons.
connected to truth – for giving additional weight to the views of particular people.” (Misak, 2000, p. 135)

However, as ought to be clear, this differential rating of the views is something done in reasoning and not in the actual structuring of the procedures of deliberation. The procedure must be inclusive and it cannot assume that we already know what a correct answer is. Hence, the procedure must be free, in the sense that it is possible to influence the agenda regardless of one’s views and free of normative prejudice. Without such freedom and inclusiveness, one may reasonably reject the decision as one that was not appropriately and only influenced by the respective weight of relevant reasons. One could assume that the procedure was biased towards some agents’ views.

This idea of ‘no-prejudice on normative views’ does not imply that every possible normative view can enter the forum. For instance, it is not acceptable for a racist to claim that we should disenfranchise people from a different ethnic background since such a racist view cannot be assumed to be reasonable. This is mainly because it is inconsistent with the idea of inclusiveness that is essential to proper truth-orientation: “those engaged in moral or political deliberation who denigrate or ignore the experiences of those with a certain skin color, gender, or religion are also adopting a method unlikely to reach the truth.” (Misak, 2004, p. 15) It is because agents can be assumed to aim to achieve correct political decisions that it is inconsistent for them to hold at the same time that some part of the population ought to be excluded from the decision-making procedure. Hence, it is not as such that the procedure excludes this type of normative views. It is rather that these normative views are self-defeating. For similar reasons, it would be inappropriate for agents to be involved in deliberation but in a dishonest way as such a practice is not likely to reach the truth. Hence, agents ought to be honest and “really engage with others.” (Misak, 2004, p. 18)

Finally, I mention how the essential features of deliberation I have identified warrant what are often held as liberal rights and freedoms. Under the account I put forward, these liberal rights can be seen as essential elements of a political decision-making procedure that is properly oriented to the discovery of justice. Their justification is not based in a liberal conception of justice but in the need to achieve sustainable and correct determinations of justice, hence I support these solely based on epistemic reasons. I follow Christiano and Richardson in their definitions of basic democratic/liberal rights and freedoms. According to Richardson, we should protect: “(1) the publicity of decisions; (2) the openness of the political process; (3) the freedom of the press; and (4) the freedoms of speech and of association.” (2002, p. 185) And for Christiano, we should have “four basic liberal rights: freedom of conscience, freedom of private pursuits, freedom of association, and freedom of expression.” (2008, p. 138) What is the proper content of these rights and how should they influence decision-making is

94 FN 51
up for reasonable disagreement. What is not is the idea that something that is recognisably part of these rights ought to be part of democratic decision-making if we are to expect it to appropriately aim at justice. This is because: “the public cannot react to a policy unless it is made known to them”; “Unless the policy-making process is appropriately open to public input, then, efforts at public reflection will be undercut” (Richardson, 2002, p. 185); and since freedom of speech and association are necessary for the public to exist. (Richardson, 2002, p. 186) Without the freedom of conscience, private pursuits, association and expression, it does not make sense to expect the views held by the agents to be expressed and to be properly developed. Hence, I maintain that epistemic democracy must include some form of these basic rights and freedoms.

To summarise, for democracy to be properly expected to aim at justice, it must involve deliberation. Deliberation is the appropriate means to aim for justice inasmuch as it is an essential part of proper reasoning. The features of deliberation must be openness, inclusiveness, freedom, the absence of prejudice on normative views and honesty. These warrant a form of political equality as equality of opportunity. Finally, deliberation, to be properly conducive to truth, has to be associated with some liberal rights and freedoms, such as freedom of speech and conscience. At this point, I want to argue in more detail why democracy – rather than some form or another of unequal arrangement – is necessary to assume the truth-orientation of our political procedures.

4.3 Against Epistocracy

Estlund coined the term ‘epistocracy’ to designate voting systems where ‘the wise are supposedly identified and given more voting power per person than others.” (2008, p. 207) At face value, it would seem appropriate either to give them more votes or more importance in deliberation if we are concerned with epistemic benefits. I claim, however, that no identification of moral experts would be possible if we are to respect disagreement: some agents may appear wise to us and even seem to be moral experts. It is not obvious, however, that they will be seen as such by all reasonable agents. If no such expert can be identified beyond reasonable disagreement, it is unclear that agents would accept the justification for this agent’s superior political power. Moreover, even if we were to identify

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95 It is even argued, as reported, though not endorsed by Goldman, that “freedom of speech is the best social arrangement for generating good ‘veritistic’ (true belief) consequences.” (2010b, p. 22)
96 Heyd and Segal argue for what they call a ‘democratically elected aristocracy’ (2006, p. 105) and López-Guerra (2010) argues for the relevance of randomly selecting some agents to allow them to take part in deliberation and then to make a decision.
97 As a test of this assertion, I ask the reader to identify a moral expert that would be recognised by all. Furthermore, even if we identify such a moral expert, it is a different matter to assume that we can all reasonably accept that she should have more political power. See Gaus’s similar discussion (1996, p. 185).
experts in a manner that respects disagreement, it would not change the fact that inclusive deliberation and equal political power have more epistemic benefits than ‘epistocratic’ decision-making procedures. In this sense, I complement Estlund’s arguments against epistocracy with further epistemic considerations: (1) Diversity trumps expertise; (2) The uncertainty of expertise with regard to (2.1) future performances and (2.2) cognitive bias.

Diversity does not consistently trump expertise. It is nonetheless plausible that it does so with regard to political decision-making where an innumerable number of considerations enter into play. Political decision-making is arguably one of the most complex types of decision-making. In this sense, expertise in political decision-making demands extreme polyvalence in a very high number of fields. I have serious doubts that such expertise can be achieved. Even if it did, there would still be reasons to regard diversity as preferable: I argue in the next chapter in further detail why diversity trumps expertise. At this point, a quick overview will suffice to show that epistemic considerations do not warrant giving more votes to the experts. It should be clear, however, that I do not exclude the idea of balancing: it might sometimes be possible to give up some diversity so as to achieve greater epistemic benefits. Just as Page mentions, diversity must be relevant, “we cannot expect that adding a poet to a medical research team would enable them to find a cure for the common cold”. (2007, p. xxix) My point is more general and aims to exclude the idea that generally we should rely on experts to make better decisions. Furthermore, my claim is compatible with the use of other decision-making procedures, such as the market, as long as democracy has priority when deciding how to decide.98

Ober argues that democracy granted Athens a vital benefit over competing city-states. This benefit was that the (somewhat) inclusive, equal, and diverse deliberation that was going on in Athens gave it an innovative edge over more authoritative rivals. This is because the “cloistered-experts approach to policy making – insofar as it ignores vital information held by those not recognized as experts – is both worse for democracy and less likely to benefit the community.” (Ober, 2008, p. 1) Experts may indeed be over-confident in their own capacities and may not recognise some information as essential (as they suffer from the limitedness of human understanding like any of us), even if it is presented to them through deliberation. There may also be experts in some field who possess relevant knowledge for some decision but who would not be included amongst those with more political power. (Ober, 2008, p. 95) In the face of the extreme complexity of politically relevant information, it seems inappropriate to claim that some can be real experts on all the relevant types of information. This is mainly because expertise is narrow. (Surowiecki, 2005, p. 32) One may be an expert in a specific field but may be quite ‘normal’ in any other field. An expert on poverty in the kingdom of Fife may know nothing about the foreign policy of Canada but, in terms of political decision-making, both may be relevant.

98 This is what Knight and Johnson (2011, pp. 18-19) call the second-order priority of democracy.
Furthermore, there are other problems with expertise. For instance, “groups that are too much alike find it harder to keep learning, because each member is bringing less and less new information to the table. Homogeneous groups are great at doing what they do well, but they become progressively less able to investigate alternatives.” (Surowiecki, 2005, p. 31) This would explain the innovative edge of Athens: it is because decision-making and deliberation were inclusive and open that innovative options could be brought forward. Hence, decision-making that relies mainly on experts fails to benefit from what we can call ‘non-obvious expertise’ and from what can be seen as new expertise. Giving more votes to the educated/experts would not ensure that all the relevant and non-obvious knowledge could be used. Proper decision-making then, if it is to be held capable of achieving correct determinations of justice, must include perspectives which would allow a better decision to emerge and that cannot be achieved by reserving political power for supposed experts.

The second point against giving more votes or political power to experts relates to two types of uncertainty. The first one is a simple point regarding certainty of future performances. We cannot identify a reliable expert in political decision-making: even if after having instituted an epistemic democratic procedure some agents were to always arrive at the same decision as the democratic procedure we could not defer to them. This is because we can reasonably ask if they got it right by chance and if their better than average capacities will remain constant. It is unclear that past performances can guarantee future success. (Surowiecki, 2005, p. 35) Without such a guarantee, deferring to their views is not justified.

Furthermore, we can also assume that those with more political power will develop some private interests which will be “cognitively debilitating” in their assessment of the public interests. (Westbrook, 2005, p. 181) Such private interests imply that we can doubt that their decisions will be strictly oriented to truth. As Besson explains: (1) “minority rule endows minorities with more power proportionally to their number than majority rule”; (2) “minority veto protects organised minorities better than insular ones”; (3) “minority rule can induce minorities to use their veto to safeguard naked interests rather than reasonable opinions and convictions.” (2005, p. 249) It seems clear then that political equality is preferable to giving more power to the educated if we are concerned with the correctness of the decisions to be made. These arguments also explain why electing one person to decide amongst various options, e.g. elective dictatorship, cannot be assumed to achieve correct determinations of justice over time.

To summarise: “Diversity helps because it actually adds perspectives that would otherwise be absent and because it takes away, or at least weakens, some of the destructive characteristics of group

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99 Napoleon Bonaparte may have been an expert on war. Nonetheless, he is famously reported to have said to Robert Fulton: ‘You would make a ship sail against the winds and currents by lighting a bonfire under her deck? Excuse me, I have no time to listen to such nonsense.’
decision making.” (Surowiecki, 2005, p. 29) It allows: (1) Innovation; (2) The recognition of non-obvious relevant information; It helps avoiding (3) the uncertainty associated with experts’ future performances and; (4) The cognitively debilitating development of particular interests. There are, however, some objections regarding the epistemic capacities of deliberation that need to be addressed.

4.4 Some Objections

I survey three objections to the idea that deliberation and diversity can be truth-conducive. The first holds that deliberation is not about knowing justice but rather about deciding what we shall do – as opposed to what ought to be done. The second claims that it is question-begging to assume that we can rely on an epistemic procedure to resolve our disagreements. The third raises doubts regarding some of the epistemic features of deliberation, notably diversity and honesty. I think that none of these objections are fatal for an epistemic account of democracy, inasmuch as it is purely procedural.

According to Mcafee, “Aristotle went to great pains to make sure his students understood that deliberation is not aimed at matters of fact but is aimed at indeterminate matters of choice and action. This is a lesson missed by those who today think of deliberation as ascertaining moral truth.” She then goes on to explain that deliberation is not about ascertaining what is actually the case about justice or truth. It is rather a question “of making a choice that will work for the community as a whole.” (2008, p. 263) Deliberation according to this view is a pragmatic enterprise and not an epistemic inquiry. It is about arriving at a decision that will stand for the community’s decision. It would then be a mistake to assume that deliberation must be truth-oriented and that decisions achieved through deliberation can be assumed to be correct determinations of justice. My approach would then assume more from deliberation than it actually achieves.

In fact, my view is not far from Mcafee’s since I claim that we have aims of decision-making. To reformulate Mcafee’s view in my own words: deliberation is good to arrive at decisions that can achieve sustainability and concord and this without relying on the idea of truth. I disagree, however, that deliberation is mainly about achieving ‘compromise’ and ‘consensus’. Truth is the regulative idea of deliberation: it explains the exchange of reasons and arguments and it is necessary to understand how a decision can be rationally motivating. There are certainly elements of bargaining and compromise in deliberation about what shall be done. However, ultimately, the decision made ought to be seen as part of justice – or not too contrary to it – if the agents are to wilfully coordinate on it through rational motivation. It is not clear otherwise how deliberation can provide the agents with decisions that can trump their other moral considerations. Rather than claiming that deliberation is not about truth, what Mcafee should claim is that decision-making is not only about truth. Truth must enter the picture to explain rational motivation, but it does not need to be the only aim of decision-
making. Hence, I think that McAfee’s objection can be avoided if we see what role truth actually plays in the argument.

An argument that may be more damaging is formulated by Waldron and Besson regarding epistemic conceptions of democracy. They both claim that epistemic approaches of democracy are question-begging since they only reproduce at a different level the disagreement that first divided us. According to Waldron: “any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people disagree about the goodness of outcomes that they need to set up and recognize an authority.” (1999b, p. 245) We cannot uphold a procedure based on its capacity to achieve a good answer since we disagree about what a good answer is. I agree with this argument and it is why I reject strictly veritistic approaches of the epistemology of democracy. If I had specified what counts as a good outcome, Waldron would be correct. However, I rely on a purely procedural account of epistemic democracy which leaves the content of what a good answer is empty – it is whatever it is. The framework of epistemic proceduralism can avoid Waldron’s criticism.

Besson offers a more difficult objection that is directed against both veritistic and purely procedural approaches. She says: “We can converge neither on moral rightness standards nor on epistemic standards as to how to get to know best what our standards of moral rightness are.” (2005, p. 219) She also says: “Knowing and agreeing on how to best get to the right answer would indeed amount to not disagreeing about the content of the decision to take in the first place.” (2005, p. 219) Besson would certainly have been right in her criticism if I had claimed that democracy was good at achieving a correct answer at any given time but my claim is less ambitious than that. I only claim that democracy is good at achieving rational decisions over time since we are never in a position to claim truth for the decisions made. Deliberation must remain open and this is because the decision is always fallible: there is in fact no agreement on how to remove all our doubts about the correctness of a decision. Democracy is solely apt, considering the epistemic features it involves, to direct our decisions towards truth. Hence, it provides us with indicative reasons to regard our decisions as potentially true in the long run. The argument is not that democracy will provide the right answer but rather that it includes features that are essential if we are to assume that we can achieve justice in the face of disagreement.

The last objection is raised by Richardson regarding the epistemic features of deliberation he himself mentioned. He claims that deliberation can indeed have epistemic features but that: “(1) Given the incommensurability of worldviews present in contemporary publics, there is reason to fear that multiplying perspectives will simply foster confusion and paralysis.” He mentions the debate on

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100 See Waldron (1999b, p. 254).
abortion and how allowing more perspectives would not make it more truth-directed. He then argues that “(2) [...] public deliberation is pervasively subject to distortion as participants seek to mask their narrow interests in language appealing to universalizable reasons. In addition, the community may share prejudices to which public deliberation is forced to pander.” Finally, he mentions how “(3) [...] we know from experience that policies formed after long discussion are not always moderate in their nature or their grounds.” (2002, p. 77)

It is right that multiplying perspectives may sometimes make the debate confusing. Yet, acknowledging that diversity can make the achievement of a common solution more difficult is not a denial of its epistemic benefits. If we are concerned with truth, we should not give up diversity by restricting a debate to a few views in order to increase our chances of achieving a coordination solution; it is not epistemically preferable to have a polarization of the available views. Diversity, even if confusing, is still necessary for proper truth-orientation. Hence, even if in such complex cases as abortion, diversity and deliberation might have to be complemented with other features of democracy so as to facilitate decisions, as I explain in the next chapter, we can still maintain diversity to be epistemically beneficial.

The second point has two aspects: dishonesty and what we can call ‘hegemonic discourses’. (Young, 2001, pp. 685-686) Regarding dishonesty, it is only parasitic on proper truthful political discourse and it does not affect the normative status of deliberation. If some agents mask their naked interests under the guise of the good, it is because other agents assume that deliberation is functioning properly. It is only when agents trust one another that one can benefit from being dishonest. This does not show that diversity and deliberation are not truth-conducive – it only shows that if dishonesty was pervasive then deliberation would be undermined. Still, it is only through deliberation that one can reduce the effects of dishonesty and hegemonic discourses – which are similar to cognitive biases. Richardson is right to mention these points about the possible negative effects of deliberation. However, they do not negate the fact that deliberation is actually essential for proper truth-orientation or for the correction of cognitive biases. These points remind us that one must not be too optimistic about the correctness of any political decision. We must always remain conscious of democracy’s fallibility as well as of our own.

In this chapter, I offered a revised pragmatist approach of deliberative democracy based on the aims of decision-making. I first argued for three aims: justice, sustainability, and concord. I offered arguments to regard these aims as presupposed by the circumstances of politics. I then argued for an account of deliberative democracy if we are to assume that democracy can achieve the aim of justice. I explained how deliberation is a form of reasoning. I argued for different essential features of deliberation; I claimed that it needs to be free, open, inclusive, honest, and without prejudice. I explained that some minimal conceptions of liberal rights – which include freedom of speech and
freedom of association – and of political equality as equality of opportunity were warranted. What this chapter offers is an argument for some necessary features of democracy if we are to regard it as able to achieve truth. It is important, however, to explain how these features actually allow democracy to achieve correct determinations of justice. The idea of the constructive function of democracy helps in this respect.
CHAPTER 5: THE CONSTRUCTIVE FUNCTION

This chapter develops and expands the idea of the constructive function of democracy. I have hinted at this notion earlier, most notably when discussing Ober’s view that diversity\textsuperscript{101} allows innovation and when discussing social pluralism.\textsuperscript{102} This function designates the capacity of democracy, through its epistemic features, to influence in various positive ways the identification of problems of justice affecting a policy and the formulation of solutions to these problems. My aim at this point, is to explain the processes which make this function plausible. While the previous chapter was concerned with explaining some necessary elements for democracy to be truth-oriented, this chapter explains in further detail how democracy is able to achieve correct determinations of justice over time. Accordingly, the constructive function of democracy helps to define epistemic democratic legitimacy since it provides additional essential elements to understand the proper organisation of democracy.

I first mention technical and social knowledge and how democracy pools relevant information. I explain how this process helps in setting the agenda and in formulating and understanding the problems of justice faced by society and in devising correct solutions. I then discuss the idea of a revision process. In the second part, I explain how these features affect disagreement: notably by reducing it. I then mention how they may fail to resolve all disagreements: I discuss how deliberation and the constructive function can act even there to achieve the aims of decision-making mentioned in the previous chapter. I argue that deliberation can help to prevent some moral disagreements from becoming political disagreements, thus achieving sustainability and concord. Finally, I discuss the role of voting in the face of irresolvable disagreement. This chapter will complete my exposition of the epistemic features of democracy.

5.1 The Constructive Function and Information Pooling

The first aspect of the constructive function of democracy I discuss is information pooling. This refers to the capacity of democracy to make dispersed knowledge available for decision-making and to act on policy-making. The capacity of democracy to pool information impacts the formulation of the problems of justice faced by society, their possible solutions and the views held by the agents in various ways. This explains why this function is called ‘constructive’ – since it helps in shaping all these elements. Peter, following Sen (1999), offers this definition: “how individual agents learn from each other in deliberative decision-making processes about what the problems are that affect them and what the best means are to solve them.” (2009, p. 3) Her definition includes the two first aspects of the constructive function of democracy I discuss: the identification of problems of justice and

\textsuperscript{101} \S 4.3
\textsuperscript{102} \S 2.2.1
information pooling. It is also important for the constructive function to achieve its purpose to include the third point I discuss: a revision process.

Identification of Problems of Justice

The first element of the constructive function of democracy is the identification function. This function allows the revelation of the problems of justice that affect the members of a polity and to set the agenda in function of these. (Anderson, 2008, p. 134) This identification function comprises two aspects: (1) It helps in setting the agenda regarding what the agents judge ought to be done. For instance, agents may judge that income ought to be redistributed to tackle the problem of poverty. By making the agenda open and free, democracy ensures that what agents judge to be problems of justice can actually be brought to the forum. This cannot be ensured with the same reliability in a system that is not open and free. (2) The identification of the problems of justice must also cover the actual solutions enacted since some solutions may have perverse and unforeseen effects or fail to achieve their purpose. By having an open, inclusive and free forum, democracy can more reliably pool the information regarding devised solutions so as to ensure that they actually achieve their aims.

Peter explains that: “public deliberation may lead to the discovery of problems that affect existing policy proposals or to the formulation of new policy proposals.” (2009, p. 73) Accordingly, the identification function would be a consequence of public deliberation, i.e. of an open, free and inclusive forum. If we are to understand this identification function, and ultimately the constructive function, of deliberative democracy, it is necessary to understand how democracy can actually pool information. Without this pooling function, we cannot expect democracy to properly identify problems of justice or to design better policies. This is why I now turn to an explanation of how democracy can actually pool dispersed knowledge through the use of tacit knowledge and through the proper distribution of social and technical knowledge.

Information Pooling

It is not sufficient to make information available for it to be properly used: multiplying views about abortion does not show that the correct and relevant ones will be identified. One must also show that information can be properly pooled and recognised. This is essential if one is to have reasons to regard democracy as able to achieve correct decisions. This also makes clear what is lacking from chapter 4 to make a conclusive case for the epistemic benefits of diversity and deliberation. Democracy must then be shown to be good at pooling knowledge in the relevant way. In other words, democracy must allow for the recognition of what constitutes relevant information and new relevant information. I first mention that relevant knowledge is actually dispersed, then mention two types of

103 Knowledge that is available but that is not been taken into consideration.
knowledge that are relevant to understand information pooling: social and technical knowledge. I then describe how democracy, through these two types of knowledge, can be seen to recognise relevant information and to make rational decisions.

Relevant knowledge for political decision-making is dispersed for at least three reasons: (1) The effects of problems and policies are uncertain; a particular policy, for instance, may have perverse or unforeseen consequences due to the complexity of human institutions, to changing circumstances or even to the unpredictable and changing behaviour of the agents. Hence, decisions cannot be assumed to be correct when made in isolation from information regarding the actual consequences of a problem or policy; (2) Based on social pluralism, the diversity of human expertise, and the diversity of human experiences, it is not unreasonable to assume that relevant experiences are dispersed. Since I defend a pragmatist approach according to which reasons and experiences must influence beliefs and normative judgements, if these latter are to be rational, it is essential to pool these various pieces of information; (3) It can be expected that there will be reasonable disagreement regarding the normative value of different proposals. This can be explained through: social pluralism, the limitedness of human understanding, cognitive bias, and moral pluralism. If we are to respect disagreement, we must assume that even a group of agents, as diverse as it may be, may not be able to represent all the relevant disagreements present in society. Hence, we can assume that relevant political information is dispersed and only a widely open, inclusive and diverse procedure can really be expected to (be able to) pool all the relevant perspectives.

To understand how democracy can pool relevant but dispersed information, we can turn to a classification of knowledge in two different types offered by Ober (2008). These two types are not meant to be exhaustive, complete, nor mutually exclusive. We should regard this as a heuristic classification for understanding how ‘information pooling’ is possible rather than as a strict classification of knowledge types. The first type is technical knowledge: it “may be defined as specialized knowledge about how to use tools and processes to gain desired ends in a given domain of endeavor.” (Ober, 2008, p. 92) It may also include, under a more general definition, all relevant types of empirical knowledge, e.g. the number of people living in a given town or usual scientific knowledge. It is mainly knowledge about what the best means are to resolve different problems. It is a type of knowledge that is dispersed through different fields of human expertise and that can be held by non-obvious agents. (Ober, 2008, p. 95) This type of knowledge usually relates to factual considerations, rather than to the normative judgements of the agents. It is not impossible, however, to include in its definition (sociological) knowledge about problems of justice or about how the agents judge the respective normative value of different alternatives.

The second type is social knowledge: it “includes knowledge of people, norms, institutions and their characteristic practices.” (Ober, 2008, p. 91) It is about how the institutions work, what the laws are,
and who does what in the institutions. Someone with a lot of social knowledge is someone who is
often said to know how the ‘system works’. Furthermore, and more interestingly, social knowledge is
about knowledge of other people and of who knows what; knowledge about who is an expert and in
what field. It can be associated with the capacity to gather relevant knowledge for decision-making
through social means, i.e. by relying on other agents. This is simply because knowledge is dispersed
and we have to rely on a “division of epistemic labour”. (Festenstein, 2009, p. 73) Social knowledge
is hence a key element to understand information pooling.104

If democracy is to make proper use of dispersed knowledge and if social knowledge is to achieve its
aim, other agents must be trust-worthy and this is not without problems. This is because: “political
relationships throw the very conditions of trust into question” as there is always an element of
conflicting interests. (Festenstein, 2009, p. 74) Trust is difficult in politics because: “We do not wish
to be duped either by intentional trickery or by our own complacency when confronted by the
incompetent testimony of others.” (Festenstein, 2009, p. 74) Social knowledge about other agents’
capacities must therefore be understood as a mixture of trust and experience; an agent whose
testimony always fails with regard to the aims of inquiry should not be trusted, but such failure cannot
be known without experience. Hence, social knowledge – if it is to be efficient – has to develop over
time for experiences to be gained. (Ober, 2008, p. 97) Consequently, democracy without epistemic
trust can hardly have any epistemic features since social knowledge is a key element of information
pooling.105 If agents cannot rely on one another we can doubt that they will act on the evidence they
can gather through their fellow citizens. This is not meant to reduce our confidence in the epistemic
function of democracy but rather to explain that if democracy is to achieve its epistemic function,
agents must be able to rely on one another’s testimony and evidence. Trust is a necessary condition of
democracy.106

If talk and deliberation are to pool information appropriately, they need to be accompanied by some
form of structure, i.e. social knowledge. The capacity of social knowledge to enable the pooling of
technical knowledge can be associated with ‘a process, sometimes called “summation,”’ whereby
diverse “knowledge/expertise sets” are taken into consideration by a large group’. (Ober, 2008, p.
110) This process is described by Aristotle in the Politics and reported by Ober: “This is why the
many judge better in regard to musical works and those of the poets, for some judge a particular

104 Here are examples of social and technical knowledge. Social knowledge: knowledge that my lawyer friend
knows how I can go about suing someone else. Technical knowledge: knowledge of the temperature at which
iron melts. Mixed knowledge: knowledge of social habits. This is a mixed type since it can be the object of
social sciences but also acquired through social practices.

105 This trust can be achieved through the existence of strongly interdependent interests. Agents would then have
good reasons not to fool one another. See Christiano (2008, pp. 80-81) and the notion of a common world.
Furthermore, trust may be achieved by knowledge of each other through democratic deliberation.

106 Trust does not have to come first. Democracy might be created by a leap of ‘faith’, such as when old enemies
start trusting one another.
aspect, while all of them judge the whole.” (Ober, 2008, p. 110) Ober then explains that some are experts at judging different aspects of an artistic performance, to follow Aristotle, such as rhymes, musicality and dance, i.e. there are experts in different fields. It is, however, supposed that through social knowledge, the many know who is an expert in each field. Hence, ‘Aristotle assumed that each individual takes his lead from the response of those persons in the crowd who are known to be most capable of rightly judging a particular aspect of the issue. This, I believe, is the sense of “some judge a particular aspect while all of them judge the whole.”’ (Ober, 2008, p. 111) What would result is a form of summation of all the experts’ judgements through social knowledge. What Aristotle claimed about ‘summation’ in ancient Athens can be applied to contemporary democracy to explain how information is pooled.

There are various institutions in contemporary society that are in place to allow easy recognition of who is an expert in each domain. None of these institutions are absolutely reliable but they nonetheless provide good reasons to rely on some agents as experts. In essence, a “large-scale participatory democracy must devise ways to organize itself such that the small face-to-face community is a fundamental part of its institutional architecture.” (Ober, 2008, p. 90) Small face-to-face communities have the advantage, over large-scale communities, that agents acquire first-hand social knowledge. This first hand social knowledge cannot be achieved in large-scale democracy. It is hence important to allow the social knowledge that can be achieved in some part of the system to be distributed to other parts. Athens managed this by interconnecting different small-scale social groups with different social perspectives, that which allowed local social knowledge to be shared through different large-scale networks. (Ober, 2008, p. 107) Professional orders and diplomas issued by the education system are nowadays devices which achieve this aim: they provide reasons to regard someone as trust-worthy or as a ‘prima facie expert’ in a given field. The relatively small-scale network that is academic philosophy, when awarding a PhD, provides reasons for those within the field and outside the field – such as employers and students – who do not have first-hand social knowledge of the new PhD holder, to regard that person as a ‘prima-facie expert’ in the field.108

Note that what is essential for democracy to achieve correct political decisions is an appropriate interplay between social and technical knowledge. Innovation must not be prevented by making experts’ judgements beyond doubt or by preventing the agents from arriving at their own judgements. Surowiecki argues that there are different conditions for a decision-making procedure to be “wise”, one of which being “independence (people’s opinions are not determined by the opinions of those around them).” (2005, p. 10) Even if one relies on experts to arrive at a decision through social knowledge, one must not formulate one’s judgement simply by copying the experts. It is by taking the

107 Greek removed.
108 See Fuerstein (2008, p. 87). The fact that we both use PhDs as example is fortuitous.
cue from different experts that agents can actually make better decisions; agents must nonetheless make use of their own understanding. Otherwise, they fail to take into account their own particular piece of information and the benefit of diversity is lost.

Moreover, social knowledge helps to deal with Richardson’s objection\(^\text{109}\) that diversity – by multiplying views – would make the issue more confusing and difficult to discuss. When agents know where to gather relevant information, the significance of this objection can be downplayed. To borrow the common expression, Richardson would say that ‘too many cooks spoil the broth’. My reply is: ‘not if there are chefs in the kitchen.’ We do not have to share Richardson’s fear that diversity will make deliberation too messy since social knowledge helps to create ‘a body of decision makers capable of recognizing (through social knowledge) who really is an expert, and capable of deciding (by voting) how much weight to give various domains of expertise in “all things considered” judgements.’ (Ober, 2008, p. 112)

Democracy is not the only system that can achieve social knowledge. It is, however, better suited to that purpose: through free and open deliberation, it can foster, test, and verify the adequacy of social knowledge. It offers more opportunities for social knowledge to develop by increasing the number of possible networks\(^\text{110}\), notably through deliberation since, through it, agents come to know more about one another. Additionally, there are different elements that are necessary for knowledge to be shared and expertise to be recognised that democracy can satisfy: there should be “incentives to knowledgeable individuals so that they will choose to share what they know” and there should be “means available to agents for communicating useful knowledge” and these means “should be as nearly costless as possible.” (Ober, 2008, p. 119) Since democracy provides an open forum, it allows agents to share and communicate easily what they know. Furthermore, since agents in a democracy may come to develop strong interrelated interests\(^\text{111}\) through joint decision-making and political interaction, we can reasonably assume that the incentives for communication in a democracy will be higher and that agents will have a higher stake in such a system than, e.g., in an oligarchy where identification with the polity is less direct.

Democracy, to summarise, can achieve a better understanding of the problems of justice and of the means to resolve them through its greater capacity to pool technical knowledge. This capacity to pool information is based on the openness and diversity of deliberation and is achieved through deliberation cum social knowledge. Social knowledge is more easily achievable in a democracy for various reasons: openness of deliberation, incentives for communication and availability of diverse means to communicate. The constructive function of democracy can be achieved if technical

\(^{109}\)§4.4


knowledge can be brought to the forum and if agents can achieve knowledge of each other. What this means for democratic legitimacy is that institutions must not exclude various views from entering the forum and that they should aim to foster social knowledge. However, the fallibility of a decision can never be excluded if we are to ensure that democracy can really make use of all technical knowledge: we have to include a revision process.\textsuperscript{112}

\textit{Revision Process}

If democracy is to be apt to achieve correct determinations of justice, decisions made must be responsive to evidence and considerations during and \textit{after} decision-making. This need to keep the decisions open for revision is explained by their fallibility. This also explains the need for democratic legitimacy to include a revision process – one that is not overly complex – if we are to assume that the decision-making procedure can achieve correct determinations of justice. This need for a revision process will make clear how entrenchment is problematic for epistemic democracy.

Fallibilism holds that: “No belief is held to be \textit{a priori} certain or beyond the reach of criticism and revision.” (Festenstein, 2009, p. 70) This need not imply that all beliefs have to be “dubious”; rather, we may rest confident with beliefs inasmuch as they are well-justified. (Westbrook, 2005, p. 4) This idea, as should be clear by now, is central to the pragmatist account of democracy since what we aim for are rational/well-justified decisions based on the evidence we currently have. Since justification demands proper responsiveness to reasons and evidence, a well-justified belief cannot be isolated from reasons and evidence. Since democratic decisions find their authority in an account of how they can be held to be proper determinations of justice, it ought to be clear, therefore, that they cannot be held to be infallible. Democratic decisions once enacted must remain open to revision especially since, with regard to political decisions, we do not know when all relevant reasons and evidence have been considered.\textsuperscript{113}

This is for various reasons. For example, there might be changing circumstances: new technologies, new social groups, new beliefs, etc. Some experiences and considerations might not have been available before the decision was made. Deliberation and information pooling can be imperfect. There can be a failure on the part of the agents to take some reasons into account due to their own fallibility or to hegemonic discourses. Furthermore, often when a decision is made, deliberation has not been conducted to its completion due to a lack of time, the urgency of the matter or some other reasons.

\textsuperscript{112} Often, arguments are made that the market is better than democracy at aggregating knowledge. I do not have place to discuss such an objection here. I can nonetheless say that I fail to see how the market may construct and frame problems of justice without adequate deliberation: the market may be good at aggregating, but not necessarily at pooling information or at revising a decision. I maintain that there are indeed circumstances in which we may prefer to use the market as a decision-making procedure but it cannot have priority over democracy. I refer the reader to Knight and Johnson for a thorough rejection of the market’s priority over democracy. (2011, pp. 51-89)

\textsuperscript{113} FN 75
Finally, the law applies across generations and what is justified for a polity at one point in its history may no longer be at a later point. All of these influence what is the proper determination of justice to implement and if the law cannot be changed or be responsive to new evidence, we can doubt that it can achieve truth. Democracy is an imperfect procedure: it can be directed towards truth but cannot be assumed to achieve a true determination of justice for each and every one of its decisions. If democracy is to be truth-oriented, then, a revision process is necessary and provides us with good reasons to assume that democracy can, over time, achieve correct determinations of justice by correcting itself.\footnote{114} Hence, the constructive function of democracy requires a revision process or what is also called a feedback process.\footnote{115}

The fallibility of democratic decisions and the need for a feedback process imply that deliberation must remain open and that agents do not have to epistemically defer to a democratic decision since – for the epistemic benefits of diversity to obtain – they must remain independent and free in their judgements. In other words, democratic legitimacy must include an authorisation of dissent; agents are never expected to believe that any decision made is the true one. This is because dissent can alert us “to deficiencies in a chosen policy, and can prompt a new search for better policies.” It is hence “epistemically productive”. (Peter, 2009, p. 117) Deliberation, by remaining open, is a proper means for the feedback process to obtain: “Democracies are designed to be responsive to such inputs; autocracies generally are not.” (Anderson, 2006, p. 13) Systems that do not recognise their own fallibility and that are not open to receive information about the consequences of a chosen policy will fail with regard to the feedback process.

One of the consequences of the need for a feedback process is that we need to reconsider the notion of legal entrenchment. The point I make is similar to Raz’s discussion of the consequences of what he calls ‘critical rationality’. This notion is close enough to my own pragmatist account of fallible but well-justified beliefs. Raz holds that we would be better off with political institutions “which allow adequate opportunities for periodic re-evaluation of public policies.” (1988-1989, p. 765)\footnote{116} Similarly, and based on my own pragmatist account of justified belief, I maintain that a law that cannot be revised or that is so difficult to modify that it is practically beyond revision fails to obtain democratic legitimacy. Raz then explains that: “The requirements of critical rationality affect the structures of institutions and the processes of decision-making more than they affect the substance of policies.” (1988-1989, p. 765) This is because justifying our decisions through an open process does not directly determine what should be criminalised, for instance, but it does affect how a decision-making procedure must be organised for this process of open justification to take place. Decision-making

\footnote{114} See Festenstein (2009, p. 71).
\footnote{115} This is a point also argued for by Anderson. (2006, p. 12)
\footnote{116} See also Knight and Johnson for whom the revision process extends to the institutions of democracy themselves. (2011, p. 162)
procedures which prevent the revision and the subjection of decisions to relevant considerations ought to be rejected. Accordingly, under my account, we can question the legitimacy of entrenchment and other similar legal arrangements which dampen the capacity of democracy to revise its laws. Furthermore, Raz is also right in arguing that “policies which are incompatible with the existence and proper functioning of political institutions whose actions and policies are open to re-evaluation and revision should be avoided.” (1988-1989, p. 765) This implies that some laws are illegitimate if what they require is against revision. For instance, a law that would ban any revision process regarding some specific law would lack democratic legitimacy. In consequence, epistemic democracy is in tension with the usual understanding of bills of rights and constitutions as entrenched legislation. I shall come back to this matter in the next section of the thesis. At this point, it is sufficient to keep in mind that for the constructive function of democracy to obtain, there ought to be an easy revision/feedback process.

To summarise, the constructive function explains how democracy can identify and devise proper solutions to problems of justice by making use of relevant knowledge pooled trough social knowledge. The constructive function also explains how democracy can devise better solutions by allowing for revision and for information to always enter the forum. This picture of the epistemic features of democracy may seem too idyllic: it appears as if agents will come to agree but there are many reasons why we can expect agents to carry on disagreeing even after deliberation and information pooling. It is hence important to explain how democracy deals with irresolvable disagreement.

5.2 The Constructive Function and Irresolvable Disagreements

The constructive function of democracy is well-suited to the resolution of first-order (factual) problems of coordination. These are problems concerning the identification of the proper means to achieve some agreed upon ends. Suppose, for instance, that agents agree that they ought to ensure sustainable food supplies and livestock welfare. They also agree on what is meant by these ends. Through the constructive function, information will be made available along with different experts’ views on the subject so as to select the best means. Also, through the revision process, the experimental nature of democracy is ensured; the selected means can be revised if it fails in achieving the desired end. It is, however, important to explain how the constructive function also applies to second-order (normative) problems of coordination, that is when there is disagreement about the proper ends to achieve: e.g. in the same scenario offered, agents could disagree about the correct meaning of welfare.

117 This is not meant as a clear cut definition.
I first explain how deliberation and the constructive function can help to reduce and restrict disagreement and how they impact value judgments and therefore influence agents’ second-order disagreements. I will then provide reasons to infer that some disagreements will survive deliberation. From there, I argue that even if some disagreements are irresolvable, democracy involves features which can help to prevent moral disagreements from becoming political disagreements. I classify these features in the constructive function of democracy since they help to define the problems of justice that democracy will have to address. I do not hold that democracy can always prevent political disagreements from emerging – nor do I hold that this is a very efficient function of democracy. Rather, my point is that we have epistemic reasons within a democracy to regard our fellow citizens as reasonable; reasons which we would not have in a system without free and open deliberation. This recognition of reasonableness is essential for sustainability in the face of irresolvable disagreements. This last epistemic function of democracy shows how my approach, as opposed to most epistemic approaches of democracy, clearly pays attention to the aims of decision-making rather than to purely epistemic aims.

Deliberation and the Restriction of Disagreement

I explained the sources of disagreement in more detail in chapter 2: verbal, conceptual and normative. I now argue that information pooling and deliberation can act on these sources of disagreement so as to diminish their influence. This disagreement reducing function of deliberation and of information pooling should not be controversial. This is because our basic understanding of reasoning and of rationality includes the assessment of facts through reasons and evidence. This basic understanding also includes the assumption that for most problems we face, a single body of evidence should yield a single doxastic attitude, this is known as the “the uniqueness thesis.” (Feldman & Warfield, 2010, p. 6) One does not need to endorse this thesis with regard to all aspects of epistemology to understand its relevance. All we need to acknowledge is that it seems a plausible prima facie and instinctive understanding of rationality that if agents share their evidence and if they are rational they should at least arrive at quite similar results. It is unlikely that we would expect agents to be always justified in endorsing both \( P \) and \( \neg P \) based on the same body of evidence as if disagreement was the norm of epistemology.\(^{118}\) My claim is that, ceteris paribus, the more similar the evidence the more similar the results of reasoning should be.\(^{119}\) Hence, by making the available body of evidence more uniform and

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\(^{118}\) There are reasons why agents may arrive at \( P \) and \( \neg P \) while reasoning properly, under some circumstances, which I find convincing. (Goldman, 2010a) Nonetheless, these reasons still explain why the agents are justified in diverging from the norm.

\(^{119}\) To support this claim, one can see how it helps to explain why the epistemology of disagreement is so relevant. If there was no apparent problem in the fact of reasonable disagreement – in the fact that peers with identical evidence can arrive at different answers – we would not question the epistemic significance of disagreement.
by improving its content, deliberation and information pooling match our basic assumptions that identical evidence should, in general, yield identical answers.

Based on my previous claims about democracy’s epistemic features, it should be clear that disagreement can be reduced and that democracy can strive towards the real zone of disagreement by providing a more uniform body of evidence. I leave aside verbal and conceptual disagreements as we can easily extend the arguments for democracy’s capacity to reduce normative disagreement to these other sources as well. I discuss two types of normative disagreement: epistemic and metaphysical disagreements. The second may seem more immune to the disagreement reducing effect of deliberation – I argue nonetheless that even metaphysical disagreement is subject to reasoning and that by improving reasoning, deliberation can at least help in eliminating errors.

With regard to epistemic disagreements, agents can arrive at different views based on the fact that different information is made available to them. Agents A and B who share the view that abortion is acceptable inasmuch as it is not a painful process for the foetus may still disagree about when abortion should be authorised if they hold different information about when the foetus starts feeling pain. The basic argument for democracy’s capacity to reduce epistemic disagreement is its capacity to pool information and to experiment through its revision process: thus allowing for a more uniform and adequate body of evidence. For instance, suppose that after inquiring agent A comes up with evidence showing that the foetus feels no pain only before 24 weeks, that which confirms her view, and that agent B, on the other hand, cannot find any evidence for her view that the foetus feels no pain only before 10 weeks. Inasmuch as agent B is rational, we expect her to be moved by the force of the evidence and the disagreement should be resolved. This shows how information pooling reduces epistemic disagreement.

In the case of metaphysical disagreements, the question is more complex since we assumed that morality is plural; that is, agents could have conflicting moral intuitions and still both be right. That notwithstanding, we can expect collective reasoning and information pooling to have an error reducing function even with regard to these disagreements. This is because intuitions are not the whole picture of our moral judgments – as Misak says: “a case can be made for perception or experience in the moral domain. […] we find some reasons, arguments, imagined situations, and thought experiments compelling and may, in light of them, revise our moral judgements.” (2000, p. 90) Metaphysical disagreement holds that agents can come up with different views about what ought to be done based on their different understanding of moral values. Even if that is the case, what counts as a moral value for an agent cannot be isolated from the world of experience: moral intuitions may

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120 See Goodin (2003, p. 79).
121 §2.1.1
come to be revised and adjusted in the face of experience and reasons. One could even revise one’s intuitions based on other people’s experience or based on a new strong argument. For instance, one may change one’s insensitive moral assessment of rape were one to meet someone who has suffered such an ordeal. The claim is simply that even if we may sometimes be unable to show one another wrong when we hold different values, it is not impossible to revise these values based on experience and arguments. Even if values are incommensurable, our understanding of these values is not independent from the world of experience and reasoning. (Misak, 2000, p. 91) Deliberation and information pooling make experience available for the moral assessment of our values and intuitions. Accordingly, the constructive function of democracy makes it possible for reasons and experience to act on metaphysical disagreement – and second-order disagreements – so as to reduce possible errors.

Hence, value judgements and what people judge to be part of justice will be affected in many ways by democratic deliberation both at the factual and normative levels. Since this pooling of information generally “makes it more likely – although not certain – that truth will prevail over prejudice” (Besson, 2005, p. 227); we can assume that this will increase the truth-probability of the normative views held by the agents – at least by reducing errors based on factual inadequacy in value judgements. Nonetheless, there are reasons to hold that some disagreements will remain.

**Irresolvable Disagreements**

I provide here an explanation of the possibility of sustained disagreements even in the face of deliberation and of information pooling. I take for granted that agents are reasonable and that their mental capacities are functioning normally so as to avoid the view that sustained disagreements are only due to mistakes. I also leave aside the facts about the finitude of human understanding and that rationality and morality could be plural. These facts can indeed help to understand sustained disagreement but I want to provide further arguments based on the possible failures of deliberation. The existence (and possibility) of sustained disagreement is problematic for many approaches of deliberative democracy – not like mine – which assume agreement and consensus to be the aim of decision-making procedures since many deliberative democrats think that deliberation “will transform disagreement into reasonable agreement”. (Besson, 2005, p. 230) Conversely, I argue that there are strong reasons to assume that deliberation cannot ensure reasonable agreement. I first mention Besson’s arguments before putting forward stronger considerations from the epistemology of disagreement. This incapacity to achieve agreement will explain the need for a decision mechanism.

Firstly, Besson observes that, as with Richardson’s argument against diversity, it is unclear that multiplying the available options through open deliberation will increase our chances of agreement. (2005, p. 230) We may still make truth available through deliberation but it does not mean that there

122 Besson refers to: Barber (1984); Sunstein (1988); Cohen J. (1989) and Mansbridge (1980).
will be agreement on it. Hence, reasonable agreement can never be certain. Secondly, Besson says that deliberation “may simply make the bases for disagreement clearer.” (2005, p. 230) If agent A and B disagree, even if they deliberate, they might only understand better why they disagree without being moved towards one another’s position. A better understanding of one another’s view, per se, does not imply that one has to reduce one’s confidence in one’s view. There is nevertheless an epistemic benefit to this greater understanding of one another’s views. If further relevant reasons and experience arise in the future, by sharing a better understanding of each other’s views, agents will be better suited to make use of this new information.

These are good reasons to assume that deliberation does not necessarily lead to agreement but they fail to make clear why deliberation sometimes achieves agreement and sometimes does not. This is why I provide further arguments by relying on the epistemology of disagreement. I am not providing further reasons to explain disagreement; I am in fact exposing the limitations of deliberation. My point is mainly that deliberation fails in important ways with regard to the communication of evidence playing a role in our moral epistemology. It can fail in transmitting the relevant reasons and evidence for the following three reasons: (1) We may not have access to our operative evidence; (2) Our evidence may not be exportable; (3) We – as different agents – may have mutually exclusive though internally consistent pre-theoretical moral intuitions.

The first point is discussed by Sosa when reporting Moore’s argument against the sceptical challenge in epistemology: “The idea that we can always or even often spot our operative ‘evidence’ for examination is a myth.” (2010, p. 291) During our lifetime, we acquired evidence for the beliefs we currently hold. For some of these, the evidence may “no longer [be] operative except indirectly through retained beliefs”. (Sosa, 2010, p. 291) Sosa gives the example of one’s belief regarding the name of one’s school teacher: I may have a justified true belief that the name of my second grade teacher was ‘Diane’ even though the evidence is no longer accessible or assessable. Nonetheless, I do feel warranted in holding the said belief. This has two implications for deliberation and disagreement: (1) Since the evidence is not accessible it is not exportable. I know that my teacher was called Diane but there is no way that I can provide you with the evidence: my testimony is only evidence of evidence. (Goldman, 2010a, pp. 210-211) In terms of normative judgements, I may very well believe that charity is a virtue as I acquired this belief through experience and reasoning. If my evidence for this belief is no longer operative, I have no evidence to offer to resolve the disagreement. (2) Since my own evidence cannot be assessed, it will be hard for me to be moved by arguments and reasons that would normally affect this evidence. Deliberation would therefore fail to achieve its function. It is important to point out, as Sosa does, that: “We may be justified in insisting on our side of a

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123 See also Knight and Johnson (2011, p. 142).
124 The first two reasons can apply to both moral and non-moral evidence.
disagreement despite being unable to spell out our justification. But this does not empower us to proclaim the view unsupported. The demands of public debate are different from those of private belief.” (2010, p. 292) Hence, such irresolvable disagreements may have a place in the epistemology of disagreement, but they cannot stand as *ultima facie reasonable* political disagreements since they would fail to ensure rationally motivated policies. Nonetheless, this type of ‘inoperative’ evidence explains how deliberation may fail to achieve agreement.

Secondly, Inwagen mentions, though he expresses doubts about this, that “evidence is not always of the public sort, that some evidence is not *exportable*”. (2010, p. 26) For instance, if an agent is being accused of having killed someone, the fact that he did not is evidence only for him that he is innocent. It is not evidence for anyone else. (Goldman, 2010a, pp. 210-211)\(^{125}\) In moral epistemology, we often rely on intuitions to explain our understanding of morality. My intuition that some A is good is not something I can export to you. I can tell you that I have that evidence but you cannot come to share my intuitions in the same way. Furthermore, there are experiences that simply cannot be expressed properly through language or that communication fails to capture completely – think of rape. Based on these facts, deliberation cannot always achieve its aim of reason-exchange since, in these cases, the reasons cannot by their own nature be communicated.

Thirdly, disagreement can be founded on the fact that “the two sides have sufficiently different *pre-theoretical moral intuitions*, which lead them to believe different fundamental moral principles.” (Wedgwood, 2010, p. 219) These sets could be mutually exclusive though internally consistent. There would therefore be “no incoherence that would alert the believer to his mistake, it is hard to see how further reflection based on these intuitions could lead the believer to correct his mistake.” (Wedgwood, 2010, p. 222) In this type of disagreement, there simply is no hinge on which deliberation could act to make any of the two parties realise that they are mistaken. One possibility would be to show some inconsistency between one of the party’s beliefs and the world as it actually is. However, there are no (or very few) clear self-certifying moral facts that can prove someone’s set of moral beliefs wrong. Hence, deliberation may not be able to find any arguments for an agent to regard her views as mistaken. We can also extend the point about pre-theoretical moral intuitions to different fundamental sets of beliefs. Gaus explains that “people start off with different sets of rejected and accepted beliefs. Even if different people impeccably employ the same logical operations on two such sets, there is no reason to believe that they will end up with the same belief set.” (1996, p. 43) Such agents would then face irresolvable reasonable disagreements.

\(^{125}\) Similarly: “I will, in ordinary situations, often have access to information about myself that I lack with respect to you – let us call this personal information. Personal information is information that one has about the normal functioning of one’s own cognitive faculties.” (Lackey, 2010, pp. 309-10)
In the preceding section, I have shown that we can generally expect the epistemic features of democracy to reduce disagreement and to direct us towards agreement. Nonetheless, irresolvable disagreement remains possible in respect to both factual and normative beliefs. In this sense, one must explain how democracy can achieve coordination in the face of irresolvable disagreements; it can achieve this through the avoidance of unsustainable political disagreement and through voting.

The Prevention of Political Disagreement: Sustainability

In chapter 2, I mentioned two types of disagreements: moral and political. Political disagreements are about what we should enforce – or refrain from enforcing – upon one another through our political institutions – think of pro-life and pro-choice. A moral disagreement is like the one between vegetarian and meat eaters: there can be a ‘political truce’ between these two – even if the vegetarian thinks that it is morally wrong to eat meat, she does not usually try to enforce that judgement through political institutions.

A decision is sustainable inasmuch as it achieves wilful coordination over time: enforcing vegetarianism through law might result in violent conflict and this would not be a sustainable decision. To support democracy, it is essential to explain how it can achieve coordination, even when deliberation fails to achieve agreement, without collapsing into deep political conflicts. Such conflicts can be avoided by keeping them at a moral level – as it is the case with the vegetarian and the meat eater. I argue that democracy provides us with reasons to maintain some disagreements at the moral rather than at the political level when politicising these disagreements would be unsustainable and cause discord, i.e. a failure to coordinate that leads to political decay. This is because democracy provides us with information about the reasonableness of our opponents. To be clear, my argument is not that one has decisive reasons not to politicise a disagreement when the disagreement is reasonable; it is a weaker position than that. My claim is that inasmuch as one sees one’s opponents as reasonable, one has reasons to avoid political disagreements that would result in unsustainable/discord situations. In other words, one has reasons to ensure that coordination will be possible and that may imply that one has to refrain, ceteris paribus, from politicising one’s views when they are too contentious. I will first provide arguments for this view before explaining in more detail how democracy informs us of our opponents’ reasonableness, i.e. of their disposition to be responsive to reasons and evidence and to adjust their beliefs accordingly.

The Readiness to Avoid Political Disagreement

The first step in my argument for the capacity of democracy to achieve sustainability and concord in the face of irresolvable disagreement is to argue for the epistemic desirability of the continued

\[ A \text{ totalitarian brainwashing state might achieve the same but it would fail with regard to the aim of justice qua truth. In contrast, democracy is clearly truth-oriented. } \]
existence of an inclusive democratic decision-making procedure. This gives a normative reason to seek sustainable decisions. The second step is to argue that our disagreements with peers warrant some restraint on what we can claim in practical political reasoning – which is a weak form of reciprocity. What these two steps point to is the necessity to have reasons to regard one’s opponent as reasonable or as an epistemic peer. Without this assumption of reasonableness, the reasons to prefer sustainability cannot obtain.\textsuperscript{127}

As I have argued, if one is concerned about truth/justice one must also be concerned with the proper conditions of assertion and of truth assessment. In the face of political disagreements, these conditions are those offered by deliberation and reason-exchange. An open and inclusive forum of deliberation is necessary if one is to assume that one can assess the truth of one’s beliefs about justice: therefore, one has reasons to ensure the continued existence of this forum. A sustainable decision is one that prevents disagreement from becoming an open conflict where coordination is no longer the aim but rather forced compliance. There is therefore a \textit{prima facie} reason to avoid implementing unsustainable views, i.e. highly controversial views whose implementation would threaten the continued existence of our polity. This applies even if the agent holds these views very dearly and with high confidence. This is because: “It is by omitting reference to controversial premises that we preserve democracy and thereby secure the conditions under which proper epistemic practice can continue.” (Talisse, 2009a, p. 154) Truth-aiming implies that one must be ready to make concessions and to refrain from trying to enforce one’s highly opposed beliefs since the existence of the deliberative political entity is a condition of truth/justice-aiming. There is hence a normative argument to support sustainable decisions.

Moreover, peer disagreement influences what one is ready to assert in practical political reasoning. When coordination is necessary and when agents disagree with epistemic peers, I hold that they have to refrain, to some extent, from acting on the disagreed upon beliefs whether or not they have to revise the said beliefs.\textsuperscript{128} This is because reasonable disagreement is puzzling for those who hold one another as peers. In other words, whether or not disagreement should affect what agents believe, it does affect what they should, and do, accept\textsuperscript{129} in a practical political reasoning. This is because by acting on something over which there is intense disagreement one is not offering proper respect to one’s peers

\textsuperscript{127} The first step is a reformulation of the pragmatist argument, which I adopt, developed by Misak and Talisse to which I refereed in chapter 2 and 3. The second step is an original extension of Talisse’s own argument. (2009a, pp. 147-149) The support for the ‘assumption of reasonableness’ I provide grounds better Talisse’s argument and explains better how democracy achieves sustainability.

\textsuperscript{128} I do not take a stance on what the proper doxastic behavior is in the face of peer disagreement; there is a lot of disagreement on this in the literature and it is not necessary to establish my claim. Still, a view which holds that in the face of disagreement one ought to reduce one’s level of confidence in one’s beliefs would provide even more reasons to refrain from acting on beliefs which are subject to strong disagreements.

\textsuperscript{129} “To believe that \( p \) is to feel that \( p \) is so. To accept that \( p \) is to adopt a policy of being willing to treat \( p \) as a premise in inferences or as a basis for action.” (Elgin, 2010, p. 64) based on Cohen J. (1992).
(the weak form of reciprocity). In other words, one fails to treat one’s opponent as one’s epistemic peer. If the agents indeed regard themselves as vague epistemic peers, it should be reflected in what they accept as a basis for action. They should not try to implement something regarded by their epistemic peers as totally unjust and immoral as this would give no weight whatsoever to one’s peer’s views in one’s practical political reasoning. Hence, when agents regard one another as epistemic peers and when they cannot prove one another wrong, they practically have to refrain from acting on what is too controversial if they are to give any weight to the fact that they regard them as peers. This is because agents are concerned about the correctness of their coordination solution. Selecting the coordination solution that one’s peers oppose the most is (epistemically) disrespecting their judgment. If wilful coordination is to be achieved, one ought to take into account the judgment of one’s peers: this is a requirement of coordination with peers.

This view is very similar to the liberal one according to which we ought to regard one another as free and equal. As Gaus discusses: “moral persons are all equally authoritative interpreters of the demands that morality places on one”. (2011, p. 15) For Scanlon, for instance, this means that if we disagree with our peers we should only implement “principles that they could not reasonably reject” – this is because not doing so is a failure to recognise one’s peers as free and equal, i.e “as equal interpreters of morality.” (Gaus, 2011, p. 17) The understanding of what it is to hold agents as free and equal proposed by Gaus is not too different from the one I assumed in terms of our vague epistemic equality. I admit that democracy and liberalism can be highly compatible. I maintain, however, that the epistemic argument for democracy and the liberal position arrive at similar conclusions from different premises. The liberal argument starts from freedom and equality while the epistemic argument starts from our concern for the truth and from our dependence on others to properly assess the truth. The epistemic argument implies that if we are (to hold one another as) peers, there seems to be something wrong for me to force you into compliance with a view that is despicable to you, as if your view had no weight in my judgement about what ought to be done. As similar as this may seem to the liberal view, it is also different: there are situations where one will reasonably reject an implemented view that my argument would not hold to be problematic. My position is much weaker than (some) liberal views: it is part of (epistemic) ‘respect’ for our epistemic peers to avoid unsustainable disagreement not that the only legitimate political views are those which cannot be reasonably rejected by all. My concerns for equality and for respect for our peers remain epistemic.

130 For a similar but more substantial view see Brettschneider (2007, p. 58).
131 This is only a prima facie requirement; there might be reasons for not refraining in certain circumstances. There might also be reasons to refrain that have nothing to do with holding our peers as peers. (Besson, 2005, p. 158)
132 The view I defend here must be differentiated, even if similar, from the politics of ‘avoidance’ or ‘omission’ found in Rawls (Talisse, 2009a, pp. 48-52). The idea is not that we should never use objectionable premises or rely only on premises that are accepted by all but only that sustainability should be ensured. See also Bellamy and Schönlau on ‘trimming’. (2004, p. 416)
rather than substantially moral; treating another as an epistemic peer has epistemic consequences on what one ought to accept as a proposition of practical reasoning even if there is also a moral argument such as the one offered by liberalism.

Problematically, it is not obvious that one will be ready, in the face of sustained disagreement, to keep regarding one’s opponent as reasonable and as a peer. In fact, the phenomenology of disagreement indicates that: “Typically, both sides think the other is wrong, and each assumes that there is a failure of reasoning on the part of the other.” (Hershenov, 2005, p. 232) By assuming that there is a failure of reasoning, one downgrades one’s opponent from the status of peer. This is because one assumes that oneself is not making a mistake based on ‘personal information’. The issue is then that agents would no longer be regarding their opponents as peers but this is necessary if we are to expect democracy to achieve sustainability.

Hence, democracy must provide evidence that one’s opponent is one’s epistemic peer. More precisely, one only has to have evidence that one’s opponent is one’s vague epistemic peer. By this I mean that one must be able to regard one’s opponent as having approximately the same evidence and to be reasonable (following my epistemic definition of the term). If democracy can provide such knowledge of one’s opponent, as I believe it can, democracy would have a capacity – even if it is a very weak capacity – to prevent unsustainable disagreements from being made into political disagreement. This is because it is both a normative requirement of proper truth-aiming but also a practical requirement of regarding someone as a peer. In the next section, I explain why the phenomenology of disagreement is less frustrating than it seems by arguing that democracy provides evidence for the reasonableness (or unreasonableness) of one’s peers.

How do we Know one Another

Much is said in democratic theory about the role of deliberation in changing one’s preferences and views. I rather concentrate here on an often disregarded epistemic feature of deliberative democracy. Deliberation provides an essential type of knowledge to hold our opponents as reasonable peers and this knowledge is precisely knowledge of our opponents: “it is in the processes of exchanging arguments, voicing criticisms, and responding to objections that we come to see each other as reasoning and reasonable agents.” (Talisse, 2009a, p. 148) Through reason-exchange and deliberation, one does not only acquire knowledge about the subject of the deliberation, one also

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133 FN 125
134 There are indeed unsustainable political disagreements which cannot be prevented. For some of them, it might not be possible not to take a stance due to the object of the disagreement itself: for instance, abortion is either allowed or not.
135 See also Peter’s discussion of the non-instrumental epistemic value of deliberation. (forthcoming)
acquires knowledge about the other’s reasoning, views and preferences; that is, one acquires knowledge about the other and who she is.

This function of deliberation does not provide additional reasons to regard the result of deliberation as accurate. Rather, as McAfee explains, it provides a different type of knowledge that is necessary to regard our opponents as peers in the face of sustained disagreement:

Repeatedly in observing public deliberations, I and others note something quite stunning. Participants often leave saying that they did not necessarily change their own views on things but they did change their views of others and others’ views. In a deliberative poll in Austin, Texas, a “welfare mother” from Chicago was in the same small group deliberating on the family and the economy as was the rich lady in her fur coat from Westchester. Each came into the deliberation with preset views of the other (monster, bitch, cheat, etc.); but through the course of the deliberation they started to see the other as human and familiar, not so strange after all. (2008, p. 262)

This function of deliberative democracy allows agents to regard one another as peers and to understand their respective point of view. This, even if it does not help to achieve agreement, helps to achieve sustainability: recognition of reasonableness allows agents to regard one another as peers and to trump/balance the phenomenology of disagreement. By maintaining one another as peers even when faced by sustained disagreement, we can expect some strongly opposed views to not be implemented and that some disagreements will remain at the moral rather than at the political level. It is therefore an essential epistemic feature of democracy if we are to understand how democracy can achieve the presumptive aims of sustainability.

We can understand this epistemic feature of democracy by relying on the following ground: in a disagreement where one does not deliberate with one’s opponents, but where one knows that one shares the same evidence, one may rightly assume that the opponent is mistaken inasmuch as one holds personal information about one’s cognitive processes. If one revises one's evidence and cannot identify any mistake or failure\(^\text{136}\) and since one knows that one is not drugged or under any cognitive impediment, it seems correct to hold that one’s opponent must be somehow mistaken. What deliberation achieves is a better understanding of the opponent’s cognitive processes, interests, value judgements and views in general. Through such better understanding, one will acquire reasons to recognise one’s opponents as a peer since, as McMahon argues: “If one sees those with whom one disagrees (about what substantive public values require) participating effectively in shared deliberation, providing plausible if not convincing replies to one’s criticisms, this can increase one’s confidence in their intellectual competence.” (2001, p. 101)\(^\text{137}\) Deliberation provides both knowledge of the opponents’ capacity to reason but also of the opponents’ reasons for holding their views. One

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\(^{137}\) Note that the opposite is also possible: we may stop regarding our opponent as a peer if she fails to demonstrate the necessary characteristics of reasonableness.
may still disagree with one’s opponents and one may still hold that their views are mistaken – even if
one cannot point to the mistake. Nonetheless, it becomes more difficult through continued deliberation
to hold one’s opponents as unreasonable or incapable of properly reasoning. Hence, by providing
knowledge of one another’s views, interests, values and capacity to reason, deliberation provides the
agents with reasons to regard one another as peers and reasons to assume that democracy can achieve
sustainability.\textsuperscript{138}

At this point, I only supported the idea of ‘weak reciprocity’. I still need to explain how to select a
coordination solution when agreement cannot be achieved. This is why there is a need for a decision
mechanism.

\textbf{5.3 Deciding by a Vote}

Since deliberation cannot be held to always achieve agreement; we sometimes have to decide which
view will stand for the time being as what ought to be done so as to achieve coordination. There are
different ways to select one course of action over another: e.g. nominate someone to decide, randomly
choose by flipping a coin or vote. There are also different ways to vote: majority voting, approval
voting, lottery voting, etc. The essential, however, is that a decision can be made if there is to be
coordination and that this decision can be rationally motivating.

The need to vote and how it should be conducted is a central question of democratic legitimacy and it
is essential for me to say something on the subject. Otherwise, there would be an important gap in my
account of democracy as a \textit{decision}-making procedure. Notwithstanding, this section is more of a
required digression than a core element of my chapter since voting is not key to my overall epistemic
argument for democracy: all the central epistemic features of democracy lie in its deliberative
function and in its capacity to pool information. Voting is essentially a tracking/selecting device, not a
knowledge creating/producing feature of democracy.

I defend that in circumstances where a decision needs to be made and where agreement cannot be
achieved, voting with universal equal suffrage\textsuperscript{139} is the appropriate procedure to respect disagreement
and to achieve a rationally motivating decision. Only thus can the decision be connected in the
relevant way with the views held by the agents. By ‘in the relevant way’, I mean that it can be
assumed that the agents can actually and reliably influence causally the result of the vote. I leave open
which precise voting system must ultimately be adopted, even though I defend majority voting for the
purpose of this discussion: i.e. I do not have strong conclusive preferences for majority voting –
where agents vote for only one option – over approval voting – where agents vote for as many options

\textsuperscript{138} See Goodin (2003) for his discussion of ‘deliberation within’ to see how the recognition of reasonableness
does not have to be achieved only through actual deliberation.

\textsuperscript{139} This is not incompatible with representation, as I explain in the next chapter.
as they want without ranking them. It is also probably the case that different voting systems can be adopted for different situations. My position remains general and is not incompatible with more refined work on the subject. I first argue for the relevance of universal and equal suffrage voting based on the same arguments I provided for political equality before arguing that we have epistemic reasons to prefer majority voting over random decision mechanisms.\footnote{A completely random mechanism would be one issuing a decision based on all the possible alternatives; e.g. imagine a computer able to conceive of all the alternatives without input from the agents and to issue a solution randomly. Another mechanism would be one where we would randomise over the views held by the agents without weighting their views: e.g. flipping a coin between two views unequally supported by many agents. Finally, imagine a system like weighted lotteries which randomises over the results of a vote. I call the first two types random mechanisms while the third one qualifies as a form of voting. I have defended the epistemic edge of majority voting over lottery voting in \cite{Allard-Tremblay2012}.}

Voting is a decision mechanism in the face of sustained and irresolvable disagreement. I say ‘mechanism’ to contrast with a decision-making procedure. If deliberation could always yield consensus, it would still be a decision-making procedure but without a decision mechanism. The relevance of voting emerges in the face of our incapacity to agree through deliberation \cite[p. 240]{Besson2005} and to identify which disagreements are actually reasonable.\footnote{See the citation from Kelly on page 30.} To explain why voting is the proper decision mechanism for an epistemic procedure, I must make clear how it can provide us with indicative reasons for the correctness of the decisions made. I explain: (1) Why we should decide that one position will stand for the time being as what ought to be done; (2) Why voting rather than other decision mechanisms; (3) Which epistemic arguments support majority voting.

Firstly, the need to decide is built into the circumstances of politics: it comes “primarily from our sense of the moral urgency and importance of the problems that it is necessary for us to address – the things that (morally) need to be done and must be done by us, in our millions, together if they are to be done at all.” \cite[p. 117]{Waldron1999b} This is simply the idea that deciding is essential for our obligations of justice to obtain. If we fail in coordinating, we cannot achieve some important duties of justice, whatever they may be. Hence, we can say that “there may be nothing else to do but vote if deliberation has left us with an unredeemed plurality of opinions in a situation where a single course of action is called for.” \cite[p. 212]{Waldron1999a} It is the need and the will to achieve coordination that explains the need to make a decision even if deliberation has not yielded one single solution. It is thus important to understand deliberation as being only one part of decision-making: voting is equally essential.\footnote{See Besson \cite[p. 210]{Besson2005}.}

Secondly, there are two main arguments for voting as a decision-mechanism: the first consists of claiming that voting offers “equal respect for all opinions in circumstances of disagreement”. \cite[p. 246]{Besson2005} The second claims that voting is the only\footnote{This applies to various voting systems rather than only to majority rule.} decision mechanism that carries the
epistemic benefits of deliberation to the results of the votes and thus can provide rational motivation. These two arguments together explain why voting is preferable to random decision mechanisms. Furthermore, the (epistemic) arguments I have already provided against granting more power/votes to experts apply here so as to support universal and equal voting if we are to achieve rational motivation.

Disagreement applies to what the right answer is but also to who ought to decide. Agents may agree that some have better capacities than others; for they certainly agree that some have less.\footnote{Paraphrased from Estlund (2008, p. 3). There might also be a threshold of capacities that is beyond disagreement that could allow for the determination of who can take part in the procedure. I contend, however, that once this threshold would be passed; there would not be agreement on who would be better able to achieve correct decisions.} However, there is reasonable disagreement on who amongst them have these capacities. As I argued, it is not beyond reasonable disagreement to claim that all those with a degree should have more political power. Hence, a closing mechanism ought to avoid offering more power to some agents in objectionable ways if it is to bridge disagreement. Accordingly, the fundamental argument for universal and equal voting is that it “offers each individual view the greatest decisive weight compatible with the equal weight of other views” and “[i]n this sense, majority-decision is a fair method of decision-making, at least in the most impoverished or formal sense of fairness qua equal respect.” (Besson, 2005, p. 250)\footnote{See Waldron (1999b, pp. 114, 188).} It is because majority voting is purely mechanical that it can be generally acceptable from all reasonable points of view. (Waldron, 1999b, p. 117) Universal and equal voting cannot be rejected on the basis that it establishes objectionable and unequal power relations or that it relies on substantive notions of equality or fairness. It is indeed fair in terms of anonymity, but that notion of fairness is purely ‘formal’ and ‘impoverished’. Within the context of decision-making in the face of extensive reasonable disagreements, universal and equal voting, by offering equal power to everyone, cannot be rejected on the basis that the decision would have been affected by some agents’ superior political power so as to direct it away from a correct determination of justice.

Universal and equal voting is purely mechanical because it does not presuppose the correctness of any of the views nor does it give more importance to any of them. Rather, majority voting only combines the different views without judging their content. It provides every view with an equal weight.\footnote{See Sadurski (2008, p. 60).} As such, then, voting is neutral with regard to the different views expressed and there cannot be reasonable disagreement on such a closing mechanism in the circumstances of politics where we disagree about what the right answer is.\footnote{Even though there can be disagreement on its proper field of application.} Hence, since a decision needs to be made and since we disagree about what we ought to do, voting comes out as a mechanical device to close our deliberation.
in a manner that respects disagreement. There are, however, other closing mechanisms that are normatively neutral, such as coin-tossing and lottery voting.\textsuperscript{148}

It is not only the acceptability of majority voting that counts in its favour; it also empowers the agents in the relevant way. The result of majority voting is reliably connected with the views that came out of deliberation: if \( X \) is clearly preferred in deliberation over \( Y \), \( X \) should be selected. If there is a change of mind after the decision is made and \( Y \) is now preferred, \( Y \) should be able to replace \( X \). This supports majority voting because, if the decision is to be rationally motivating, agents must have reasons to regard it as having benefited from the epistemic features of deliberation so as to approximate over time a correct determination of justice. We must be able to regard the results of the decision mechanism as determined by what the agents actually hold and we must also assume that the agents can exercise an actual and reliable control over the decisions made – they must have some form of causal power rather than a simple influence. This is mainly because the epistemic features of democracy are founded in its deliberative process. This explains why coin-tossing should be rejected – but not why majority voting should be preferred over lottery voting.

That is why, thirdly, I need to explain how majority voting achieves rational motivation. We must have reasons to regard the results of voting as rational, that is as being able to track the rational decision.\textsuperscript{149} The arguments I offer here support majority voting over partly random voting mechanisms like weighted lotteries. The capacity of majority voting to track the rational decision can be supported by three arguments: (1) The cumulative weight of independent peers; (2) The implausibility of a widespread breakdown in rationality; (3) The connection of majority voting with the constructive function.

The first argument defends the idea that a majority of agents arriving at the same answer supports the rationality of the view they hold (without denying that the minority’s view can be rational as well). Certain conditions must apply: we must assume that the agents are reasoning independently and that they share a set of evidence. The situation we must consider is one where independent peers arrive at a different answer and where there is a majority on one side of the divide. According to Kelly: “As the number of peers increases, peer opinion counts for progressively more in determining what it is reasonable for the peers to believe, and first-order considerations\textsuperscript{150} count for less and less.” (2010, pp. 143-144) What is essential for this argument to make sense is that agents reason independently one from the other: “numbers mean little in the absence of independence.” (Kelly, 2010, p. 148) Without independence, we only witness the reproduction of the same mind over and over. What this

\textsuperscript{148} See Saunders (2010b, p. 151).
\textsuperscript{149} Some may see a resemblance with the Condorcet Jury Theorem. However, my claim is not a mathematical one. I rather provide further reasons to regard the result of voting as potentially correct.
\textsuperscript{150} These are elements of the set of evidence the agents were reasoning upon.
shows is that when peers agree in large numbers on a subject, they have reasons to regard their position as most probably rational. This argument is limited inasmuch as agents involved in deliberation and political disagreements rarely reason totally independently one from another. Hence, it is not required to hold the majority’s view as overcoming our own assessment of what the rational answer is. Rather, I claim that we can have reasons to regard their view as probably rational whether or not we end up changing our own assessment. As long as we can regard the other side’s view (the one that is going to be implemented as the result of voting) as rational, we would have achieved rational motivation. This argument and the one I am about to offer are both supported by what I argued in the present and preceding chapters: based on deliberation’s epistemic benefits and on the constructive function of democracy we can expect agents to defend views that have benefited from these epistemic features.

The second argument for majority voting is offered by Hershenov. He argues that in the face of an irresolvable disagreement: “there may indeed exist a rational tie in which either both views are compatible with justice or those in the majority are correct, for there is less likely to be a widespread breakdown in their ‘moral intuition module/faculty’ than in the cognitive machinery of the members of the minority.” (Hershenov, 2005, p. 221) Hence, one may have to regard the view held by the majority to be rational since it is less probable that they are mistaken than the minority. This claim depends on what type of majority we face: e.g. “a small but diverse majority (composed of people of different religions, cultures, classes, races, sexes, educations, etc.) is less likely to provide erroneous intuitions than a larger group that is more homogenous.” (Hershenov, 2005, p. 227) This is because a diverse majority is more independent and the assumption that agents have reproduced a mistake can be rejected. What Hershenov shows is that in cases of irresolvable disagreement, there are reasons to regard a majority as rational based on what could have caused the difference in our views inasmuch as a widespread breakdown of the majority’s (moral) epistemology is less plausible – especially if composed of highly independent agents. Indeed, if we are to have any confidence in our capacity to reason it is highly improbable that a majority of agents will suffer over time from a breakdown of their reasoning capacities. This supports the idea that majority voting can select a rational decision.

Thirdly, majority voting makes the revision process of the constructive function of democracy possible in a way that respects equality. This is because majority voting can accurately track changes of mind by revising a law when a specific threshold has been crossed. More importantly, this revision

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151 In which case either random or direct voting mechanisms are acceptable.
152 In which case only the majority voting mechanism is acceptable.
153 This is clearly not always the case. There can be situations when the majority is mistaken, but it remains unlikely.
threshold is built into its internal logic: a decision will be revised if we pass the threshold of 50%. This revision threshold respects equal voting since we normatively have to take a new vote every time an agent changes her mind. This does not, however, mean that we will actually hold another vote; pragmatically, a decision will not change if not enough agents change their mind. My point is not that we have overriding reasons to see a revised law as correct but rather that majority voting with its built-in revision threshold makes the revision process possible in a reliable, direct, and acceptable way. Majority voting therefore provides us with reasons to regard this decision mechanism as appropriate for decision-making procedures requiring a feedback process.

To conclude, I have shown that we have reasons to adopt majority voting as a decision mechanism for our decision-making procedure if we are to provide the agents with rational motivation. This is for different reasons: voting is causally connected with the views held by the agents, it is procedurally fair and respects disagreement, and it makes the feedback process possible. Majority voting is therefore appropriate for an epistemic account of democracy. I have also argued in this chapter that democracy is apt through the constructive function to pool relevant information for decision-making. Furthermore, I have established that democracy can provide us with knowledge of our co-citizens and that it can therefore provide us with reasons to secure sustainable decisions, even in the face of irresolvable disagreements. I have provided clear evidence that democracy is an appropriate procedure to achieve rational motivation whose decisions can be held to achieve correct determinations of justice over time. I have also argued that the epistemology underpinning democracy is in tension with legal entrenchment. Legal entrenchment seems nonetheless something to which we are highly committed if we are to ensure rights protection. In the next section of the thesis, I establish the compatibility of constitutional laws with epistemic democratic legitimacy.
SECTION 3

EPISTEMIC DEMOCRACY AND CONSTITUTIONAL LAWS
CHAPTER 6: CONSTITUTIONAL LAWS WITHIN AN EPISTEMIC ACCOUNT OF THE LEGITIMACY OF DEMOCRACY

The previous chapters aimed to establish that democracy is the appropriate procedure to settle our disagreements since it incorporates features which make it truth-conducive. I maintained that these disagreements are very extensive: even human rights, over which there seems to be some type of shared agreement, are not immune to diverse reasonable interpretations and positivisations, i.e. there are many ways of incorporating them within positive law. If democracy is the procedure by which to settle our disagreements legitimately, it is not clear how requirements, such as bills of rights or constitutional laws – alternatively fundamental laws/rights – can legitimately trump this procedure. There are several reasons why an epistemic account of democracy seems incompatible with fundamental laws: e.g. in the previous chapter, I argued that revisability is essential for legitimacy and that, in consequence, legal entrenchment seems democratically illegitimate. We can also wonder how fundamental rights legitimately acquire their special status so as to trump other laws if all laws equally find their legitimacy in the process by which they were established. At face value, then, fundamental laws seem hardly compatible with an epistemic procedural account of democratic legitimacy. There are, nonetheless, good reasons to have laws with a higher degree of protection. For instance, it is important to have clear and stable laws about how to resolve our conflicts. Some legal rights also seem to have a special moral standing such as the right against torture, a moral standing which appears to require a fundamental status for such rights.

In this chapter, I set the stage for my own explanation of the compatibility of constitutional laws with epistemic democracy. The overall aim of this chapter is to explain the tensions between epistemic democratic legitimacy and constitutionalism while making it clear that constitutionalism remains desirable. I first clarify how my epistemic account of democracy explains the authority and legitimacy of democracy. I mention the essential elements of democratic legitimacy and how they are compatible with many institutional arrangements. I then explain the notions of procedural and substantial failures of democratic legitimacy which open the door for the role of fundamental laws. I argue that it is desirable to have fundamental laws; mainly because of the importance of some considerations. I then review the usual arguments for the protection of these special considerations through fundamental laws and why they are inconsistent with the epistemic account of democracy.

6.1 The Authority and the Legitimacy of Epistemic Democracy

In this section, I explain how the epistemic argument supports the authority of democratic laws and how this account explains what is necessary for democratic legitimacy. I then explain how legitimacy needs to be understood as coming in degrees and how it can suffer from both procedural and substantial failures.
The Authority of Democratic Laws

I argued in chapter 1 that law plays a role within morality when settling our disagreements and when providing us with determinations of more general principles of justice. However, we need evidence to infer that it is properly fulfilling this role since there is much disagreement as to the actual moral value of any law. If law is to be seen as more than a pragmatic settlement to our disagreements – one whose specific content is less important than having a settlement – we need to have reasons to regard it as appropriately fulfilling its role within morality, i.e. as providing a correct solution to what the disagreement is actually about.

My epistemic account of democracy is designed to allow law to be seen as fulfilling its role within morality since, under my account, democracy is likely to provide us, over time, with correct determinations of justice. The procedure by which law is produced and is maintained provides us with strong reasons to regard the laws to be correct. Accordingly, democracy provides us with indicative reasons to regard the laws it achieves as intrinsically normative (or as instrumentally normative when there is agreement on the ends). The moral authority of democratic laws – i.e. their content-independent and pre-emptive moral bindingness – can be assumed and inferred based on the evidence we have that the law is a correct determination of justice. The purported authority of law does not come from the procedure’s moral characteristics or from the law’s intrinsic moral value, but from the evidence the procedure provides us that the law in question is part of morality or that it is the best means to achieve some agreed upon end. One of the advantages of my account is that it explains the authority of democracy by connecting it with the agents’ original disagreements: it is because democracy can be seen as providing a correct solution to the agents’ disagreements that they have reasons to respect this procedure. This contrasts sharply with accounts, as seen in chapter 3, which rely on moral notions to trump disagreements.

Note, however, that the presumed authority of democratic laws does not rely on their actual correctness. This is because correct laws could only be identified were we to conduct the democratic procedure to the hypothetical end of inquiry but we can never claim to have achieved the end of inquiry; further reasons and experiences can always emerge. Hence, it is hardly possible to claim that any actual law is appropriately and truly part of justice. This makes clear that the authority of law relies on an ongoing process. What is required for this process to provide the agents with indicative reasons for the authority of law is what constitutes democratic legitimacy.

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154 This includes the determination of the best means to achieve some agreed upon end and the determination of the ends themselves.

155 “An indicative reason [...] is something that matters as evidence for the existence of an intrinsic reason.” (Regan, 1990, p. 7)

156 §1.2
Democratic Legitimacy

Whether or not a law is ‘objectively’ morally correct is, in most cases, irrelevant to the legitimacy of a decision – this is because, as I just explained, the purported moral bindingness of democratic law does not rely on the actual correctness of the law, but on it being the outcome of an ongoing process involving the relevant epistemic characteristics. These characteristics are those which are required for the agents to infer that the process in question can affect their obligations; in other words, procedural democratic legitimacy explains the features which a procedure must involve for the agents to see themselves as liable to a change in their normative conditions by the democratic procedure, whether or not the procedure is in fact objectively affecting their normative condition.

My notion of legitimacy does not require any real/objective moral obligation even if it is not excluded. In fact, in some cases, there could be an obligation simply because the procedure issued a directive: e.g. in cases of pure coordination dilemma where coordination is necessary. In most cases, however, the questions ‘is coordination necessary’ and ‘which coordination solutions are correct’ are questions over which there is deep reasonable disagreement. It follows that we should rather understand legitimacy as the conditions under which agents can infer that they have a real moral obligation. Political legitimacy explains when agents are (see themselves to be) liable to a modification of their (legal) normative circumstances by a political power – without necessarily having to assume that in fact their moral situation is really affected. In other words, we can regard political legitimacy to be about presumptive obligations, whilst a stronger notion of legitimate authority, like the Razian one, would be about actual obligations. On this account, the elements of democratic legitimacy I have provided are justified since they make it possible for democratic laws to be regarded as authoritative.

Accordingly, my account of democratic legitimacy explains the conditions that are needed, under the circumstances of politics, for agents to infer that they have an obligation. There ought first to exist a deliberative forum which can be divided into a formal forum – for specific decision-making – and an informal forum – for assessment and communication to take place. This forum ought to be free: agents must be able to set the agenda themselves. It ought to be inclusive: all views ought to be allowed to be expressed. It ought to be open: all agents should be able to access it. The polity ought to offer political equality to the agents. Freedom of speech and of conscience must be protected: agents must be able to change their mind, pursue their own conceptions, vindicate some ideas, etc. Agents also ought to have a capacity to influence the political agenda and the decisions: they ought, at least, to be able to decide through equal suffrage in a vote. Finally, legal norms ought first to be the outcome of the political process and second, to remain open to revision. This is to ensure that the law can always be subjected to (new) evidence. These conditions were all justified in the previous chapters through the epistemic argument for democracy.
This list does not provide precise definitions of these conditions. Rather, they remain general and underspecified and this is essential to be compatible with the political constitutionalism I defend in the next chapter.\textsuperscript{157} They may, however, come to be specified and limited in some way by the procedure itself. They, nonetheless, provide us with a clear idea of a purely procedural account of epistemic democratic legitimacy: a democratic law is legitimate if it was produced through a procedure which exemplifies these requirements. This does not mean that all laws produced by a democratic procedure are equally legitimate: the procedure may fail or produce more or less legitimate laws.

\textit{Legitimacy and Failures}

\textsuperscript{157} The normative requirements of political constitutionalism tend to be very minimal. (Gee & Webber, 2010, p. 289)
6.2. Why Constitutional Laws

Constitutionalism has progressively become, in the recent centuries, a norm of legal systems and according to Kay: “the triumph of constitutionalism appears almost complete.” (1998, p. 16) This is not simply recognition that a great number of legal systems now include a written constitution; rather
fundamental laws are now seen as an essential part of the organisation of the legal order and as the best means by which to protect rights. This is a relatively recent event in history; in 1793, the French included a right of insurrection in their constitution rather than a legal safeguard.\textsuperscript{173} In fact, judicial review was only clearly established in 1803, in the USA, with Marbury v. Madison. In this section, I explain why we may want to rely on constitutional laws to protect some legal norms from the possible illegitimate decisions of the democratic process. I discuss the understanding of constitutions offered by legal constitutionalism, as opposed to political constitutionalism. These two distinctions should become clear in the course of my discussion. I will ultimately reject the former as incompatible with epistemic democratic legitimacy. I shall first explain which rights and considerations we may want to protect and then why constitutional laws seem appropriate to protect them.

Beforehand, it is important to appreciate the precise role of the considerations I identify so as to understand the structure of my argument. There are three steps in an argument towards judicial review and legal constitutional enforcement. The first step is the recognition that there are limitations on the extent of the decisions that a democratic procedure can take: the power of democracy does not extend to every normative requirement. That step can even be divided into two: (A) The recognition that there are limits and; (B) The identification of these limits. The second step is to argue that the best way “of preserving and maintaining these limitations is to establish a review system that imposes institutional constraints on the legislature”. The third step is to argue that the “review process is a legal process and that the task of review should be assigned primarily or exclusively to the judiciary.” (Harel, 2003, p. 250) My aim, with this present section, is only to establish that there are considerations which deserve protection and then to show how the usual understanding of protection is incompatible with epistemic democracy.

\textit{Clear Rules of Conflict Resolution}

Constitutions structure the legal system and provide rules for the exercise of political power. (Raz, 1998, p. 153) Inasmuch as our political institutions are means to resolve our disagreements, having clear rules to define the structure and the process by which these disagreements will be resolved is essential. These rules should be minimally stable and, for this purpose, not too easily modifiable if they are to provide guidance on how to resolve our conflicts.

As Kay explains: “The advantage of the use of a priori legal rules to define the sources, procedures, and extent of public power is that it imparts to that power some minimum of orderliness, of regularity, and this makes it a thing capable of being rationally known.” (1998, p. 23) By providing the rules by

\textsuperscript{173} During the years following the French Revolution, Emmanuel-Joseph Sieyès proposed the idea of a ‘jury constitutionnaire’ as a form of judicial review, but this was never implemented. (Fioravanti, 2007); (Goldoni, 2012)
which the legal system is ordered, constitutions provide a guide for action that is stable and predictable and support the rule of law. These clear rules apply both to the structure of the political process – such as which branch of government does what – and to the unfolding of the political process. It explains how a law may be created and by whom. Having such clear rules of conflict resolution is desirable, even within an epistemic account of democracy, since the goal of our political institution remains precisely the (correct) resolution of disagreements.

Furthermore, such structuring legal norms help to ensure the proper involvement of the agents and the proper maintenance of the democratic institutions. For instance, by making clear that election must take place if the government loses the confidence of Parliament or after a specific number of years, the constitution makes clear the conditions under which some democratic rights will be exercised. Additionally, the ways in which agents are to exercise their democratic role have to be specified and positivised as democratic or political rights. (Loughlin, 2001, p. 43) These rights do not have to be included in a written and entrenched constitutional document for them to be held as ‘constitutional’. An implicit or conventional constitution can be sufficient to ensure clear rules of conflict resolution. It remains that by providing rules of conflict resolution, a constitution allows the agents to tackle the object of their disagreement rather than having to decide first on how to resolve these disagreements. Rules of conflict resolution must not be subject to random change so as to ensure that we can resolve our disagreements and conduct our political affairs in an orderly and efficient manner.

The Importance of some Considerations

Structures and processes are only one part of those laws that we want to protect, based on their special importance, from illegitimate democratic laws. There are also some rights and substantial notions which are deemed highly important. These have a significant importance based on the nature of our decision-making procedure such as substantial democratic rights or based on their status in morality.

Bellamy explains that:

Most constitutions contain three types of rights […] The first type concerns human well-being in a general sense. […] The second type includes rights relating to the rule of law, notably the need for a due process and equality before the law. Finally, the third type refers to rights of a more strictly political character. There are the rights entailed by a functioning democracy. (2007, pp. 18-19)¹⁷⁴

In this section, I concentrate on the first two types since the procedural rights entailed by a functioning democracy can be included in those mentioned in the section above. I first discuss human rights, rights in general, then substantial democratic rights, and finally the rule of law. By rights in general, it should be clear that I do not mean the strict conceptual analysis which sees any right as correlative to a duty.

Rather, I mean something closer to the way rights are used in political discourse as a “valid exercise of rhetorical licence” such as with ‘manifesto rights’. (Feinberg, 1973, p. 67)

To begin with, one may be puzzled by the fact that I am now claiming that some considerations are more important than others so as to require a special protection. In previous chapters, I have strongly opposed the possibility of relying on substantial notions to justify democratic legitimacy. Along with Waldron (1999b, p. 11), I claimed that people disagree about the definition of rights and about their content. It appears as if rights are inconsistent with my account of democratic legitimacy. To be clear, I do not disagree with the existence of rights: I disagree with the fact that their legitimate formulation can be identified and specified independently from the democratic procedure. I share Waldron’s point of view about this:

I think the rights enterprise is a massive achievement and that it is very important that it be sustained and advanced [...] The only issue on which I disagree with supporters of strong judicial review of legislation is whether judges or elected legislators ought to have the final word when there is serious and good faith disagreement about what the rights-standards should be and how, on important issues, they should be interpreted. (2011, p. 417)

This quotation makes clear the possibility of being committed to the existence and to the central role of rights in the organisation of our political institutions while at the same time acknowledging the importance and the challenges of disagreement. I claim that a democratic procedure is the proper device to resolve our disagreements about rights and that therefore it is not possible to rely on rights to justify that procedure. We should separate the need to have rights and to recognise their crucial role from the fact that they can determine a priori the legitimacy of a procedure. In my account, rights do not independently justify the legitimacy of democracy; they are rather part of what democracy is about.

A reason why we should acknowledge that rights are more important so as to require a special protection is that not all aspects of morality are equally important. For instance, the theft of a candy bar is wrong, but it is certainly less wrong than rape. Both are morally wrong actions, but we feel more committed to the prevention of rape than to the prevention of candy bar theft. This is often reflected in the way we structure criminal law and distribute punishment: not all crimes are equally severe and equally punished as some laws are seen to be more important than others. Hence, the idea that some moral considerations are more important than others supports the idea that some laws may require some special protections or may be more binding than others. The results of our decision-making procedures should reflect this structure of morality.

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175 Rowan Cruft suggested to me that this can be formulated as a right violation. In this instance, it is a trivial right of property that has been violated. One should understand the notion of right I use as basic rights.

176 See Raz (2006, p. 1024) on the establishment of the comparative importance of laws.
Human rights are often seen to be such special moral considerations. As Miller argues, “having a right denied is more serious than just having a claim unmet or a desire unfulfilled” and to speak of human rights helps “to emphasize the moral urgency of the situation of the person or group whose rights are being denied.” (2007, p. 164) If we hold human rights to be important and urgent moral considerations, then this supports the idea that some considerations are especially important and so require a special protection. For instance, a right against torture is often seen as such a morally urgent right which ought to be protected. The special relevance of human rights may be justified in different ways: e.g. Miller argues that human rights should be supported by the idea of basic human needs. (2007, p. 168) Whether or not this justification is right, we can still recognise that if there are such things as human rights, however we define them, then they would have more importance than other claims since they are about fundamental aspects of human life applying to all those involved in the circumstances of politics. This is something our polity can recognise in its laws just as it can recognise that candy bar theft is less grave than rape. If it can be assessed epistemically and procedurally, the assumed moral importance of rights should be reflected in their legal importance.

Not every important moral consideration has to be formulated as a human right. Within a certain polity, some moral, political or even cultural considerations may be considered highly important so as to be formulated as legal constitutional rights without being considered universal and ‘morally urgent’ in the same way as human rights. It should be clear once again that I do not refer to rights under their strict conceptual analysis. I mean rights as a judge like Laws would understand them. As he explains: “The law is bound to speak in the language of rights. The need for rights is an aspect of the need for law.” (1996, p. 626) Just as we need to coordinate our behaviour through law, there is also a need to define the limits of one another’s liberty and to define our respective obligations. Legal rights stand as a form of protection against the possible defects of our political systems and against other agents: rather than coordinating behaviour, they specify limits – negative rights – on the type of laws that are possible and also specify types of actions that are required – positive rights. Under this understanding of rights, they are more important than regular laws.

Some such constitutional rights may be justified by the special circumstances of a polity or by the evidence the agents of that polity regard as more important. For instance, bilingualism is protected in Canada177 and French is protected in the province of Québec.178 These are neither human nor universal rights. They are rather constitutional rights the Canadian and Québécois peoples have given themselves since they regard them as morally/politically/culturally imperious within their polity. As Harel argues, some “values are shaped and dictated by societal practices” (2003, p. 272) and this can

178 Charte de la langue française.
explain why some basic rights are specific to certain polities. Such rights are considerations, along with clear rules of conflict resolution and human rights, which we would want to protect from the possible illegitimate laws of democracy.

My acknowledgement that some moral considerations can be formulated as constitutional rights should be limited by the idea that their formulation should “be precise enough for us to be able to apply them to concrete circumstances, and the criteria defining what counts as a right stringent enough to prevent each and every goal or preference we have becoming the subject of a human right” or rather, in my view, a constitutional right. (Bellamy, 2007, p. 148) This is because if constitutional rights are to play any clear and legitimate role within the polity, they ought to be positivised through the democratic procedure. As Bellamy further explains: “rights cannot be taken as given. They have to be politically constructed. So, the political legitimacy of their construction necessarily takes precedence over the issue of their being interfered with.” (2007, p. 156) Hence, even if we acknowledge the existence of various rights, we can still claim that their legitimate formulation/positivisation needs to be politically constructed.

Some additional considerations which are deemed to have a special importance so as to require their protection from illegitimate laws are implied by the type of decision-making in which we are involved. I mentioned equality, political autonomy, and reciprocity but we can add to this list substantial rights like freedom of speech and a basic right of subsistence. These rights, however we define and positivise them through the political process, will take on a special importance inasmuch as we acknowledge, as I have argued in the previous chapters, that there is a substantial content to democratic procedures. Such rights “do not simply provide a zone of protection to the individual but become constitutive of democratic will-formation. Rights provide the basic building blocks of the political structure and give expression to the idea of democracy.” (Loughlin, 2001, p. 44) In other words, once positivised, these rights constitute what democracy is within that polity.

The final requirement I present which has a special importance, so that we want to protect it against the mishaps of the democratic process, is the rule of law:

The basic goal of the rule of law is to ensure that the law is capable of guiding the behaviour of its subjects. This requires that all laws be prospective, adequately publicised, clear, and relatively stable; that the making of particular legal orders or directives be governed by general laws that satisfy the criteria just listed, and by the principles of natural justice; and that the implementation of all these requirements be

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subject to review by a readily accessible and independent judiciary. (Goldsworthy, 2001, p. 66)\textsuperscript{180}

The importance of the rule of law can be explained by the fact that it allows the law to achieve properly its role as a non-dominating coordination solution. A system without the rule of law will have difficulty to achieve sustainable and wilful coordination inasmuch as it will not provide clear and consistent rules of behaviour, nor will it ensure freedom. But, as Brettschneider explains, the rule of law is also supported by the idea of democratic rights: “Rights against ex post facto laws and bills of attainder\textsuperscript{181}, for instance, are also necessary to respect citizens’ status as addressees of law, in particular to prevent arbitrary coercion and to ensure that laws do not degrade their status as equals.” (2007, p. 39) The rule of law ensures that the law is not used arbitrarily to treat some agents inappropriately or to make them subject to the arbitrary power of others. Such protection from arbitrary power is justified by the idea of proper respect for peers and by the idea that this is not a sustainable arrangement. If laws are to act as sustainable coordination solutions to our disagreements, the rule of law must be seen as an important feature of our legal system. Now that I have established that there are some special considerations – both structural and substantial – which have more importance, I can turn to the explanation of why their importance would require a special protection through constitutional laws.

\textit{Why Protected by Constitutional Laws}

If constitutional laws are held adequate to protect the special considerations just identified, it is because they insulate, by their features, these considerations from the day-to-day functioning of democracy. I first mention the three central features of constitutionalism that are relevant for rights protection according to legal constitutionalism.\textsuperscript{182} These features are also those that must be shown – or revised so as – to be compatible with epistemic democratic legitimacy. I will then report various arguments which aim to establish that democracy is likely to issue illegitimate laws and why constitutionalism is in a good position to protect laws from the risk present in the democratic process. By presenting these arguments, I do not aim to argue that we should rely on entrenchment and judicial review. Rather, all that I aim to show is that, since democracy can indeed issue illegitimate laws, there are grounds to establish different levels of confidence in the legal system so as to protect those we justifiably deem to be more important.

Constitutions should include:

\begin{footnotesize}
\begin{itemize}
\item[180] Reporting Raz’s conception. Cf. Simmonds (2007); Allan (2001, pp. 56-57) and Laws (1996, p. 627). Independently of which conception is the correct one, the rule of law is a desirable feature of our legal system so as to require a special protection.
\item[181] This can be understood as a law inflicting a penalty to a particular individual.
\item[182] See also Raz (1998, pp. 153-154).
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1. "Normative Supremacy. Constitutions purport to establish and regulate the basic structure of the legal system, and thus they are deemed normatively superior to all other forms of legislation." (Marmor, 2007, p. 70) It is necessary, for the constitution to be able to regulate, trump or shape the other laws in the legal system, to be more binding.

2. "Judicial Review. In order to implement the constitution's supremacy, legal systems typically entrust the application and interpretation of the constitutional document in the hands of the judiciary." (Marmor, 2007, p. 70) This feature does not have to be exercised by a Supreme Court with a power of strong judicial review.\textsuperscript{183} There are different ways constitutional compatibility can be assessed: for instance, there can be a special committee assessing the constitutionality of a bill before it is enacted. Nonetheless, the point here is that there is a legal possibility to overturn a law based on its unconstitutionality or at least to reject it at some point in the law-making process. Laws should be compatible with the constitution and if they are not, there ought to be a means to correct the deficiency.

3. "Rigidity. [...] Constitutions typically provide for their own methods of change or amendment, making it relatively much more difficult to amend than ordinary democratic legislation. The more difficult it is to amend the constitution, the more 'rigid' it is." (Marmor, 2007, p. 71) By being entrenched, constitutions are removed from the ordinary democratic process, thus offering a special protection to their content from day-to-day politics.\textsuperscript{184}

Hence, constitutions are designed, especially when accompanied with judicial review, to check the democratic process: they seek to "remove certain decisions from the ordinary democratic decision making processes, basically, to shield them from the majority rule." (Marmor, 2007, p. 70) They aim to protect some rights from the faults that can affect the democratic procedure.

Arguments for the need to protect rights and that this protection should be achieved through judicial review and entrenchment are often amalgamated and founded on the same premises. The argument I present here is one of them: it is often used to justify the protection of rights through constitutional laws and by the same token support the role of courts in the protection of these rights. It is omnipresent in the literature and takes many different shapes, which all refer to the same idea: the majority can be tyrannical (Mill, 1975, p. 9); notably because the democratic process is subject to passions and sudden irrational movements.\textsuperscript{185} As Lenta explains: "the constitution is justified as a prophylactic against political akrasia, against the transient urges and passions of majorities, and the

\textsuperscript{183} Strong judicial review: the binding power of courts on all branches of government with regard to constitutional validity. (Harel & Kahana, 2010, p. 230)

\textsuperscript{184} Laws explains that without entrenchment "the right is not in the keeping of the constitution at all; it is not a guaranteed right; it exists, in point of law at least, only because the government chooses to let it exist, whereas in truth no such choice should be open to any government." (1995, p. 84)

\textsuperscript{185} See Brennan (1989, p. 434) and Bellamy (2007, pp. 16-17).
vicissitudes of the legislative process, being translated into a violation of the rights of minorities.” (2004, pp. 2-3) Akrasia is most certainly the right term here, as it explains the need for rights protection through the possible weakness of the will of the democratic process.

It is often believed that majorities are likely to disrespect rights especially in “politically stressful times.” (Perry, 1998, p. 103) There are indeed different circumstances during which agents might be tempted not to be guided by reasons but by fear, private interests, or disrespect for the minority. For instance, the democratic process might be tempted to allow the death penalty or torture for a terrorist immediately after a murderous attack even if that goes against a previously recognised bill of rights. We must recognise that, since majorities are at the foundation of the democratic process and since majorities can indeed be subject to passion (just like minorities), we would do better to ensure that rights – if they are more important – have some protection against these passions.

For those who defend judicial review, it follows naturally that: “precisely because courts are not democratic institutions, they would be relatively free from such short sighted political temptations. Therefore, it makes a lot of sense to assign the implementation of the constitution to the courts.” (Marmor, 2007, p. 75) In fact, rights protection through constitutional laws is more often than not associated with judicial review since courts are regarded as an objective forum of principles which is somehow immune, or less subject, to the temperamental hazards of majorities. Notwithstanding the value of these last arguments, they make clear why courts are seen, at least from the legal constitutionalist point of view, as proper to address the possible causes of democratic illegitimacy.

In my view, a better way to express the fear of the majority and the need for rights protection is by relying on the idea that there are circumstances when the possibility of errors increases: political stressful moments, emergencies and some forms of institutional arrangements for instance. It makes more sense to speak of possibilities of errors rather than ‘akrasia’ or ‘temptation’. There are plenty of features of our political institutions which explain better the possibilities of errors than a ‘temptation’ to disrespect rights. As Harel explains, legislatures can purposefully or accidentally overstep their authority. (2003, p. 253) This is especially the case when the legislature is the judge of its own limitations. Hence, the need to protect rights has to do both with the fact that certain circumstances increase the risk of right violation, e.g. emergencies, and with the fact that institutions need some limitations to their power. The idea is not that the legislature will be tempted to abuse power – even if that is a possibility – it is rather the idea that if rights are not protected and left entirely to the legislature, then based on the fact that the legislature can be mistaken about the limits of its own power, this increases the chances of mistakes.

187 Cf. Harel, for whom courts could just as much “abuse their own power” (2003, p. 252).
188 See Bellamy (2007, p. 20).
It is based on these reasons that entrenchment is often seen as a proper means to protect rights. Gaus (1996, p. 240) argues that we should adopt supermajorities so as to ensure that mistakes about constitutional laws are not easy to make. Since supermajorities require greater agreement, they help in preventing the implementation of unjustified laws. Following the views I have presented, the fundamental reason to rely on judicial review and legal entrenchment for rights protection is simply that: “Paper promises whose enforcement depends wholly on the promisor's goodwill have rarely been worth the parchment on which they were inked.” (Brennan, 1989, p. 426)

I leave open at this point how best to achieve rights protection\(^\text{189}\) in a legitimate way. My concern here has been to support the need for constitutional laws through the idea that the democratic process can fail to be guided by reasons and that some form of constitutional mechanism seems appropriate to tackle these possible sources of illegitimate laws. Since democracy is fallible, we should be careful with those considerations we deem more important: if rights are really more important – and if we can have some confidence in their identification – then we should not neglect the fact that the democratic process can err. In my view, all that the arguments presented here support is the idea of institutionalising different levels of confidence: it supports the idea of normative entrenchment which I shall discuss later.

### 6.3 Inconsistency with the Epistemic Account

In this section, I explain how normative supremacy, judicial review and rigidity, as conceived by legal constitutionalism, are incompatible with epistemic democracy. My own arguments for the apparent incompatibility of democracy and constitutionalism differ from the usual ‘antimajoritarian problem’. I do not oppose legal constitutionalism simply because it trumps majorities, I rather concentrate on its lack of epistemic credentials. I first mention the source of the legitimacy of constitutional laws, before mentioning problems with entrenchment and with judicial review.

**The Source of Legitimacy of Constitutional Laws**

There are two major ways to justify the legitimacy of constitutional requirements.\(^\text{190}\) One can rely on the origin of the constitutional requirements or on their moral relevance. These two options are problematic for the epistemic account of democracy I provided because: (1) They do not offer proper respect to disagreement and; (2) They challenge the requirements of epistemic democratic legitimacy, such as revisability and political equality.\(^\text{191}\)

\(^{189}\) In the next chapter, I will defend that a strongly participative and adversarial system is apt to protect rights. (Gee & Webber, 2010, pp. 281-282)


\(^{191}\) See Zurn (2002, pp. 507-508) for conditions of legitimacy for constitutional laws within deliberative democracy.
Firstly, the origin of constitutional laws in time or in a special process is used to explain their normative supremacy. This idea of justifying the legitimacy of constitutional laws through their origin is related to the idea of constituent power or to the idea of an entity with the authority to make constitutional laws. As Kay explains: “A constitution [...] usually is legitimized not by promulgation according to preexisting law but by a widely shared political consensus as to the nature of the constituent authority in a polity.” (1998, p. 30) This constituent power can be either located in a group of framers at some point in time or in a special decision-making process which applies to constitutional law-making.

It could be argued that the laws which were included in the constitution by the framers ought to be protected precisely because they were included by the framers. The framers could have had the authority to make a constitution based on the need at the time of the constitution-writing to have such a constitution or based on their special moral expertise. As Raz explains, “new constitutions may derive their authority from the authority of their makers” inasmuch as there is a moral need for a constitution which will make coordination possible. (1998, p. 169) This only explains why, when there is no constitution, there is a need to have one. Similarly, when there is no decision-making procedure, it is better to have one than none. This does not, however, explain why we should stick with this precise constitution or decision-making procedure once it is established. If we want to achieve just coordination, we need to have further reasons to maintain a constitution as it is. Hence, for constitutions to be valid across time, they also need to provide us with rational motivation. Again, as Raz explains: “For an authority to be able to pass timelessly valid laws of this kind it must be counted as an expert on morality – that is, as having a significantly superior grasp of abstract moral principles than do the people who are bound by its laws” (1998, p. 167) and as I explained in the previous chapters, we can have serious doubts that any specific agents or any specific institution may be able to have this moral expertise in a way that is not objectionable. We can therefore doubt the idea that constitutions can find their authority in the expertise of the framers and this is supported by the epistemic arguments I provided.

Rather than finding the legitimacy of constitutional laws in the authority of the framers, one could also justify their legitimacy through a special procedure. This procedure could be seen to be authoritative for two reasons. On the first approach, by imposing supermajority and more rigid legal requirements we could identify the better self of the democratic process. In other words, through the more restrictive process of constitutional law-making, we arrive at a rational precommitment to protect ourselves against the akrasia of the majority.\(^{192}\) On the second approach, supermajorities and special processes would supposedly help avoiding false positives (enacted laws that are in fact

incorrect determinations of justice) inasmuch as they are supposed to provide us with laws that are well-justified. (Gaus, 1996, p. 240)

I have doubts, however, that a supermajority is really the best means to achieve well-justified laws. In my view, it gives more power to the few and this does not improve the probability of arriving at a right answer and can even have detrimental effects on our capacity to eliminate false positives. This is because: (1) Private interests could develop; (2) An unreasonable view affecting a minority could hold a reasonable majority in check; (3) Supermajorities impede our capacity to revise and adapt laws. A supermajority may indeed prevent the adoption of false positives but it may also entrench false positives especially when we admit that what is justified can change over time. I fear, therefore, that the protection a supermajority may offer against false positives is balanced by the risk it creates of entrenching them.

It is equally unclear that the special procedures assumed to be required in order to identify rational precommitments or to avoid false positives can establish, legitimately, the normative supremacy of constitutional laws. This is because the democratic procedure is the proper means by which to arrive at correct determinations of justice. Hence, we cannot claim that a substantially different procedure would provide better indicative reasons: why then should we rely on the less effective procedure for day-to-day politics? One reason might be a balancing between the quality of the results and the procedural requirements of democratic legitimacy. However, special procedures involving supermajority substantially change the procedure – they affect political equality and impede the feedback process – rather than only tweaking it in a legitimate way. It follows that special procedures, as they are usually understood, are incompatible with epistemic democracy since they cannot consist in improved epistemic procedures and since they violate the requirements of democratic legitimacy. Overall, founding the legitimacy of fundamental laws in their origin – either through the authority of the framers or through a special procedure – fails to meet the requirements of epistemic democratic legitimacy.

Secondly, constitutional laws can also be justified, not through the procedure by which they were arrived at, but rather through their content or through their specific moral relevance. For instance, a constitutional law forbidding torture could be held to be morally correct. It would be argued that since it is morally correct, it is allowed to trump an incorrect democratic law. However, as I already explained at length, we need some specific and legitimate account of the content of the rights in question, of their limitations, and of how they apply. We can only identify and legitimise these moral considerations through the procedure. The procedure cannot therefore be trumped by them. A special

\[193\] See McGann (2004); cf. Perry (2010, p. 159).
legitimacy for constitutional laws that would be based in their origin or in their moral relevance is therefore out of the question.

The Problem with Entrenchment

Additionally, there is a problem with the idea that we can remove constitutional laws from the democratic process. The assumptions that are necessary to support legal entrenchment are inconsistent with epistemic democracy inasmuch as they reject the epistemic capacity of the democratic procedure and neglect political equality, thus making entrenchment objectionable.

Marmor explains the three conditions that are necessary for legal entrenchment to be justified. The first one is that “ordinary democratic procedures are not to be trusted to yield correct results on” the issues that are entrenched. We must also “assume that (1) we can tell in advance what those rights and principles are and (2) that we can be sufficiently confident that a judicial determination of the content of those rights and principles is going to yield better results than its democratic alternative. Both of these assumptions are problematic, to say the least.” (2007, p. 77) Regarding the ‘trust’ in democracy, we can reject the idea that democracy cannot be trusted about questions of rights. Based on the epistemic arguments provided in the previous chapters, democracy embodies necessary conditions for proper determinations of justice to be achieved. We should not as such ‘fear’ the democratic process; even though we must remain cautious given that democracy can be mistaken. Hence, insulating questions of rights from the democratic process is not epistemically warranted. Secondly, as I explained, we cannot know in advance exactly what the rights and principles which are more important are. Thirdly, it is not clear that a judicial determination is epistemically superior or generally acceptable. Just as it is objectionable to offer more power to experts, it is objectionable to offer more power to judges on general questions of morality over which expertise can be doubted. It would also be objectionable to rely on a supermajority, as I made clear.

One of the Many Problems with Judicial Review

There are many issues with the democratic legitimacy of judicial review. For instance, many object to the role of unelected judges. For my part, I will concentrate on the objection that epistemic democracy can raise against it. This is mainly because I believe that the epistemic objections would still be valid even if judges were to be elected.

There are different types of judicial review. It should be noted that I only object to strong judicial review, or as it is often called ‘judicial supremacy’. I object to the replacement of the legislature by courts as the ultimate and final forum to: (1) Specify rights; (2) Limit rights; (3) Resolve rights conflict; (4) Ultimately decide what the correct interpretation of a right is. As such then, my objection is not with the role of courts in the nullification of laws that are clearly inconsistent with a bill of
rights, nor with judicial review of administrative laws, nor is it with the role of courts in interpretation, adjudication or in the development of the common law. The problem I see with judicial review is its lack of epistemic credentials in the settlement of the reasonable disagreements agents have about the proper interpretation, content, extension and limitation of a right.

I already argued that democracy is the proper procedure to pool all the relevant information and to make a decision that can resist the assumption of bias inasmuch as it offers equal political power to every agent. When courts ultimately resolve disagreements, they take over – not as usurpation, but as ‘doing in the stead of’ – the decision-making function of the democratic process. The courts do not involve the same epistemic features as democracy and there are good reasons to think that courts are epistemically not superior to the legislature – at least for moral questions.\footnote{See Waldron (2009) and the related papers in the symposium.}

Firstly, courts restrict deliberation to a few agents: the parties involved, the justices, those who can formulate \textit{amicus curiae}. This is not an inclusive and open forum. Hence, we can doubt that the courts are as apt as a democratic procedure to pool all the information that is relevant. By restricting deliberation, courts “are less able than legislatures to assess the impact of a particular view of rights on the community as a whole and to anticipate its potential consequences”. (Bellamy, 2007, p. 31) Furthermore, one can doubt that judges are more apt than other agents to make valid moral judgements: “Nothing in the legal education and legal expertise that judges acquire prepares them better to conduct sound moral deliberation than legislators or other (reasonably educated) members of the community.” (Marmor, 2007, p. 85) This does not mean that the courts will make bad decisions; it simply means that we cannot infer that they will make better decisions than democracy.

Secondly, “courts are typically under serious political pressure to cast their arguments in legal terms, justifying their decisions by legalistic means, that is, even if it is the case, as in most constitutional issues, that the decision is, actually, straightforwardly a moral or political one.” (Marmor, 2007, p. 85) The fact that courts tend to address disagreement about rights in legal terms is not epistemically superior to an open deliberative forum. By relying heavily on legal terms, texts and precedents, “judicial review tends to obscure the real issues at stake when citizens hold diverging views about rights”. (Tuori, 2011, p. 371) They are prevented from dealing with all the relevant views and information that could affect the question at hand. Hence, when dealing with reasonable disagreement about rights, if we are aiming for a correct answer, we should not rely on courts to achieve the resolution of our disagreements. Judicial review is hence incompatible with epistemic democracy when it aims to define and limit rights instead of the legislature.

In conclusion, I mentioned some considerations that are more important so as to warrant some form of protection. I argued that these considerations are often protected through constitutional laws. Three
conditions for constitutional laws to effectively protect these considerations were mentioned: normative supremacy, a review process, and rigidity. I then showed how these three considerations are usually argued for and how they are incompatible with epistemic democracy. In the next chapter, I offer a two-pronged solution to rights protection within epistemic democracy. I first argue for a compatible notion of rigidity and judicial review that can be found within political constitutionalism. I then argue for the normative supremacy of constitutional rights through an increased quality of justification.
CHAPTER 7: A PURELY PROCEDURAL EPISTEMIC ACCOUNT OF CONSTITUTIONAL LAWS

In the previous chapter, I outlined reasons why constitutional laws are desirable. I then explained why the usual understandings of rigidity, judicial review and normative supremacy are incompatible with epistemic democratic legitimacy. In this present chapter, I reconcile constitutionalism and my account of epistemic democratic legitimacy. The first prong of my solution consists in revising the usual legal understanding of constitutional rights. I argue that we should adopt political – rather than legal – constitutionalism. In this respect, and following Webber (2009), I sign up to a revised approach to rights. I argue that rights and their limitations should be internal to the political process. I then explain how rights can influence and affect the legislature even without entrenchment and how judicial review should be understood within my epistemic account of political constitutionalism.

The second prong of my solution consists in establishing the normative supremacy of constitutional laws under a procedural account of legitimacy. For this, I first argue that rights need to be seen both as rules and principles; this makes it easier to understand how they can both trump other laws and be negotiated/balanced. Finally, I argue that the normative supremacy of rights should be understood through the notion of ‘pragmatic encroachment’. Basically, I hold that the amount/quality of justification required for a law to achieve normative supremacy varies depending on how much is at stake. Since a lot is at stake with fundamental rights, then they require more/improved justification. I then explain how such improved justification can be provided without relying on a substantially different procedure. My goal is accordingly to show that, contrary to our initial assumptions, fundamental laws if understood through political constitutionalism and the idea of an improved justification are compatible with pure procedural epistemic democracy. My solution provides an original epistemic reading of political constitutionalism, judicial review, and rights protection, as opposed to their usual republican or liberal foundations.

7.1 Political Constitutionalism and Negotiable Rights

For constitutional laws to be compatible with epistemic democracy, we must explain: (1) How rights can structure the process while remaining revisable; (2) How rights can be protected. In view of that, I defend political constitutionalism as the correct understanding of constitutional laws. I first recall the received approach to constitutionalism before explaining how to revise our understanding of rights. I make clear the central role of the democratic process within this account and how rights can still be binding while revisable. I then explain how rights are to be protected, first through the political process and second through an acceptable form of judicial review.

195 *Right* should loosely be understood as any constitutional essential unless specified differently.
196 I also use the notion of ‘statements of intent’.
197 See Gee and Webber (2010, p. 282).
By political constitutionalism, I mean an approach that is defended mainly by Bellamy (2007), Tomkins (2005) and Griffith (1979).\textsuperscript{198} Gee and Webber mention four theses to describe this approach: (1) “there is no sharp distinction between law and politics”; (2) “Law and politics are to be understood by reference to [...] ‘the circumstances of politics’”; (3) Rights should be seen as political conclusions since there will be extensive disagreement about them; (4) We should extend the reach of the political process to “the nature and content of the constitution itself.” (2010, pp. 278-279) Political constitutionalism, rather than regarding rights as structuring the political process from the outset, holds the political process as the means to resolve issues of rights. Furthermore, it affirms that a properly constituted political process will protect rights in a more legitimate way than a legal constitution. Political constitutionalism is open to the idea of revision and adaptability through the regular political process (Gee & Webber, 2010, p. 288); it is thus compatible with the needs for revision and to keep the road of inquiry open required by epistemic democracy.

The Received Approach to Constitutionalism

In this section, I describe how legal constitutionalism usually understands rights. This is essential in order to compare political and legal constitutionalism and to show how the former can respect the requirements of epistemic democratic legitimacy. The understanding of rights associated with legal constitutionalism makes clear why it relies on entrenchment and judicial review to protect rights. Revising this understanding of rights provides us with a way of overcoming the tensions between these two features of constitutionalism and democratic legitimacy. I first explain how rights are often given an extensive reading which is then limited through judicial review. This is then shown to limit the function and role of the legislature.

Webber presents the notion of a ‘received approach to the limitation of rights’ or to constitutionalism (2009, chapter 2). He argues that most contemporary bills of rights include a “limitation clause that sets out the conditions according to which the limitation of a right will be assessed.” (2009, p. 55) According to the received approach, “a rights-claim proceeds in two stages, divorcing the question of the right from the question of its limitation.” (Webber, 2009, p. 56) This understanding of rights and of the role of the courts in their limitation is central to the incompatibility of legal constitutionalism with epistemic democracy.

In more detail, the rights that are incorporated in a bill of rights are given an extensive reading: “the underdetermined guarantee ‘everyone had a right to φ’ [is] providing an encompassing right for all to all that is related to φ.” (Webber, 2009, p. 2) For example, if a bill of rights includes ‘freedom of speech’, there is therefore a right for everyone to an extensive freedom of speech. This also goes for ‘freedom of religion’: the bill guarantees the exercise of any religion to every individual. And so on

\textsuperscript{198} See Gee and Webber (2010, p. 273).
for all the other rights guaranteed by the bill, nevertheless, they will not necessarily be applied along the line of their extensive reading since they may come to be limited. Accordingly: “the question of a right’s definition and the question of a right’s limitation are held distinct.” (Webber, 2009, p. 3) Hence, e.g., freedom of speech and freedom of religion are each given an extensive reading and when they are non-compossible, one of the rights will have to be limited and violated/infringed.

Two things should be remembered from this extensive reading of rights: (1) The rights in question are highly underdetermined. The proper content and definition of the rights are left open for interpretation; (2) The limits of the rights are also left open. Rights do not act as trumps, but rather as important considerations for balancing/limitation. Under the received approach and under legal constitutionalism, courts will be responsible for the definition of the rights and the determination of their limits.

The limitation of a right is usually achieved through proportionality reasoning: the right infringement/violation is weighted against other principles or considerations so as to ensure that it is an acceptable infringement. As Webber explains:

Any infringement or violation is eligible for validation, so long as it is proportionate and balanced with the good it brings about. Rights are generally opposed to the requirements of public health and morals, national security, and the regulation of disorder and crime; they are defined in abstraction of a free and democratic society. (2009, p. 5)

Hence, under this approach, freedom of speech is understood as a right applying to everyone and to every circumstance but that can be outweighed by some considerations; there will be circumstances which may authorise the limitation of a right. For instance, the requirements of security might outbalance freedom of speech and authorise its infringement. It follows that courts have a fundamental role in the determination of what the limits that apply to rights are, since rights are dependent on courts for their applications and limitations. For legal constitutionalism, courts must define and provide limitations for rights and approach them as general rights in order to keep the legislature and the executive in check.

Accordingly: “the court is positioned as the arbiter of what infringements may be justified” (Webber, 2009, p. 56) and decides which considerations are more important than others and which right may be infringed. As Laws explains: “the court will assume that a high priority must be accorded to it [a fundamental right] and require the decision-maker to provide a substantial objective justification if he is to be allowed to override it. Upon such an approach, the use of the proportionality principle involves no offence to the claims of democratic power.” (1998, p. 6) For legal constitutionalists in general, it is democratic for the courts to proceed to the balancing between rights and other considerations.

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200 E.g. Harel (2003) defends the activity of courts as a form of participation which does not offend democracy.
Rights, as enacted by the law-making process, stand as principles which guide the reasoning of the courts, but these latter are free to interpret and limit them. However, the concern is that when rights are ultimately defined, interpreted and limited by courts, then the issue of the democratic legitimacy of courts arises as they fail to meet the requirements I offered in the previous chapters. 201

Furthermore, this received approach defeats the fundamental role of rights as absolute and obligatory requirements: “any explicit constitutional prohibition of torture is translated from a categorical prohibition to an optimization principle.” (Webber, 2009, p. 111) Hence, even if the legislature commits itself to some highly important consideration, there is no guarantee that the courts will not authorise its infringement/violation. As the above quote by Laws shows, rights are only given a high priority; not an absolute trumping power. If we are really committed to the importance of rights and to their protection, there is something unsuitable in having courts achieving the balancing (or the limitation). 202 This is especially the case if we are committed to an epistemic account of democracy: essentially, the courts’ central role limits the role of the legislature. For legitimacy to obtain, courts should not be the ultimate institutional agent responsible for balancing/limitation. Evidently, even political constitutionalism recognises that there will be a process of balancing and limitation – the distinction is that once the rights have been limited by the political process, the courts should not be involved in the same process: what the democratic process has decided should be binding.

Note that the relevance of a distinction between ‘limited’ versus ‘general’ constitutional rights fades away for epistemic democracy. Nothing bears much, at least for the arguments advanced here, on whether legal rights are inherently limited rights or general rights that are in need of balancing. 203 This is because both conceptions are compatible with my epistemic account of democracy: it could be the case that the legislature provides a list of general rights and that it is either involved in balancing or limiting these rights. In both cases, the balancing and the limitations are epistemically justified and binding on other institutional agents such as the courts. In this respect, the rights the legislature commits itself to, under this account, could be absolute and obligatory inasmuch as only the legislature would be ultimately qualified to balance or limit them. On the other hand, there is a problem in both cases if legal constitutionalism assumes the legislature to be providing a list of general rights which will then be limited or balanced by the judiciary. This is because the judiciary does not have the relevant epistemic characteristics to be the ultimate decider about the proper limitation or balancing of rights. I will therefore leave aside whether the legislature or the courts are actually involved in balancing or limiting, even though I cannot avoid this vocabulary.

201 It would not change anything to the legitimacy of the courts if the judges were elected. This is because, as my account of epistemic democracy implies, legitimacy is not related to the will of the people but to the epistemic credentials of the decision-making procedure. Courts are not an open, free and inclusive forum and cannot have the last word. See § 6.3.3.
The received approach to rights limitation removes questions of rights from the grasp of the democratic process and transfers them to the courts. However, we can reject the democratic legitimacy of such a practice on epistemic grounds since the limitation of rights is not only a legal question or only about the application of clear principles. When freedom of speech is balanced against public security, we are dealing with the balancing of principles and values over which there is extensive reasonable disagreement. Rights limitation is a complex moral question about the extent and the content of a right. Hence, since we encounter the same disagreements here as everywhere else, we should resolve them with the same legitimate procedure so as to achieve just and sustainable resolutions. The removal of questions of rights from the democratic process and their transfer to the courts affects the democratic legitimacy of the decisions made. Accordingly, legal constitutionalism falls short of democratic legitimacy. In contrast, political constitutionalism aims to internalise questions of rights, thus leaving room for democratic legitimacy to obtain.

Internalising Rights

For constitutional laws/rights to be legitimate under epistemic democracy, they ought to be produced and revisable by the democratic process. However, if they are to count as constitutional laws, they must also be protected and able to shape other parts of the legal system. In this section, I explain how rights should be seen as negotiable and limitable through the political process. I then explain how rights protection can be achieved under political constitutionalism before explaining what role remains for judicial review.

The central problem with constitutionalism, as I presented it, is that it conceives rights as external to the political process: once the polity has committed itself to some rights, they are to be removed from its grasp through entrenchment and their interpretation and limitation will be achieved by the courts. This tendency to remove constitutional laws from regular politics can be founded in the idea that what justifies a constitutional law is its independent moral relevance or the fact that it was achieved through a special process. Political constitutionalism rejects this. It rather holds that rights are the subject of day-to-day politics and that they can only be defined and limited in a legitimate way through the political process. If rights are to be legitimate, they ought to be internalised and by this I mean that they must become subject to the political process. For this to be possible, we must first have a political understanding of rights, then provide a role for the democratic process in the definition and limitation of rights, and finally explain how rights can be binding.

204 See Gee and Webber (2010, p. 284).
205 Even if some fundamental laws are not totally removed from the political process, since they remain accessible through extra-ordinary procedures, some, e.g. Laws (1995, p. 84), claim that some fundamental rights are properly outside the reach of the political process.
What I mean by a political understanding of rights should be understood in contrast with the received approach to rights limitation. Rather than understanding rights as general rights, i.e. unspecified rights which are in need of further limitation/balancing, to which the polity has committed itself or as apolitical considerations, we should see them as inherent parts of the political system. They “should be understood to be both architecture (the constituting, distributing, and constraining of governmental power) and activity (the re-negotiating of that which is settled).” (Webber, 2009, p. 8) In other words, they are binding political conclusions about what ought to be done which, like any other laws, are open to revision. They are subject to the political process while at the same time structuring it.

If we take disagreement seriously and understand that what is justified when we agree on specific rights – such as a right against torture – is a wide range of acceptable interpretations, then it becomes clear that even rights on which we agree do not escape the need for specification and limitation. This limitation is a political question whose resolution calls for legitimacy. Hence, rather than conceiving the limitations of a right as something that must be arrived at by the courts, inasmuch as the right is understood to be a right to all that pertains to its content, we can understand the definition and the limitation of a right as being something essentially political. As Gaus explains: “almost all rights will be inconclusively justified, and it is only through a system of law that one of the competing inconclusive claims can be publicly identified a right.” (1996, p. 203) It is hence the role of the political process to achieve the legitimate definition of the right and identify the legitimate limitations which may apply to it. Under this approach, a general right to freedom of speech cannot be dissociated from the definition and the limitations the political process will arrive at. It is in this respect that the political process will be called upon to decide what is meant by democratic rights such as ‘equality’, ‘political autonomy’, and ‘reciprocity’.

Under political constitutionalism, rights are conclusions of political reasoning rather than requirements that escape the normal political process, simply because there are no rights which escape the need for balancing or limitation. The democratic process is therefore central to the resolution of questions of rights and these can therefore be associated with the epistemic benefits of democracy. The political process will define and limit rights so as to legitimise their enforcement. In that sense, the rights which apply in a particular polity are constituted by the democratic process. In contrast with Bellamy (2007, p. 160) and Tomkins (2005, pp. 57-65), for whom republicanism and freedom as non-domination explain the importance of democracy for political constitutionalism, I support political constitutionalism because it is one of the best ways of responding to what epistemic democratic legitimacy requires.

206 See Webber (2009, pp. 8-9).
207 See the conclusion for a discussion about the necessity of constitutionalism.
It follows that my arguments provide new additional support for political constitutionalism and that:

1. Rights and constitutional laws can achieve epistemic democratic legitimacy. This is because the determinations of the rights which apply to the polity, what their content is and what their extent is, are all subject to the democratic process. They can be decisions arrived at through a process which can meet the requirements of epistemic democratic legitimacy;

2. These decisions about constitutional laws are revisable and, therefore, can obtain the requirement of revisability. As Webber explains:

   constitutional re-negotiations should be available on an ongoing basis in the sense that at no stage should they be unavailable. [...] One should thus appeal to the idea of ongoing in the sense of constantly open for re-negotiating. [...] This appeal to the idea of ongoing opposes itself to ‘never’, ‘by special process’ and ‘at fixed intervals’. (2009, p. 41)

By rejecting entrenchment, rights and their limitations are always subject to being improved by new information and new considerations. In this way, they can always be subject to adaptation and revision as required by epistemic democratic legitimacy.

Even if we reject entrenchment, it does not follow that rights are not binding. When a right is properly limited (or balanced) through the political process, the courts cannot only provide it with “a high priority” as Laws would have it. (1998, p. 6) Rather, once a right has been arrived at through the democratic process, it “can never be justifiably infringed [by the courts]; they are either complied with or violated – there is no in-between [that has not been approved by the democratic process].” (Webber, 2009, p. 124) This is because the rights are meant to have been shaped, through the open democratic process, by “the plethora of other considerations that determine the justifiable scope and content of the right”. (Webber, 2009, p. 124) Hence, rights (once limited or after balancing) are binding inasmuch as they consist in clear political conclusions which, like any other laws, ought to be respected by the agents within the political system: courts, government and legislature included.

Under legal constitutionalism, it makes sense to assume that the polity has committed itself to general rights, inasmuch as bills of rights are often imprecise and general. It would be impractical to rely on extra-ordinary political procedures every time a limitation of rights should be decided and this is why courts are involved in this process of limitation. However, under my account of political constitutionalism, rights are seen as objects of the day-to-day political process for epistemic reasons. Accordingly, there is no impracticality in assuming that the political process can achieve limitations since there is no need to rely on extra-ordinary procedures. Rights (once balanced or limited) are absolute since once the legislature has decided upon them; they can no longer be the object of balancing by the courts – though they may be revised through the democratic procedure.
We must acknowledge, however, that full positive specifications and limitations of rights are impossible\textsuperscript{208}: judges will have to interpret some rights in hard cases. In these cases, the rights the polity committed itself to can provide principles that can guide reasoning. That is, when interpreting a case, rights must still be taken as weighty considerations, just as legal constitutionalism would have it. Furthermore, rights can also be seen as structuring/binding the deliberation of the legislature by providing principles that need to be taken into account in regular decision-making and when deciding upon the limitation of a right. This is precisely why bills of rights have been included in the constitution of many countries of parliamentary tradition: “the desire to infuse legislative decision making with more sensitivity for rights.” (Hiebert, 2004, p. 1968) Hence, rights structure decision-making in at least two different ways: as guiding principles in reasoning and as fundamental limitations of governmental actions. Rights, under this account, have both a legal role in restraining political actions and a moral role, at least in terms of the considerations which have to be taken into account in reasoning.

\textit{The Political Protection of Rights}

In this section, I show how making the legislature the ultimate forum to decide about rights does not leave rights open to violation since it is possible to \textit{structure} the legislature so as to ensure some form of rights protection. Goldsworthy mentions three methods to protect the rule of law: “‘structuring’, as opposed to ‘confining’\textsuperscript{209} and ‘checking’\textsuperscript{210}.” (2001, p. 77) By structuring, we should understand the role of different institutional designs in the achievement of rights protection. I present a way in which institutions can be structured so as to infuse the law-making process with considerations of rights. This should make clear how rights protection can be achieved while respecting the requirements of political constitutionalism and of democratic legitimacy.

Hiebert (2004) provides a clear description of the progressive inclusion of bills of rights within the constitutions of the parliamentary democracies of the Commonwealth. My goal here is to take an example from her empirical study to show how, even when a Parliament is not subject to strong judicial review and when the bill of rights is not entrenched, rights still structure and limit the actions of the legislature. Firstly, Hiebert explains how the UK Human Rights Act (HRA) 1998 is statutory legislation – it is not entrenched. (2004, p. 1965) Hence, the modification of this bill of rights is not structurally as complex as it is in Canada for instance. Second, in terms of judicial review, the UK Supreme Court:

\begin{quote}
\indent does not have a mandate to invalidate legislation that is inconsistent with rights. Instead, it is obliged to interpret legislation “so far as it is possible... [to be] compatible with the
\end{quote}

\textsuperscript{208} See Hart (1994, p. 128).

\textsuperscript{209} Removing some power from an institution: entrenchment.

\textsuperscript{210} Providing another institution with the power to trump the first institution: judicial review.
Convention rights.” Where this is not possible, the HRA empowers a superior court to make a “declaration of incompatibility” if primary legislation cannot be interpreted in a manner that is consistent with Convention rights. (Hiebert, 2004, p. 1976)

Parliament has the capacity to fast-track legislation in order to amend the incompatible law or to maintain it as such. This shows how Parliament can be seen as the ultimate forum to decide the limitation of a right. There might, however, be worries that, just as with the notwithstanding clause in Canada (Hiebert, 2004, p. 1968), the political cost of maintaining an incompatible law in force is too great211 but I have to leave these worries aside. My claim is that under this characterisation, the British Constitution is not structurally incompatible with epistemic democratic legitimacy212; Parliament is not subject to strong judicial review and the bill of rights is not entrenched. Still, this does not prevent rights from constraining and structuring how Parliament drafts legislation.

Parliament has to show concern for rights when drafting legislation notably through ‘political rights review’. This process consists in assessing the compatibility of a proposed piece of legislation with rights, notably through the Joint Committee on Human Rights. (Hiebert, 2004, p. 1978) There is also a requirement “that any minister sponsoring a bill must declare to Parliament either that a legislative bill is compatible with Convention rights or that the government intends to proceed with a bill even though the relevant minister is unable to make a declaration of compatibility.” (Hiebert, 2004, p. 1977) The political cost of sponsoring a bill that is incompatible with rights might prove too great to assume and such a declaration of incompatibility may also trigger “close scrutiny of the proposed legislation.” (Hiebert, 2004, p. 1978) In this sense then, rights, even if they do not bind directly the legislature as legal constitutionalism would understand it, still retain a strong capacity to structure and infuse legislation with their content. It is by structuring the decision-making process – such as making it a requirement to stipulate if the proposed bill is compatible with rights – that political constitutionalism can ensure the protection of rights against the legislature without relying on strong judicial review and entrenchment.

Political constitutionalism also maintains that rights protection can be achieved through wide and equal deliberative institutions, since they allow agents to claim their rights. Democracy makes it possible for agents to voice their concerns when they think that some of their rights have been violated. This is obviously also possible through the judicial system. Nonetheless, agents in a democracy have the additional political capacity to claim their rights by recalling political officers or by building new majorities in order to change the laws. The point here is that the structure of democratic decision-making itself is better suited to ensure rights protection than other decision-

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211 I have not found a case of a law that has been maintained after a successful declaration of incompatibility in the UK. (Ministry of Justice, 2011, p. 29) Also, the fact that the UK is part of the EU does complicate the picture. For one thing, there might be extra costs (political and economic) associated with the enforcement of an incompatible law.

212 It is a totally different question if it really is.
making procedures inasmuch as it allows the rights-holders themselves to act politically and judicially so as to correct the rights violation. In a similar way, Gaus defends ‘widely responsive’ procedures (partly) on the basis that they can ensure rights protection better than other procedures: “Law-making procedures that are widely responsive to the judgements of the citizenry have been shown to be the most reliable protectors of basic individual rights” (1996, p. 227) since they are by definition responsive to citizens’ perceptions that their basic rights and interests are being attacked.

Additionally, the conflicts of interests involved in democratic law-making and its adversarial nature, the fact that coalitions have to be formed if power is to be exercised, that ministers must be held accountable before Parliament, etc. all help to prevent rights violation. This shows how day-to-day politics within democracy imply structural limitations on the legislature’s capacity to infringe rights. (Gee & Webber, 2010, pp. 281-282) This political protection of rights is only one aspect of how rights can be protected; judicial review still has a role to play.

Judicial Review under Political Constitutionalism and Epistemic Democracy

The full texts of this section and sections 7.1.5 & 7.1.6 are not available for legal reasons

213 See Bellamy (2007, p. 141) and Tomkins (2010, p. 2).
214 See also Christiano (2011, p. 158).
7.2 Epistemically Justified Constitutional Laws

In this section, I provide an explanation of the normative supremacy of constitutional laws within a purely procedural account of epistemic democracy. Based on what I argued before, founding the normative supremacy of constitutional laws in a special process is not a promising avenue. Pure procedural legitimacy allows for institutional pluralism but it does not allow a special process, as constitutional law-making processes are usually understood, that makes the law “exceedingly difficult, sometimes to the point of practically impossible, to amend or repeal.” (Perry, 2010, p. 159) This is simply because laws must remain open to revision and political equality must be respected. We can therefore ignore options involving supermajorities, constituent assemblies, or necessary referenda.\footnote{Even if there is a question of degree here – for instance, a very weak supermajority will not be that difficult to overturn – the requirements of democratic legitimacy are also substantially affected by such options.}

To be consistent with political constitutionalism and democratic legitimacy, the constitution must remain revisable/accessible through the regular law-making process while being normatively supreme.

I first describe what is meant by constitutional normativity. I mention the dual aspect of constitutional laws and how ultimately they can be seen as legal principles/statements of intent. From there, we can better assess their capacity to trump other elements of the legal system. I then explain the special importance of democratic rules. This special importance does not, however, explain how to achieve positivised notions of these rules or how any other constitutional law would achieve normative supremacy. To resolve this issue, I turn to the notion of justification. I argue that, based on the position of constitutional laws in the legal system, there is pragmatic encroachment on their
justification. In other words, they require increased evidence to be epistemically/practically justified. As I will explain, if constitutional laws are to have legitimacy under the epistemic account of democracy, their justification ought to be better than that of ‘regular’ laws. I then mention different ways in which we can improve the epistemic credentials of the democratic decision-making procedure without substantial alterations.

_Consitutional Normativity and Statements of Intent_

In this section, I discuss what is meant by the normative supremacy of constitutional laws: firstly, they need to stand as clear legal rules and secondly, due to their position in the legal system, they must also serve as guiding legal principles to develop some values through law. It is this latter function which I want to address here in more detail so as to understand how they can be justified to occupy this central position in the legal system.

Constitutional laws can establish two types of inadequacies in the legal system. Firstly, when negative liberties are violated, we face “antinomies”. (Ferrara, 2011, p. 3) This is the most common understanding of the function of constitutional laws as legal rules: when the legislature or the government enacts something which is against the constitution, the lesser legislation is invalid. Secondly, constitutions also often incorporate substantial considerations like: the right to education, to work, to health, to a just wage and so on. When ordinary legislation fails to implement these rights, we do not speak of laws being ‘unconstitutional’ in the same sense as in the previous case: [...] we should rather understand this predicament as the rise and consolidation of constitutional gaps or lacunae. (Ferrara, 2011, p. 3)

There are therefore two ways in which a polity can fail to meet the requirements established in the constitution. It can first act against the constitution in a way that is inconsistent – and this can give rise to forms of judicial review. Second, the polity can also fail to meet some substantial requirements. In these cases, this may “require the activation of legislative remedies”. (Ferrara, 2011, p. 3)

The normative supremacy of constitutions cannot consist only therefore in their increased weight in practical deliberation since they also stand as conditions of validity on other laws both as rules and principles. In other words: (1) A constitutional law stands as a law on law (Ferrajoli, 2011, p. 365) as it regulates the rest of the legal system and specifies the conditions of laws’ validity; (2) It is a statement of intent or commitment – a principle – which indicates how to develop the legal system and present some values as those which the polity should be committed to. This second aspect of constitutional normativity should be understood as encompassing the first since even specified

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236 See Hart (1994, p. 31).
238 See most famously Dworkin (1967, p. 23).
conditions of legal validity can serve as substantial values in the reasoning of judges (or of the legislature) when extending our understanding of rights in hard cases. For instance, a specified right to vote which applies equally to all the members of a given group may stand as an imperfectly realised value which supports the extension of the franchise to agents outside of the given group.

This second aspect allows us to elucidate the central position of constitutional laws within the legal system: they act as underdeterminate principles which ought to be negotiated, interpreted, and limited and provide guiding principles for the interpretation of the rest of the legal system. The values they incorporate ‘radiate’ through the rest of the legal system and in the law-making process through political rights review. Even if they play a dual role, i.e. rules and principles, constitutional laws can always be regarded as guiding principles for the rest of the legal system. This understanding of constitutional laws is supported by a widespread view of the role of rights within the legal system: “basic-rights provisions not only create subjective rights but also express principle norms that manifest the legal order’s fundamental values and that exert their influence in all fields of law.” (Tuori, 2011, p. 385) And as Campbell explains: “a prime role for human rights discourse, and one which may be lost in the move to positivize human rights, is to express broad value commitments which form a basis and inspiration for establishing more precise political objectives through debate, compromise, and working agreements.” (2001, p. 90)

Constitutional rights stand as fundamental values that are held to structure and shape the rest of the legal system either in an interpretative way (when underspecified) or in an adjudicative way (when properly limited and specified).

It follows that constitutional rights can be seen as something similar to statements of intent. By this I mean that constitutional laws are commitments/values the polity intends to live by/developed through its other laws and decisions. Rubenfeld formulates this idea as, what he calls, the ‘constitutionalism thesis’: “A people attains self-government [...] by way of inscriptive politics, through which the people struggles to memorialize in foundational law, and to live out over time, its own foundational commitments.” (1998, pp. 217-218) Constitutional rights, when seen as such commitments/dedications to the values the polity aims to infuse its legal system with, must be regarded as occupying a central position in the legal system. This central position implies that more is at stake in the adoption of constitutional laws simply because the rest of the legal system is affected by them in a way that regular statutes do not affect the rest of the legal system.

Even if regular statutes do affect other laws, it is not always clear which statute will have priority while constitutional laws always have priority over the rest of the legal system. The fact that more is at

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240 This is similar to the idea that: “easy cases are [...] only special cases of hard ones”. (Dworkin, 1986, p. 266)
241 The language of ‘intention’ conveys a strong ‘voluntarist’ tone which I would hope to avoid. I am not strongly committed to the idea of a ‘statement of intent’ and if the reader finds difficulties with it, it can be replaced by ‘legal principle’.
stake with regard to constitutional laws helps to clarify how we can explain their normative supremacy: if we are to understand constitutional normativity, we ought to understand how constitutional laws can stand as the form of commitment they are. But first, let me turn to the issue of the normativity of the rules of the democratic process, since it differs from the normativity of other rules. They are not like social rights to which a polity would commit itself. Rather, they appear as pre-conditions on the conduct of the political process.

Rights and Values Essential to Democracy

What this section establishes is how the democratic rules of decision-making in their unspecified form are always normatively supreme even under a purely procedural account of democratic legitimacy. This is based on the pragmatic justification of democracy I adopted. I presented the conditions that are necessary to achieve sustainable and correct coordination solutions. Just like Knight and Johnson hold that we can justify “freedom and equality on the grounds that free and equal participation enhances the effectiveness of the democratic process. Here democracy justifies freedom and equality and not the other way around.” (2011, p. 262); I hold that the rules of democracy and the values they imply are justified because they are necessary to achieve the aims of decision-making within the circumstances of politics. Within these circumstances, the rules of democracy are normatively superior to other laws and should stand as conditions on law’s validity. Furthermore, the normativity of democratic rules extends further than simple formal rules. These rules also include substantial requirements like political equality and freedom of speech which are essential to the proper functioning of democracy and, in fact, constitutive of democracy. These values and requirements are justified, to the extent that we are involved in the circumstances of politics, since they are ‘constitutive’ of what it is for all of us to make a decision in these circumstances.

Agents who reject these considerations in the circumstances of politics would be close to a performative contradiction: ‘Contradictions between the content of an act and the necessary presuppositions of its performance can be designated “performative contradictions.”’ (Alexy, 2000, p. 139) Hence, the normative supremacy of these rules is owed to the nature of the circumstances in which the agents are involved and to the nature of what they are committed to: to achieve a coordination solution which aims at justice, concord and sustainability. The normative value of these rules may not carry across all contexts, but it has to be recognised within the circumstances of politics. This explains the normative supremacy of the rules in question and how they can stand as constitutional requirements. This also extends the account I have given earlier of a justification to overturn rules which would threaten democracy.

242 See also Knight and Johnson (2011, pp. 248-249, 257).

243 §7.1.4
However, even if these rules and the values they encompass can be seen as conditions of validity on law – and so it is possible to reject a law clearly violating these requirements – I still maintain that we need a positive version of these rules and values if we are to use them within the legal system: they need to be specified and limited by the decision-making procedure. I explained this in more detail when discussing the need for a revised understanding of rights; but as a reminder, it is possible to associate the rules of democracy and the values they encompass with ‘nested inconclusiveness’: “What is victoriously justified is a range of conceptions [...]; within that range [...] it may be impossible to victoriously justify a particular interpretation.”244 (Gaus, 1996, p. 166) In other words, there are conclusive reasons to have freedom of speech, even though there are no conclusive reasons to have any particular specification of freedom of speech. The fact that there are conclusive reasons to have freedom of speech comes from the fact of what agents are committed to: inasmuch as agents are involved in the circumstances of politics and inasmuch as they have beliefs245, they are committed to deciding following the requirements of legitimacy I put forward. These requirements have a special normative standing and laws founded on such requirements can achieve normative supremacy while remaining ‘up for grabs’.

Even if I have established the normative supremacy of the rules of democracy, I have not established how a polity can commit itself to one version or another of these rules and values so as to clearly posit them as central elements of the legal system. Since there is no entrenchment, the polity could adopt specification through the regular decision-making procedure. The constitutional laws in question would certainly, strictly speaking, be legitimate: they would have normative supremacy and would have been established through the relevant political procedure. However, this ignores the amount of disagreement there is about democracy and it leaves out non-democratic rights. We cannot escape the need for our decision-making procedure to recognisably establish the superior normativity of constitutional laws: democratic rules have the appropriate normativity to always be part of the democratic political constitution but we still need to positivise them, and other non-democratic rights, in a way which establishes their normative supremacy in a widely recognisable way. To solve this issue, I turn to the idea of justification.

Pragmatic Encroachment and Justification

Even if we adopt a pure procedural account of democratic legitimacy, we can still acknowledge that the procedure can issue laws with different degrees of confidence. The justification of democracy I advance holds that democratic decision-making procedures can provide us with indicative reasons for the ability of the procedure to achieve correct laws in the long run. In this section, I argue that it is possible – without substantially changing the procedure – to increase its epistemic credentials so as to

244 §7.1.2
245 See Misak (2000, p. 46).
increase our confidence in its accuracy. We would therefore have an improved justification to uphold the decisions made. What first needs to be shown, however, is that increased quality of justification – through the increased epistemic credentials of the procedure – is an appropriate way to establish the normative supremacy of constitutional laws. To achieve this, I rely on the notion of pragmatic encroachment, which I explain in a moment.

If constitutional laws do occupy a central position in the legal system – as I argue they do – then it will make sense to claim that there is pragmatic encroachment on their legitimacy simply out of their structural importance. A lot is at stake in terms of: (1) Their content – since we want them to protect things we deem to be more important – and; (2) In terms of their institutional implications on the rest of the legal system. This second fact establishes a substantial distinction between constitutional laws and other regular statutes; as I made clear, constitutional laws are statements of intent which are to direct the rest of the legal system while regular statutes do not have the same priority. The function of constitutional laws within the legal system demands an increased quality of justification: if we can provide such an increased quality of justification, we will have justified the central position of constitutional laws within the legal system. I will first explain what I mean by pragmatic encroachment before explaining how increased justification can be achieved.

It should be noted first that increased quality of justification per se is not sufficient to establish a law as a constitutional law. For instance, we might have extremely good justification to criminalise cold blooded murder. This does not warrant establishing such a requirement as a constitutional law. The establishment of constitutional laws is a political matter: it is a choice made by the polity which can be expressed in different ways in the law-making process.\footnote{See Raz (2006, p. 1024).} Justification does not warrant a law as a constitutional law, it warrants a choice of making a law a constitutional law in providing the said law with the necessary normative standing to maintain it as a central element of the legal system. The question is then what is required to make such a choice legitimate and normatively relevant.

I can now turn to the notion of pragmatic encroachments. I rely on Fantl and McGrath’s definition, as it is non-contentious and general – it does not apply only to doxastic states: “so long as a subject’s epistemic position regarding p is non-maximal with respect to justification, her stakes in whether p can make a difference to whether she is rational to act as if p, independently of her strength of epistemic position regarding p and of the other traditional conditions on knowledge (e.g. belief, truth, proper basing, etc.).” (2007, p. 560) Under this formulation, the claim is not about a doxastic state but about what it is rational for an agent to assume with regard to p.\footnote{I am conscious that there are strong objections to pragmatic encroachment on doxastic states in the literature (Weatherson (2005)) but all that my argument requires is to acknowledge that what is pragmatically at stake influences what it is rational to accept – not necessarily to believe. See again Cohen (1992) on this distinction.} An example often given consists in
the evaluation of agent A’s belief or acceptance that she has enough money in her bank account. If not much is pragmatically at stake – there are no important upcoming debits for instance and she does not want to be charged for an overdraft – then less is required in terms of justification or evidence for the agents to rationally accept – or as also often put: to know – that there is money in her bank account. If A looked in her account yesterday, we are ready to claim that she is rational in assuming that there is enough money. If, however, an important cheque is supposed to pass in the account which could ruin A’s future career if it is not cleared, we are ready to claim that she does not have proper justification. In fact, we believe she should just check if there is enough money.

Under the account of democracy I have given, the law stands as a legitimate law when it has been produced by the relevant epistemic procedure and when it is not defeated by some countervailing indicative reasons – like in the example of the negative restaurant bill I gave earlier. When more is institutionally at stake – in a way that can be recognised beyond disagreement – we require increased justification for a law to stand as a legitimate law: we require improved justification if we are to regard the agents as acting rationally in accepting that p (the law) is the case. I have shown that the position of constitutional laws within the legal system warrants inferring that more is institutionally at stake in their establishment, since they will affect the rest of the legal system in a radically increased manner. There is therefore pragmatic encroachment on their justification: if they are to stand legitimately as central notions of the legal system, we need to improve their justification in ways that can respect disagreement. My claim is that we can improve the epistemic credentials of the procedure so as to achieve such an improved quality of justification.

There are different mechanisms which allow agents to pay more attention to the task at hand and increase the epistemic credentials of the procedure without affecting how the procedure meets the requirements of democratic legitimacy. The goal of these mechanisms is to avoid “false positives (enacted legislation that violates the justified principles of the social contract)” since those “are more serious problems than false negatives (justified proposals that are not enacted).” (Gaus, 1996, p. 242) If we are to establish a law as a constitutional law, we would better make sure that the law in question is not improper: it is worse to enact an incorrect law as a constitutional law than it is not to enact one

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248 §6.1.3

249 When I form the mental state ‘I intend to eat this apple’, there is no pragmatic encroachment – there is no need for intentions to be properly justified. In this sense, if constitutional laws were simply ‘choices’ as a theory of sovereignty might argue, then there would be no need to rely on pragmatic encroachment. However, (constitutional) laws are more complex and as Habermas (1996) puts it, they are between facts, norms, and I would add, commitments. When a law takes the form of a commitment, it is a statement of intent which is deemed to be correct and this is an important distinction between laws and my personal mental states. The fact that the polity intends to develop, for instance, ‘free expression’ in its legal system is subject to disagreement and can be regarded as correct or not, whilst my intention of eating an apple is not. There is pragmatic encroachment on constitutional laws since they need to be justified if they are to be rationally motivating.
that is.\textsuperscript{250} This is because it is desirable to avoid unjust coercion and this can be seen to be part of the aims of decision-making. When we aim for justice, we aim to enforce upon one another only those things which it would be correct to enforce. The special importance of avoiding false positives with regard to constitutional laws comes from the fact that such laws would have a radiating effect through the rest of the legal system. Making a mistake in such instances would spread the mistake in various parts of the legal system. It is indeed also desirable to ensure that we avoid false negatives: but under-legislating, to some extent, does not have the same detrimental consequences on the rest of the legal system as over-legislating would.

A way to achieve the avoidance of false positives is to “erect special barriers to their legislative success” and for Gaus this means that we should rely on supermajorities. (1996, p. 240) However, as I already discussed, supermajorities might as well entrench false positives\textsuperscript{251} by dampening the revision process. Furthermore, if we are to respect epistemic democratic legitimacy, we cannot rely on substantially different procedures. Even so, Gaus expresses the gist of my argument: we want to improve the quality of the procedures so as to improve its accuracy. What we must explain, then, is how to achieve this goal of ‘erecting special barriers’ to false positives while respecting the requirements of democratic legitimacy; i.e. how to leave constitutional laws ‘up for grabs’ by the same day-to-day political process while improving this process.

As Waldron mentions, we do not need to rely on supermajorities to achieve some form of ‘entrenchment’ for bills of rights: “if it is a British- or New Zealand style statute, it will have credentials in the political culture that raise the stakes and increase the burden associated with the amendment effort.” (2006, p. 1394) In my view, the burden in question here has to do with the fact that what is at stake is more important and that therefore not any simple justification will do. In this case, we are not facing a legal entrenchment but a normative entrenchment. We require increased justification if we are to acknowledge a law as a fundamental law. This is all internal to the political process but it is also possible to structure the institutions, without changing them substantially, so as to achieve the same increased stakes.

There is a balancing to be made between efficiency and accuracy: a very accurate procedure might issue only one or two laws a year but that is certainly not desirable to achieve coordination. In fact, we balance efficiency and accuracy in different ways: regular law-making processes often include partially inclusive deliberative assemblies, and parliament is constituted only by those citizens that have been elected. This lack of inclusiveness is often compensated through the use of consultative

\textsuperscript{250} This is a rule of thumb since, for instance, it might be worse not to enact a (correct) constitutional law against torture than to have an (incorrect) constitutional law forbidding the possession of pencils.

\textsuperscript{251} §6.3.1. An empirical example can be given: if we assume that the right to bear arms is something which should not be part of a contemporary constitutional order, we can see how a supermajority prevents its reversal.
committees and other similar institutions. Nonetheless, the idea is that we take shortcuts in order to make law. As I mentioned earlier, many arrangements can obtain democratic legitimacy without affecting the overall legitimacy of the system – I admit institutional pluralism. Accordingly, various equally legitimate institutions may have different epistemic credentials: the strength of the indicative reasons provided can vary in function of the particular institutional arrangements.

If, for instance, regular law-making is achieved through a forum that is not entirely inclusive, we could assume that fundamental laws could achieve normative supremacy through a more inclusive forum. This is because in the balancing between efficiency and accuracy, when we make the forum less inclusive, we aim to reduce the amount of disagreement and reduce the amount of time that will be spent in deliberation (even though we do not change the procedure substantially). By making the forum more inclusive, we affect the efficiency of the process but we also increase the epistemic credentials of the procedure. We aim to make the epistemic requirements of legitimacy more perfect. There are various ways in which we can increase the epistemic credentials of the law-making process. We can first make it more inclusive and open by allowing more consultation. We can allow more time for deliberation which should allow more reasons and evidence to be brought forward so as to affect the law in the making. By boosting the epistemic elements of the procedure, we increase the quality of the justification of the law arrived at and we can regard it as an appropriate core notion of the legal system.

This comes close to a special decision-making procedure. However, my claim here is not that we need a substantially different procedure or that we ought to rely on referenda or wide and public deliberation every time we need to establish a fundamental law. Rather, my claim is that we should ensure more deliberation and more openness in the decision-making process if we are to have more confidence in the justification of the fundamental law. We are still making laws through the same decision-making procedure but we are relying on our capacity to pay more attention to the decision at hand by increasing the quality of inputs. We are not changing the requirements of political equality as supermajorities would and we are not affecting the revision process as mandatory referenda would. By improving the procedure, we do not prevent the law from being revised by the same legal process thus leaving the road for revision open. What we aim to achieve are different institutional degrees of confidence which all respect democratic legitimacy.

Such an improved procedure might indeed make the law more difficult to amend but not in a legally entrenched way; it makes the law more difficult to amend simply because agents are paying more

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\[252\] §6.3.1

\[253\] Such increase procedural attention could be triggered, e.g., whenever the legislative assembly indicates that it intends to legislate about fundamental matters or when it intends to respond to the Supreme Courts about a case of judicial review.
attention and because it undergoes greater scrutiny. This, I believe, is a better way to achieve what Gaus hopes legal entrenchment can achieve. Increased epistemic credentials are sufficient to ensure that we pay more attention to the question at hand and avoid unjustified views.

Elster mentions the main ways in which a constitution can be amended or established:

- absolute entrenchment
- adoption by a supermajority in parliament
- requirement of a higher quorum than for ordinary legislation
- delays
- state ratification (in federal systems)
- ratification by referendum (2000, p. 101)

Based on my previous claims about democratic legitimacy, absolute entrenchment, supermajorities, and state ratification are not legitimate. It is not, however, incompatible to hold that a special quorum is required if we are to amend the constitution or establish a bill or rights. The idea of a special quorum is that we increase the minimum number of officials that are required before the proceeding of the legislative assembly can be valid. Such a mechanism does not substantially change the procedure: political equality is not affected, equal suffrage and majority voting are maintained, and parliament is still responsible for the enactment of the legislation. If we require a higher quorum it is because we hold the question at hand to be more important and more views should be required. It should be noted, however, that requiring a full quorum (100%) is not appropriate as it would give every agent an effective veto. Hence, an increased quorum would only be legitimate within limits to be decided by the procedure. We might also assume that a (non-mandatory) ratification by referendum is a way to achieve increased inputs from various spheres of society. With regard to delays, we might consider them to allow more views to be brought forward, and the same could apply to public consultation. These are all ways in which we can increase the epistemic credentials of the procedure which are consistent with the substantial requirements of democratic legitimacy.

This is how we should understand the normative supremacy of fundamental laws through an increase in our epistemic justification. When fundamental laws stand as core elements of the legal system, we need to increase the amount of justification necessary to support them and this can be done by improving the epistemic credentials of the procedure. Such an approach is purely political and does not entrench the normative supremacy of law in a legal process. Rather, this approach makes the normative supremacy of fundamental laws compatible with a purely procedural account of

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254 It could equally be argued that any quorum above 50% would violate the requirements of political equality since a minority would then have the power to suspend the law-making process.

255 This is important if we are to avoid entrenchment; revision should not require a new referendum.

256 At this point, some might argue that we could drop the language of ‘normativity’ since what is doing all the work is justification. I maintain the language of normative supremacy as this is the language generally used to express constitutional laws’ capacity to trump inferior legislation.
democracy. The accounts I have given in this chapter of rights protection through the structuring of the political process, of judicial review and of the normative supremacy of constitutional laws have reconciled constitutionalism and my account of epistemic democratic legitimacy.
CONCLUSION

Constitutionalism and democracy are complex notions and many approaches try to explain their relations and to surmount the tensions between them. My aim in this conclusion is to recall the significance of my own approach to democracy for the resolution of these tensions, point to the conceptual clarity gained through my arguments and indicate some aspects which need further investigation. In this sense, I shed light on the worth of my approach to constitutional epistemic democracy.

In the first section of this thesis, I mentioned that when it comes to accounts of democracy and constitutionalism, a common problem is the lack of attention paid to disagreement and the proper conditions in which decision-making procedures are called for. For instance, constitutional laws are often supported based on their independent moral value, and decision-making procedures are sometimes supported based on their capacity either to attain or to incarnate some independent moral standards. I have shown how the circumstances of politics undermine the practical effect of such arguments: they could be theoretically sound while practically failing to bridge disagreement. Accordingly, I argued that we need to rely on something to which the agents are already committed if we are to achieve wilful and rationally motivated coordination. This explained the relevance of the epistemic argument for democracy.

I have been very cautious to avoid relying on liberal accounts of democracy since I am interested in the democratic legitimacy of constitutional norms. By this, I mean an account of legitimacy which sees democracy as first and foremost a decision-making procedure designed to bridge disagreement on what ought to be done collectively. Such an account avoids commitments to substantial moral notions and concentrates on the relevant characteristics of democracy that are required for it to achieve the aims of decision-making. There is a risk of conceptual obscurity when one relies on liberal accounts of democracy to assess the democratic legitimacy of constitutional laws. This is because democracy and liberalism are two independent concepts, which indeed have much in common, but which are not identical. If we are to properly assess the democratic legitimacy of constitutional laws, we need a properly democratic account of legitimacy. The foundation of such an account of legitimacy is what the first section of this thesis was concerned to establish.

I have argued for the importance of respecting disagreement. I have equally argued for the importance of rational motivation in the achievement of coordination solutions. Rational motivation consists in providing the agents with reasons to regard a decision (or a decision-making procedure) as providing a correct solution to their disagreements. It connects the reasons to act according to a decision (or the reasons to prefer a decision-making procedure) with what the disagreement was originally about. It is
on this basis of respect for disagreement and rational motivation that I rejected the usual arguments for democracy. I further demonstrated how other epistemic approaches to democracy are incomplete.

The second section of my thesis offers my own epistemic conception of democracy which fits within the circumstances of politics and which provides agents with rational motivation. I put forward a pragmatist argument for democracy based on three presumptive aims of decision-making: justice, sustainability and concord. I argued that these are presumptive and beyond disagreement since they are part of what it is to achieve coordination in the circumstances of politics. These aims explain the different elements of democratic legitimacy: a free, open, and inclusive forum of deliberation, political equality, majority voting, the importance of a revision process, and so on. These elements are all justified based on the fact that they are necessary to achieve wilful coordination on decisions which can be regarded by the agents as aiming for justice or truth.

My own justification for democracy improves on and complements other epistemic approaches to democracy. It provides more solid arguments and a better understanding of democratic legitimacy. Furthermore, it helps us to achieve greater conceptual clarity on the proper role and function of the epistemic argument. I explained that, as aims of decision-making, sustainability and concord are equally as important as justice. This helps to explain how democracy can deal with irresolvable disagreements, for instance, and to differentiate adequately a decision procedure from a scientific one. Without such a distinction, it is not clear why we should prefer democracy to other epistemically superior procedures which fail to respect disagreement.

In the third section of my thesis, I turned to the assessment of constitutional laws within my account of epistemic democracy. I first showed that they remain desirable since some considerations can be regarded as highly important, and as demanding a special protection against the possible mistakes of an imperfect democratic procedure. I further explained that illegitimate laws are possible through procedural and substantial failures. I then mentioned the usual elements of constitutionalism – entrenchment, judicial review, and normative supremacy – and how problematic they are with regard to the account of epistemic democracy I provided. The most obvious problems are that entrenchment prevents an easy revision process and it is not clear how normative supremacy can be achieved in a way that is consistent with a respect for disagreement and with epistemic democratic legitimacy.

In the final chapter, I provided a properly epistemic democratic account of constitutionalism. One way in which our understanding of constitutionalism is obscured is by taking the means of constitutionalism for its ends. That is, entrenchment and judicial review are often taken to be essential to any constitutional order, while, in fact, their utility only relies on their capacity to achieve the protection of the considerations which are deemed to be more important. Hence, there is a danger, too often not avoided in the literature, of conflating constitutionalism with judicial review and
entrenchment. By providing an account of constitutionalism which does not rely on entrenchment or strong judicial review, I have clarified the notion of constitutionalism.

I defended the compatibility of constitutionalism and epistemic democracy, but to explain their compatibility, we needed to revise our usual understanding of constitutionalism. For epistemic rather than republican reasons, I proposed to adopt a political notion of constitutionalism. I explained that it is possible to *structure*, rather than check or confine, the legislative institutions so as to achieve rights protection. I then showed that strong judicial review is not a desirable feature of an epistemic democratic system. In fact, I support the overturning of grossly unjust laws as well as the overturning of laws which would undermine democracy. However, courts were shown not to have a privilege on the overturning of these laws. I further explained that there are no rules which could be used to restrict strong judicial review to these cases of illegitimate laws if we were to establish strong judicial review as a regular power of the legal system. I also explained that weak judicial review and judicial expertise are important elements of a constitutional epistemic democracy, but that the legislative assembly must not automatically defer.

Normative supremacy is particularly puzzling for procedural accounts of democratic legitimacy like the one I advanced. My own solution relies on the notion of an improved justification: through an increase in the epistemic credentials of the procedure, we can achieve greater confidence in the procedure without substantially affecting the requirements of democratic legitimacy. This can be done, for example, by increasing the amount of deliberation or by making our decision-making procedures more inclusive. Such a solution is sufficient to explain how constitutional laws can stand as laws on laws and as guiding values and principles for the rest of the legal system.

We can conclusively accept the compatibility of constitutional laws and epistemic democracy. Following my arguments, as long as the rather underspecified elements of democratic legitimacy are respected, constitutional laws are compatible with democracy. Note, however, that I cannot recommend too much in terms of institutional arrangements as these are mostly political questions. Hence, I cannot provide a precise institutional arrangement that democracy and constitutions must take. There are various legitimate ways in which these can be institutionalised. This is required by my upholding of institutional pluralism and political constitutionalism.

Even if my account does not tell us much about how to organise our institutions, it does say a lot about how *not* to organise them. On the one hand, it is definitely the case that extremely entrenched constitutions such as the Canadian and the American ones are inconsistent with democratic legitimacy. On the other hand, my claim is limited to well-functioning democracies and there are aspects of our contemporary democracies which seriously put in doubt the fact that they are really well-functioning. For instance, the relatively unsupervised and unrestricted funding of political parties
in the USA and in the UK seriously damages political equality. There is an important deficit of democratic legitimacy when those with more money can speak loudly while the poor cannot be heard. Even more so, such a situation, if well-established, will deprive the democratic procedure of its epistemic benefits. In my view, the funding of political parties should be mostly public and very strict about the amounts private agents could contribute so as to ensure political equality. From this simple example about the funding of political parties, it is easy to see that a well-functioning democracy is hard to achieve and it is a relevant question whether there are any such democracies in the world.

There is definitely a sense in which, even if realisable by many institutional arrangements, the requirements of democratic legitimacy I put forward are very stringent and difficult to meet. The way I see it, this is not a problem, but a requirement of proper respect for disagreement and what it is to achieve *decisions* in the circumstances of politics. Even if difficult to achieve, the requirements I offer can act as normative requirements and they can be realised. Furthermore, legitimacy comes in degrees. There can be a deficit of democratic legitimacy with regard to the funding of political parties without delegitimising the whole system.

Nonetheless, in consequence of the stringency of these requirements, there will be circumstances when the political system in place is too far from a well-functioning democracy and in such cases *legal* constitutionalism might be warranted. These would be cases where judicial review and entrenchment would be regarded as essential to ensure respect for disagreement. For instance, a law has recently been passed in South Africa which secures secrecy on many issues relevant to proper law-making. (Smith, 2011) In this instance, legal constitutionalism might be desirable in order to prevent such abuse since South Africa is a delicate case. It has an extremely liberal constitution, democratic institutions, a well-functioning judicial system, and so on. Its society is, however, plagued with profound inequalities and this unquestionably affects the capacity of its democracy to function well. Yet, it remains that it is not clear that strong judicial review and legal constitutionalism would be legitimate elements of such a system. In my view, if we are to claim that legal constitutionalism is desirable, it should not be as the epitome of democratic government but rather as a *remedy* for democracies plagued with deficiencies and failures.

In this sense, my argument about constitutionalism is restricted to the circumstances of politics and to well-functioning democracies. Consequently, my account is close to an ideal political theory in the Rawlsian sense. (Wenar, 2008) I do make strong assumptions about the agents’ willingness to coordinate and to respect disagreement and the law. However, it would be false to claim that my account is purely “transcendental”. (Sen, 2009, p. 5) For instance, in my discussion of majority voting, I have taken into account that agents will not always be moved by reasons and evidence,

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258 To paraphrase Waldron (2006, p. 1406).
which means that some of them may be unreasonable. Overall, my account is restricted to situations in which agents are concerned with living together in a shared political world, but it is clear that a fuller political theory would be needed to explain how to establish and maintain democracies in politically treacherous and untrustworthy societies. In other words, a full political theory should as well address what lies at the outskirts of politics and wars, and I cannot do this here.

Let me now turn to further questions that can be addressed to the view I defend. I hold that epistemic democracy and constitutionalism are compatible. Some might argue that this is too weak a thesis and that my arguments warrant claiming more. What I should be arguing for is that a properly epistemic democracy must include constitutional laws and weak judicial review so as to benefit from the judges’ and courts’ epistemic input.259

There is indeed ground to hold such a view – even though I have not defended it – based on some of the arguments I advanced. For instance, I defended that the legislative assembly should use the expertise of judges on the law and take it seriously when courts perform weak judicial review. I have also defended the idea that there are considerations which we deem more important, and if we deem these considerations to be more important, it only seems appropriate to secure them through constitutional laws. These laws would then appear as the appropriate and necessary institutional arrangement to map the various degrees of commitments we can have with regard to different laws and values. The idea, then, would be that without constitutional laws we could not properly achieve the epistemic aim of democracy. We could not properly map the different normative values of different laws and we could not benefit from the expertise of judges/courts on the law.

I am tempted by the idea that only a constitutional democracy is a legitimate epistemic democracy. I do not think, however, that such a position can be defended conclusively. For one thing, judicial review, as we understand it, is only one institutional form of judicial review and it does not necessarily involve ‘experts on the law’. It is not clear either that the conditions of epistemic democratic legitimacy I have defended can only be safeguarded in a constitutional epistemic democracy. More specifically, it is not obvious that constitutional laws are strictly necessary to ensure epistemic democratic legitimacy. Suppose a more extreme British system where political equality, freedom of speech, a free, open, and inclusive forum, are respected and where laws are revisable: we can easily imagine such a system refusing to commit itself to some values through law and relying heavily on tradition for its procedural rights. This system meets the requirements of democratic legitimacy, even though it does not have any characteristic of a constitutional democracy.

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259 I thank Craig Smith for this point.
260 See, for instance, Goldoni’s (2012) discussion of Sieyès’s constitutional jury.
What can be claimed, however, is that the aim of justice would be best served if the polity had constitutional laws. We might say that a constitutional epistemic democracy has more legitimacy than a non-constitutional one simply because it allows the decisions made to better achieve justice and truth inasmuch as constitutional laws allow us to map the different levels of confidence we have in various laws and to protect them against possible mistakes. A non-constitutional democracy can still achieve correct determinations of justice and be legitimate but it is more likely that its laws will be affected by mistakes.

A further criticism that can be addressed to my thesis is that it emphasises only one aspect of law-making. It is exclusively attentive to direct legislation within a state legal system. I do not discuss the democratic legitimacy of common-law or of customary law, nor do I discuss international law. These are valid laws and I have left the question of their democratic legitimacy open. This can be problematic since British constitutional laws rely heavily on custom. It could then be difficult to apply my model to the democratic legitimacy of British constitutional laws, for instance. This is because they cannot be seen as the product of any political institution. Neither can it be claimed that they are the object of such political institutions through tacit consent.261

It would indeed be beneficial to extend the account of epistemic democratic legitimacy I have expounded here to various sources of law. I do not believe that there are any serious inconsistencies between customary law, common law, and democratic legitimacy. As Hart mentions: “Custom is not in the modern world a very important ‘source’ of law. It is usually a subordinate one, in the sense that the legislature may by statute deprive a customary rule of legal status”. (1994, p. 45) Inasmuch as a revision process is possible, it seems that such laws can obtain epistemic democratic legitimacy; unless there is extreme veneration for some customary laws which are held to be beyond revision. This is indeed a possibility and in that case epistemic democratic legitimacy would probably not obtain. However, this is a limited case which does not extend to all customary law. Nonetheless, I agree that an account of the relationship between democracy, customary law and common law is called for.

The epistemic democratic legitimacy of international law could be the subject of a full thesis in itself but I can still provide some guidelines as to how this matter could be approached. For epistemic democratic legitimacy, one of the main issues is the absence of a clear and accepted legislature at the international level. International law, more than state-made law, arises from various sources such as treaties, custom, regional parliaments such as in the EU. Furthermore, even when there is something resembling a legislature, it is not clear that conditions of equality obtain; the veto system present at the UN is a clear example of this. Furthermore, international laws are extremely removed from the

influence and the inputs of individual agents. Few, and possibly none, of the requirements of democratic legitimacy I advanced seem to apply to such laws. In this sense, they are democratically defective.

This does not prevent international laws from being valid laws since validity and legitimacy are distinct notions. Rather than relying on the idea that international laws are democratically legitimate to explain why agents should act according to what they command, we might have to rely on other considerations. There may not be any democratic reasons to obey international customary laws, but there are definitely prudential reasons to do so. Just as one has independent reasons to obey traffic laws in undemocratic states, one might have reasons to obey the laws of the sea even if they are not democratically legitimate.

Democratic legitimacy does not exhaust the normativity of law even though it explains what is required for law to bridge disagreement within the circumstances of politics. Since the circumstances of politics hardly apply at the international level – coordination is limited and some agents are significantly more powerful than others – it might not be possible to bridge disagreement in a democratic way even if it would be desirable to do so. Alternatively, in the case of the EU, it seems that we are moving towards something more similar to the circumstances of politics through greater regional integration. It follows that democratic legitimacy might be applicable in this instance. These are only some hints at how the account I provided interacts with international laws.

To finish, I point out areas of research in which to further the epistemic argument for democracy. I think that the premises of the epistemic argument for democracy warrant a novel understanding of legal pluralism which affects three important questions of political philosophy: (1) Cultural and religious laws; (2) Human rights pluralism; (3) Secession. By legal pluralism, I mean something along the line of semi-autonomous coexisting normative orders. (Tamanaha, 2008) Such coexisting normative orders could all meet the requirements of epistemic democratic legitimacy while being radically different. In other words, there could be a plurality of coexisting legitimate laws and institutions.

Firstly, a case could be made for religious and cultural laws and tribunals based on the epistemic importance of diversity. Rather than arguing for these laws based on the importance of offering cultural recognition to a minority – a requirement that is often seen to conflict with what is held to be true by the majority – it might be possible to make a case for legal pluralism based on the importance this plays in achieving the right answer. Allowing cultural and religious minorities to coordinate on different laws in some circumstances could, in fact, be a way to harvest the epistemic benefits of diversity. Secondly, the same epistemic considerations which support legal pluralism within the State legal system can also support the idea of human rights pluralism at the global level. When interpreted
with the epistemic argument for democracy, human rights pluralism takes an interesting turn: different specifications of human rights, rather than being seen as concessions made to different cultures, should be seen as different reasonable approaches infused with local knowledge so as to increase our chances of finding the truth. Finally, pluralism in law can inform our understanding of secession in at least two different ways: firstly, in supporting the claims for regional self-determination based on the role of diversity in increasing the robustness of a political system. In this sense, we might regard federal systems or devolution to be epistemically beneficial arrangements inasmuch as they make the legal system more easily adaptable to local knowledge. Secondly, in supporting secession when either coordination is not possible or desirable or when the citizenry is too different to constitute a community of inquirers, we can explain epistemically acceptable conditions for the breakdown of legal systems. These, I believe, would be fruitful extensions of the epistemic argument for democracy which would allow us to tackle various problems faced by political philosophy in a novel and innovative way.
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