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The Democracy/ Contractualism Analogy

One of the dangers in the modern enthusiasm for democracy is a temptation to suppose that the right institutions will promote justice or avoid horrors all by themselves, as if "by an invisible hand."[1] Joshua Cohen plausibly counters that "we cannot expect outcomes that advance the common good unless people are looking for them."[2] I propose to defend Cohen's proposition even against his own important normative theory of democracy and others like it. I want to demonstrate that a central strand in theories of deliberative democracy—theories generally antithetical to economistic approaches—has an invisible hand structure, and that it is inadequate for this reason. The strand I have in mind asserts what I shall call a *democracy/contractualism analogy*, in which justice is understood along contractualist lines (explained below), and then outcomes of proper democratic arrangements are held to track justice (call this the *Tracking Claim*), and to do so because they have a structural similarity to the hypothetical choice situation posited in contractualism.

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1. Adam Smith's famous phrase appears in *A Theory of the Moral Sentiments* (Indianapolis: Liberty Classics, 1982), p. 185 (part IV, ch. 1).

2. "Deliberation and Democratic Legitimacy," in *The Good Polity* (London: Basil Blackwell, 1989), p. 20 (hereafter, DDL).

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Analogy theories accept that democracy tracks justice partly because citizens are motivated nonegoistically and in a morally significant way. Nevertheless, I will argue, the analogy has an invisible hand structure because it needs to conceive of voters as addressing some question other than that of justice—the value that is said to be promoted by the arrangement. Given the profound disanalogies between the hypothetical contractual situation and even admirable contexts of democratic social choice, there is no such invisible hand. Whether actual democratic procedures, or any conceivable democratic procedures, might have justice-promoting tendencies (something I do not investigate here), I argue that there is no support for this supposition in a democracy/contractualism analogy.

Along the way I try to clarify the structure of contractualism in certain respects. However, I am neither critically evaluating contractualism itself as an account of justice or morality, nor asking what hypothetical contractors would agree to about political choice procedures. I am concentrating on the influential idea that proper democracy produces justice because it structurally resembles the hypothetical choice situation that is central to contractualism's account of justice or right.

The Analogy

Scanlon's influential contractualist view says that "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement."[3] Conceived more generally, contractualism holds that the content of justice or right is given by what participants would agree upon in a hypothetical collective choice procedure of some specified kind, including elements that reflect certain moral considerations and not only instrumental reasoning. Different theorists, however, use different versions of the general contractualist idea. I use the term "contractualist" here to cover a cluster of views that resemble Scanlon's in certain ways.

The democracy/contractualism analogy hopes to answer a standard challenge for the claim that democratic procedures might promote good

3. *What We Owe to Each Other* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998), p. 153.

or just outcomes. With so much disagreement about what is just, how could there be a generally acceptable argument that certain arrangements promote justice? Even if we assume contractualism, and even some particular version of it, there might be disagreement, some of it entirely reasonable, about what principles of justice would be supported by contractualism. Some philosophers, especially Rawls, argue that political power can only be justified by appeal to considerations that are beyond reasonable objection.[4] Since this is a criterion of what counts as a successful justification, it constrains justifications offered by philosophers as well as by ordinary citizens. Rawls gives a broadly contractualist reason for this, but many others accept it on more general liberal grounds.[5] Yet others require general acceptability of principles on other grounds such as simple stability. A general acceptability requirement of any such kind would imply that no reasonably disputable interpretation of contractualist justice can be appealed to in a justification hoping to show that a certain political arrangement tends to produce just laws and policy. Because there is some reasonable disagreement about justice itself, there is bound to be some reasonable disagreement about whether certain political procedures will tend to promote just outcomes.

On the other hand, it cannot simply be assumed that no propositions of justice are acceptable beyond reasonable disagreement, even if many are not. I will assume, for example, that a famine that could be easily avoided without significant burdens to anyone is severely unjust, and that this is unreasonable to deny. On other matters, such as whether property and taxation systems should work to promote the well-being of the least well-off, or whether recreational drugs ought to be legally forbidden, assume for the sake of argument that there are reasonable objections. The objections, then, would block the use of these views in political justification.

Suppose, then, that because of reasonable controversy about the substance of justice, the public comparison of political arrangements with respect to justice must proceed, at least partly, without testing performance by particular judgments of substantive justice. It may be initially puzzling how such a view is to proceed. How could a political procedure

4. See *Political Liberalism* (New York: Columbia University Press, 1993), e.g., p. 137 (hereafter, PL).

5. Jeremy Waldron is an example. See "Theoretical Foundations of Liberalism," in *Liberal Rights* (Cambridge: Cambridge University Press, 1993), pp. 56–57.

be thought to track justice unless it were known what is just? A contractualist account of justice tempts the following answer:

> *Similar Procedures Have Similar Outcomes*: an actual choice procedure will tend to track justice if it is sufficiently like the hypothetical choice procedure contractualism employs to explicate the content of justice.

If contractualism itself is taken for granted, this seems to be beyond dispute—its truth guaranteed by the word "sufficiently"—but the question is what guidance it provides for the design of actual institutions. Take for granted that one important goal in the design of democratic institutions is that they promote decisions or outcomes that are just or right by contractualist standards.[6] Call that achievement, if and where it exists,

> *Outcome Similarity*: actual democratic procedures tend to produce decisions that would be produced in an ideal hypothetical contractualist situation.

A natural idea to pursue, then, is the thesis that outcome similarity can realistically be achieved by promoting procedural similarity.

> *Democracy/Contractualism Analogy*: a tendency of actual democratic procedures to produce outcomes that are right by contractualist standards can realistically be pursued by promoting the similarity (in certain respects) of actual procedures to the procedure in the hypothetical contractualist situation.

This strategy has the potential to ground the claim that democratic procedures track justice even without needing to rely on any claims about what is just; it is formal in that sense, and so can avoid, if necessary, whatever reasonable controversy there might be about the more specific content of justice. However, some less controversial propositions about justice remain available as test cases. We should not accept the democracy/contractualism analogy if things go too far wrong in these central cases—if, for example, democratic procedures modeled on the contractualist procedure have no tendency to produce the decisions necessary to avoid (avoidable) famine. I will argue that the analogy should be rejected for just this reason.

6. I will use "outcome" and "decision" interchangeably, but "outcome" is less ambiguous as between process and product.

The Analogy's Influence

Several philosophers have suggested this analogy. John Rawls writes, in *Political Liberalism*,

> The guarantee of fair value for political liberties is included in the first principle of justice because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality. *The idea is to incorporate into the basic structure of society an effective political procedure which mirrors in that structure the fair representation of persons achieved by the original position.*[7]

Here Rawls supports the claim that certain political liberties, along with what he calls their fair value (not just their formal equality), will tend better to track justice by virtue of the structural similarity between political procedures and the hypothetical choice procedure in the original position.

In a similar vein, William Nelson writes,

> [F]ollowing the procedures of (a kind of) constitutional democracy, we will tend to come up with laws that are justifiable in terms of principles satisfying the conditions of acceptability for moral principles. The general idea is this: the tests that a law has to pass to be adopted in a constitutional democracy are analogous to the tests that a moral principle must pass in order to be an acceptable moral principle.[8]

Nelson lays out a contractualist moral theory closely anticipating that of Scanlon, in which a set of moral rules is acceptable if it is the object of a possible consensus under special conditions. He supports the claim that democracy could track justice on this basis. He says in this passage that procedural similarity (his "analogous tests") supports outcome similarity.

Joshua Cohen suggests that democracy of a certain kind has the desirable feature of being structurally similar to a hypothetical contractualist initial situation. He says, "The ideal deliberative procedure is meant to provide a model for institutions to mirror . . ."[9] He explicitly follows the

7. PL, p. 330, emphasis added. Here Rawls echoes a point from *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), pp. 221–22.

8. *On Justifying Democracy* (London: Routledge, 1980), p. 101 (hereafter, OJD).

9. DDL, p. 22.

remark of Rawls (quoted above), but the procedure he proposes to emulate is not the original position since the participants do not simply maximize their own holdings behind a veil of ignorance. Rather, in an ideal procedure more akin to Scanlon's version of contractualism,

> The conception of justification that provides the core of the ideal of deliberative democracy can be captured in an ideal procedure of political deliberation. In such a procedure participants regard one another as equals; they aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable; and they are prepared to cooperate in accordance with the results of such discussion, treating those results as authoritative.[10]

Democratic procedures are to be designed to mirror the structure of this broadly contractualist account of ideal deliberation, so Cohen endorses a version of procedural similarity. A trickier exegetical question is whether his endorsement of procedural similarity rests on the claim that it would promote outcome similarity. Without spending much time on interpreting the texts, I want to allow for two possible readings of Cohen's view. On one reading, procedural similarity is meant to support outcome similarity. On the alternative reading, procedural similarity has a different point: the contractual procedure is meant to have intrinsic value, and if it has it in the ideal case, then it also has it in cases of sufficiently similar actual procedures. My argument against the democracy/contractualism analogy would be damaging either way.

Brian Barry writes about Scanlon's contractualism applied to a political view, "If these are the hypothetical conditions under which rules and principles of justice can be expected to emerge, an obvious implication is that just laws and policies are more likely to arise in actual societies the closer they come to instantiating these hypothetical conditions."[11] He continues that "it is possible to set out procedures of a kind familiar within many liberal democratic political systems that will produce an empirical approximation of a Scanlonian original position by making it harder for rules that can reasonably be rejected to be adopted."[12] Barry,

10. "Procedure and Substance in Deliberative Democracy," in *Democracy and Difference*, ed. Jess Benhabib (Princeton: Princeton University Press, 1996), p. 101.

11. *Justice As Impartiality* (Oxford: Oxford University Press, 1995), p. 100 (hereafter, JAI).

12. JAI, p. 104.

citing Nelson and Cohen as precursors in this thesis, appeals here to a structural similarity between actual and hypothetical choice situations as a way to support the tracking claim.[13]

No one, of course, thinks that actual institutions could ever be exactly like the hypothetical contractualist situation, but that is not what is at issue. The democracy / contractualism analogy asserts that some strong tendency to promote just decisions can be built into actual procedures and institutions by making them structurally similar to the hypothetical contractualist situation. Of course, everyone thinks that there are ways in which things could be arranged, or ways in which participants might be motivated, that would promote justice or avoid injustice, so that is also not the claim that is in question. The more distinctive thesis asserted by Nelson, Cohen, and Barry is that structural similarities between the hypothetical collective decision procedure and actual democratic decision procedures can ground some significant tendency of the latter to make substantively just decisions by contractualist standards. (I will speak of this as the claim that the analogy can support the tracking claim.)

It will become clear, I think, that none of these theorists actually endorses institutions that structurally resemble the contractualist situation. Still, based on what I will argue is a misunderstanding of contractualism, that is what they claim to do.

A brief final note on the term "contractualism": As I am using the term,[14] Rawls is the most influential of the contractualists, but his version of the hypothetical choice situation is not normally used among those who employ a democracy / contractualism analogy. The reason is surely that the "veil of ignorance" that prevents the hypothetical participants from knowing any particular information about their identity, interests, gender, or view of the good, is utterly unpromising as something to emulate in the structure of real institutions. Since actual democratic participants will not be behind a veil, there is no hope of securing justice unless each participant is motivated to protect the interests of the other participants in certain ways—a motive that is profoundly different from the motives of the hypothetical contractors. The "fair representation of interests" of which Rawls speaks (see quote above) has two entirely different points in the original position and in actual political

13. Ibid., p. 277, n. 36.
14. See ibid., p. 2.

procedures. The parties in the original position pay no attention to each other, whereas an actual oppressed minority cannot prevail without others joining their cause. Rawls, indeed, argues that voters ought to address justice itself, the primary question the contractual situation seeks to explicate.[15] These points throw Rawls's suggestion of an analogy into serious doubt.

Habermas and Scanlon develop versions of contractualism that do not use a veil of ignorance, and they have naturally been more influential on the analogy theories.[16] Nelson's account of the contractualist situation is strikingly similar to Scanlon's (and predates it). Cohen's view shows the clear influence of Rawls, Scanlon, and Habermas but employs no veil of ignorance. Barry's version of the analogy argument is explicitly based on Scanlon's version of contractualism. All have the features my argument exploits, though I concentrate on Scanlon's version as a focal point. Hereafter, by "contractualism" I will mean a Scanlonian version—with no veil of ignorance and with contractors motivated partly to accommodate others—unless otherwise specified.

The initial plausibility of the analogy is clear: in proper deliberative democratic procedures, participants are expected to press their own interests and convictions, tempered by a due respect for those of others. Just as with the hypothetical contractors, actual participants' motives are a mixture of self-service and reasonable accommodation of others. That similarity is striking, but I will argue that it is not enough to support the tracking claim—a tendency of democratic procedures to produce outcomes that are just by contractualist standards.

The Failure of the Analogy

Suppose, then, that under the proper contractualist standard of justice, easily avoided famine is almost always unjust (and that this is unreasonable to deny), since remedial measures, or more general policies that guaranteed them, could not reasonably be rejected. First, it is easy to see why egoistic voting will not itself avoid famine: a well-fed majority might fail to support the remedy. As Sen says, famines, even when allowed to

15. See PL, p. 219.

16. For Jürgen Habermas's view, see *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996).

run their course, rarely affect more than a few percent of a nation's population.[17] In majoritarian electoral institutions with egoistic voting, how these victims could summon any decisive electoral pressure is far from clear.

Consider, next, a motivation modeled on contractualism. The motivations that democratic participants would have according to a strong democracy/contractualism analogy are not egoistic. On the other hand, truly analogous participants will not address the question of justice itself but only their own interests so far as they can be reasonably pressed. This is not egoism, but nor is it a sufficient orientation to the common good to support the tracking claim under circumstances of real and proper democratic choice. After exhibiting a number of important disanalogies between democratic and contractualist choice, I will argue that justice would not directly be addressed by participants who were analogous to the hypothetical contractors.

Here are several central features of the hypothetical contractualist situation I will consider, drawn largely from Scanlon.

(a) The task is to choose general rules that shall apply to all members of society.

(b) Agreement is not forced or coerced.

(c) Everyone affected by the chosen arrangements is a party to the choice.

(d) Participants interact on terms of equal opportunity for input and no unequal bargaining power.

(e) Agreement is defeated if it is rejected by any of the individual participants.

(f) Participants will not reject any proposal unreasonably.

(g) Participants are all motivated to come to some agreement rather than live without any rules.

(h) The proceedings are not bound by, and the decisions are not subsidiary to prior tenets of justice or right.

The democracy/contractualism analogy does not hinge on some general assessment of the degree of similarity. If it did, no theorist could ever have been tempted by it. It is easy to see that no actual democratic

17. "Freedom and Needs," *The New Republic*, 10 & 17 January 1994, 31–38.

procedure could even remotely approximate these essential contractualist conditions. Here are a few important deviations.

Missing Constituents (not-c): not everyone affected participates

In actual democracies there is no franchise or other political status accorded to members of other states, children, or members of future generations, all of whom might be profoundly affected by the actions of the state in question.[18] Even among those with rights to participate, many do not.

Unequal Political Power (not-d): those who do participate are not on remotely equal terms in the relevant sense

Scanlon stipulates that his contractors have no differential bargaining power one over another. This could never be realized or even approximated in actual political procedures. Certainly the effects of bargaining power can be reduced to some extent in some contexts, and ought to be. But here the question is whether bargaining power could ever be equal enough to ground confidence that the resulting decisions would tend to be what they would be in the hypothetical contractual situation. This is too much to believe.

Higher Law (not-h): democratic choices are constrained by higher constitutional law

A morally central feature of the contractualist situation, especially as it has been deployed in political contexts, is that there are no constraints on allowable outcomes other than the proper conduct of the

18. In his discussion of animals (*What We Owe*, pp. 177–87), Scanlon allows contractors to represent the interests of certain noncontractors. Since animals are not present in either the hypothetical or the real choice contexts, there is no violation of analogy. But the same strategy is not available for the constituencies I mention in the text. They must apparently be participants in the hypothetical choice but not in the real democratic choice. This is a profound disanalogy whose normative damage can only be undone by giving actual participants motivations crucially different from those of the hypothetical contractors. The problem is much the same as the central one I am pressing: no plausible democratic institutions can really be modeled on the hypothetical contractualist situation because the motives there are too thin to promote justice in real contexts.

procedure (including reasonable participation; the strictures of reasonableness itself do seem to be prior to the procedure).[19]

These are all significant differences, but the one upon which I want to rest my objection to the tracking claim is

The Veto gap (not-e): nothing remotely like individual veto power is appropriate in large democracies

In principle, actual democratic procedures could operate under a veto rule, requiring unanimity for the passage of any measure. However, the veto (unanimity) rule is inappropriate in large political systems such as modern states.

The Inappropriateness of Actual Veto Power

The problem is not that a veto rule could not be established but rather that it would be absurd to do so. Veto power is a very different thing in the temporal context of actual politics than it is in the atemporal context of the hypothetical contractual situation. In the hypothetical context there is no running polity, but in the actual temporal context there is. A veto power in the real world notoriously makes change far more difficult than stasis, and this privileging of the status quo has no adequate justification. If it were only exercised properly it would have no untoward effects. If only reasonable objections were pressed by the veto, the outcomes would approximate those in the hypothetical contractualist situation. This shows that the veto rule can only be objected to by frankly asserting that it is bound to be used inappropriately. This does not yet impugn the motives of any participants, but it does impugn at least their information and rationality, if not also the motives of some. From a contractualist point of view the problem with using the veto rule in actual practice is simply that it would often block even proposals to which there is no reasonable objection. I think this can be safely assumed, at least in the large pluralistic polities the democracy/contractualism analogy seems intended to address.

19. See Samuel Freeman's instructive discussion of this point as it figures in the views of Cohen and Habermas, in "Deliberative Democracy: A Sympathetic Comment," *Philosophy & Public Affairs* 29 (2000): 371–418.

In many actual democratic states, some individual rights are protected against majoritarian legislation by the higher authority of a constitution. This is sometimes thought of as a kind of veto power, the power of aggrieved individuals to block legislation on the basis of its unreasonable burdens on them. Of course, not all constitutional limits on legislation are proxies for the legitimate claims of individuals. The freedom of expression protected by many constitutions is much broader than what any speaker has a legitimate interest in being allowed to say. Much of what is protected is reprehensible.

Other constitutional rights, such as a U.S. citizen's right against cruel and unusual punishment, fit the case better. However, these are still unlike a veto power in a crucial respect: they depend for their efficacy on a court's acknowledging the alleged violation as a real violation. This requires judges to participate in the process with motives entirely different from the reasonable but self-serving motives of hypothetical contractors (more on this below). Such a system may tend to promote outcomes that are just by contractualist standards, but that is not the issue. Even if it does, there is no structural analogy between the actual and hypothetical procedures that explains this fact. The explanation involves the direct pursuit of justice by some participants, a fundamental disanalogy.

Finally, even if the analogy with constitutional rights were sound, the affected set of issues would still be quite small. The vast majority of collective political decisions would still face a wide range of options that are immune to this kind of veto, including many unjust options. For example, consider the variety of forms a system of taxation might take. There are many possible unjust systems of taxation, but it would probably be inappropriate to prohibit them all in a constitution. On this and other remaining issues, where no constitutional quasi-veto was permitted, there would be no reason to think the presence of reasonable objections would effectively block the offending proposals. Even if it more closely resembled the veto power, the constitutional approach would only account for a very slim tendency of reasonably rejectible proposals to fail in the democratic process.

Large democratic procedures, then, should not give individuals the veto power, since many proposals that should not be blocked would be. The failure of the democracy/contractualism analogy hangs crucially on the inappropriateness of the veto power. To defend the analogy it might be said, then, that real democratic procedures with the veto power are

the ideal, the form politics should take if participants lived up perfectly to their responsibilities. Analogy theorists might say that all they ever intended was an analogy with good and proper democratic procedures, not actual flawed ones. It is impossible to deny a strong analogy between contractualism and a highly idealized and imaginary democratic process of that kind. But that is not the influential claim that is in question here. Our question is whether any realistically possible political arrangements, ones that we should aspire to, exhibit the analogy in the way needed to support the tracking claim. It is important to appreciate the severity of an individual veto power in a context of millions of voters. Even if individual moral character could improve without limit, even some conscientious voters would be bound not to be fully informed, vetoing proposals to which there is not really any reasonable objection. And it only takes one. Large democratic societies, then, have no good reason to aspire to arrangements in which an individual veto power could reliably be used without error. There is no politics worth pursuing that mirrors this crucial feature of the hypothetical contractual situation. As we will see, this fact fundamentally affects the duties of democratic voters, at least if contractualism is taken to provide a good account of justice.

The Primary Question Problem

My aim is not merely to display a dissimilarity between democratic and contractualist choice situations. The two are analogous in some ways, not analogous in other ways. Those asserting the democracy/contractualism analogy are not claiming a perfect resemblance is possible, nor are they merely claiming that some similarities are possible. My thesis is that the analogy fails specifically in ways that will prevent appealing to structural similarities between the hypothetical and actual choice situations in order to support the tracking claim. The contractualist choice situation is unlike (even admirable) democratic choice situations in ways that prevent the latter from having any systematic tendency to produce the same outcomes as the former.

I want to focus mainly on the veto gap in light of a further point about contractualism. If participants do not have a veto then reasonable objections by a small number will not defeat a proposal unless enough others join them. A single reasonable objector or a small group will be

outvoted in democracy unless either there is a veto power or other voters join reasonable objections that are not their own. In democratic practice this kind of joining is common, but it is no part of the contractual situation. Contractors are, as I will say, *reasonably self-serving*, and so the power of veto is crucial.

There is an ambiguity in Nelson that is instructive on this point. In following Mill he celebrates the tendency of advocates in an open government to *defend* their proposals by showing that they should be thought acceptable to all or most citizens.[20] Nelson takes this tendency to resemble the motivations of the hypothetical contractors. This kind of "moralizing" of public discourse[21] may well be a good thing and may well improve the expected moral quality of outcomes, but it does not have any analogue in the contractual initial situation even as conceived by Nelson. He conceives of political justification as showing that a proposal would be accepted in a contractual initial situation. He never suggests that this is what hypothetical contractors try to demonstrate to each other, however, and their doing so would apparently be viciously circular. If they have a standard of rightness available to them then our philosophical account should pass over them and go straight for that standard. Justification is not a mode of discourse that takes place *within* the initial situation on this kind of view.[22] Insofar as real democratic discourse involves justificatory argumentation rather than simple endorsements or rejections of proposals, the analogy between Nelson's contractual situation and democratic procedures is strained. Nelson switches here to a different (and more genuinely Millian) basis for the tracking claim: that by directly addressing justice democratic participants might tend to track it. This claim, too, would require defense; here the point is that it decisively abandons the analogy argument for the tracking claim.

This point can be put in a more general context. To see this, it helps to introduce a piece of terminology. Some contractualist views are proposed to ascertain the content of morality, or some part of it, and others

20. OJD, especially pp. 111–18.

21. OJD, p. 119.

22. Philip Pettit observes that when we, actual moral agents, justify our actions to others, "we suppose in the very act of trying to justify ourselves . . . that there is an independent sense of right." This supposition is not available to the hypothetical contractors, which marks a decisive disanalogy. See Pettit, "Doing Unto Others," *Times Literary Supplement*, 25 June 1999, 7–8.

aim to discover the content of political justice. In general, call this issue the *primary question* for a given contractualist theory. In Scanlon the primary question is "what do we owe to each other?" In Rawls the primary question is "what is a reasonable political conception of justice?" In contractualist theories the participants in the initial situation are not conceived as addressing the primary question. Parties to Rawls's original position do not ask themselves "what is a reasonable political conception of justice?" They ask what I will call a *subsidiary question*: "which of the proposals before me will maximize my bundle of primary social goods?"[23] Scanlon's participants do not ask themselves "what do we owe to each other?," but rather the subsidiary question "do I find this proposal acceptable in light of my interests (reasonably weighted) and in light of my aim of coming to agreement with others similarly motivated?" Several critics of Scanlon have argued that the contractors are themselves, in effect, applying some noncontractualist account of wrongness.[24] Scanlon says explicitly that the account would be circular if that were so, and denies that it is so.[25]

Suppose that rather than applying a noncontractualist account of rightness the contractors apply precisely the contractualist standard of rightness. Here the problem is slightly different. Such an account involves a fatal infinite regress. We, the theorists, begin by trying to explicate justice

23. Rawls writes that "the point of the original position is to understand our conception of justice . . . by seeing how this conception is limited by and can be constructed from other notions that it is natural to think of as more basic and abstract. . . . This is the reason for bracketing conceptions of the right in the construction of the original position." "Fairness to Goodness," *Philosophical Review* 84 (1975), reprinted in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), p. 269.

24. Michael Ridge instructively defends Scanlon against these charges in "Debate: Saving Scanlon: Contractualism and Agent-Relativity," *Journal of Political Philosophy* 9 (2001): 472–81. My interpretation of Scanlon is indebted to Ridge's article.

25. "If we were to appeal to a prior notion of rightness to tell us which considerations are morally relevant and which are entitled to prevail in cases of conflict, then the contractualist framework would be unnecessary, since all the work would already have been done by this prior notion" (*What We Owe*, p. 213). See also page 214, where he says it would be circular to appeal to a "non-contractualist theory of right." On the other hand, he also says at page 5 that the parties are "moved by the aim of finding principles that others, similarly motivated, could not reasonably reject." This seems to give them the primary question: what principles are beyond reasonable rejection? The difficulty is similar to what it would be if the parties to Rawls's original position were themselves to ask, what principles would be unanimously agreed to behind the veil of ignorance? The exegetical problem raised by these quotes in Scanlon cannot be pursued here.

(to take a political version of contractualism) in terms of what would be agreed by reasonable contractors under proper conditions. But to carry out the explication rather than stopping with this formula, we need to give content to the stipulation that the contractors are reasonable.[26] This means (or so this view says) that they, the contractors, will themselves ask what proposals are beyond reasonable rejection. This involves *their* appealing to the contractualist formula, and so they now need to fill in the features and motivations of the hypothetical contractors they are imagining. But those contractors will face that same issue again, and so on. We saw above that if the contractors appealed to a noncontractualist account of right then our attention should go straight to that standard. The same is true if they appeal to a contractualist standard. The problem, then, is that our attention gets repeatedly shifted to the standard posited by the hypothetical contractors at each successive stage ad infinitum.

There is a good reason for having the parties address a subsidiary question rather than the primary question. If they were to address the primary question then the whole theoretical apparatus would fail to have any heuristic value in explicating the nature of justice or right. The primary question would remain for the contractors themselves to fathom, and their own choices would be philosophically moot. Thus it is an important feature of contractualism that the parties in the initial situation address a subsidiary question and not the primary question of justice or morality.[27]

The conclusion to draw is that the contractors we posit cannot themselves be applying the standard of right or justice at all, contractualist or noncontractualist. This is not the same as objecting to giving the hypothetical contractors motivations that are in some way moral or morally significant. This would not by itself undermine contractualism. The idea of a reasonable consideration in the contractualist choice situation

26. Scanlon resists the complaint that the theory has little value unless all this content is made explicit so results can be cranked out mechanically (*What We Owe*, pp. 217–18). This is not my complaint. The objection I raise in the text is about the structure of the account regardless of what particular content is given to the key ideas such as reasonableness.

27. There would be no circularity in a contractor persuading others of a certain subsidiary matter: that the others could not reject certain proposals without thwarting their reasonably self-serving motives. This again suggests similarities with democratic discourse. But such communication would be superfluous to the contractualist theory of right, since we could just as well model the acquisition of such information in some other way. The fact remains that the decision whether to reject must be reasonably self-serving, and that is sufficient to refute the democracy/contractualism analogy.

could be a moral idea without its being the primary idea that is being explicated. That is enough to show that the account would not be circular. And as long as contractualism does not seek to explicate all moral ideas, including reasonableness itself, it can help itself to an independent but morally significant conception of reasonableness without threat of circularity. But none of that warrants letting the contractors employ a concept of, specifically, right or justice or whichever primary question the contractualist account is addressing. As we will see next, this point is partly captured by Scanlon's view that hypothetical contractors are only motivated by what he calls "personal reasons."

Reasonable Self-Service

It is central to contractualism that the reasons for which proposals are rejected in the hypothetical choice situation are, in Scanlon's term, "personal."[28] One thing this means is that for any rejectible proposal, there are personal reasons against it from some relevant point of view. But it also means something more important for purposes of evaluating the democracy/contractualism analogy. It means that the hypothetical participants in the contractual situation behave in a highly distinctive way, from a very specific kind of motivation: they reject proposals only if they themselves have personal reasons against them. For convenience, call this the *self-service conception* of participation.

Personal reasons are by no means all selfish, since many of a person's central interests might concern the fates of others. Still, two kinds of other-oriented motivation are ruled out. First, impersonal reasons, those that do not derive from any person's personal grounds for objection, are not appropriate reasons for rejection in the contractualist situation. As Scanlon emphasizes, impersonal reasons may be important parts of the story about certain personal reasons—as when a person has a reason to seek a life in which the impersonal values of art or nature can be appreciated.[29] What we owe to each other is not concerned with impersonal reasons except insofar as they figure in personal reasons. Political uses of contractualism, in effect, assume that political justice shares this feature with the aspects of morality that Scanlon addresses.

28. *What We Owe*, p. 218.
29. Ibid., pp. 218–23.

Second, the contractual participants do not reject proposals on the ground that they are reasonably rejectible by someone or other—call this *anonymous rejectibility*—but only for their *own* personal reasons. This is not a point that Scanlon discusses directly, and so we will need to consider whether it is a fair interpretation. But before doing that, it will be helpful to see what is at stake for the democracy/contractualism analogy.

If, as I suggest, contractual participants only reject proposals against which they have their own personal reasons, then if only one person has a personal reason against a proposal, and even if it is a perfectly reasonable objection, the proposal would not be sure to be defeated unless that person had the power of veto. Since contractualism ensures that even a single reasonable rejection is fatal to a proposal, the contractors operate, in effect, under a veto rule. This is no objection to contractualism, but it is devastating to the democracy/contractualism analogy. Actual democratic choice procedures do not, and should not, operate under a veto rule. But under any other decision rule, a reasonable objection by a single person or small group will not be decisive if participants reject only proposals against which they have their own personal objections.

Democratic participants are motivated either only by personal reasons or in some other way. If participants are motivated only by personal reasons, actual democratic procedures will have no tendency to defeat proposals that are subject to reasonable personal objections unless there are enough such objectors to produce a majority or plurality. The results of even proper democratic procedures, then, will have little resemblance to those of the contractual choice procedure in which even a single reasonable objection is decisive. If, on the other hand, democratic participants are motivated by something other than solely personal reasons, then perhaps a small minority of reasonable objectors can attract enough solidaristic support to prevail by majority or plurality. But in this case the morally desirable outcomes are produced by a procedure fundamentally different from the contractual situation. Here, an individual's vote is determined partly by whether *anyone* could reasonably reject—whether *anyone* has a reasonable personal objection—by anonymous rejectibility. So the analogy between contractualism and democracy fails either way.

This argument against the democracy/contractualism analogy depends on my supposition that the participants in the contractualist choice situation are motivated to reject proposals only by personal reasons of their

own. This is not immediately entailed by Scanlon's insistence that rejectibility depends on there being some personal reason against a proposal, since that leaves open whether participants are motivated only by their own personal objections or also by those of others. If they are also motivated by *anyone's* reasonable grounds for rejection (by anonymous rejectibility), so that they would join them by adding their own rejection, then any individual's reasonable grounds for rejection will multiply solidaristically, and could be decisive even in the absence of a power of veto. There would be no need for a veto power, since parties would always, in the end, vote the same way. This would be analogous to an actual democratic procedure in which citizens first determine if they have their own surviving personal grounds for rejection, and then any proposal that is rejectible by anyone is rejected by all. Since actual democracies lack the perfect information, communication, and motivation of the hypothetical situation the match in their conclusions would not be perfect, but under favorable conditions it might be hoped that often enough a majority would join in any individual's reasonable ground for rejection.

This would obviously improve the democracy/contractualism analogy. But the rejection-joining phase appears to have no independent rationale and so no claim to be a legitimate part of the contractualist account. This way of giving participants the primary question *in addition* to the subsidiary one involving their own personal reasons would not be empty in the way giving them the primary question alone would be (as discussed above). The objection here is rather that anything beyond that subsidiary question—captured by the idea of reasonable self-service—is theoretically superfluous.

To see this, notice that similar phases could be added to any approach to moral theory arbitrarily, supporting an equally good analogy between those theories and democracy. Consider an unorthodox presentation of utilitarianism: in the first phase, we might say, participants enter the amount of their own well-being that is at stake in the various proposals. In the second phase, each determines which proposal would maximize aggregate well-being and rejects all other proposals. As a result there is unanimity. So if we said that rightness is the property of being agreed to in this hypothetical unanimous way, we could see that the results would be analogous to a procedure in which democratic citizens each reject all proposals that they believe would not maximize well-being. The obvious flaw here is that the joining phase is simply added on to a self-sufficient

normative theory. In the joining phase the hypothetical participants find themselves applying the whole criterion of rightness. But if they have it available, then so do we, even before the joining phase is added. The resulting analogy between democracy and this contrived presentation of utilitarianism is, then, artificial.

Adding a rejection-joining phase to contractualism is just as artificial. The crux of contractualism is rejectibility from the point of view of an agent's own interests and concerns. What makes an act wrong on contractualist grounds is that any system of rules permitting it would be rejectible from some person's point of view. It is true that it is only rejectible if the person's reasons for rejection survive a due accounting of the reasons others have for rejecting alternatives, but what survives is some person's grounds for rejection. Adding a phase in which all others join anyone's surviving rejection adds nothing and distracts from contractualism's distinctiveness.

Reasonable Accommodation

The reasonable self-service assumption may seem to miss the fact that contractualism is normally formulated so that the ideal participants are responsive to the reasonable interests of others. Scanlon writes that "the parties whose agreement is in question are assumed not merely to be seeking some kind of advantage but also to be moved by the aim of finding principles that others, similarly motivated, could not reject."[30] Unlike the parties in Rawls's original position, in which, behind the veil of ignorance, the parties ignore the interests of the other contractors, each Scanlonian party accommodates the interests of other contractors in certain ways. This must be construed without giving the participants the primary question, but contractualism does not intend the participants simply to press their own complaints without regard to those of others. The question is how to interpret this kind of accommodation.

This contractualist element of mutual accommodation can easily suggest the sort of public-interested debate in well-functioning democracies, suggesting a democracy/contractualism analogy. But we have seen

30. Ibid., p. 5.

that this simple view would illegitimately give contractors the primary question. We need an interpretation of the contractors' mutual accommodation that avoids this mistake. Then it remains to be asked if the democracy/contractualism analogy remains supportable.

So the first step is to interpret the idea of reasonable accommodation in the case of the hypothetical contractors. We can only consider one illustrative approach here. Suppose we interpreted the accommodation phase this way: each party is prepared not to press a personal reason they have against a proposal if this would leave only alternatives to which others had objections at least as weighty. A given contractor does not need to determine (what would amount to the primary question) whether any alternative is subject to reasonable objection all things considered but only whether the alternatives to the option they would veto are subject to objections as weighty as theirs. If they all are, then a veto would be unreasonable and so they would refrain from exercising it. Call this more limited comparison

> *Contractor Accommodation*: each party to the contractual situation must ask, for each alternative to the one(s) they would veto, whether there is someone who has as weighty an objection. If each alternative is subject to as weighty an objection by some other person, then no veto is imposed.

Vetoes must leave at least one alternative that is not as objectionable to anyone as the vetoed proposal.

I am not defending this account, nor am I attributing it to Scanlon. My aim is only to show that the idea of reasonable accommodation among the contractors could be brought in without giving them the primary question. The reasonable self-service interpretation of the contractors' motives is not missing this element.

It is helpful to look at a simple example. Consider Case #1, with persons (or factions of any size) w, x, y, z, and alternatives A–D. Say objections range from low weight of 1 to high weight of 10. Begin with person w. W will veto A if and only if it is not the case that each of B–D is subject to a weightier objection by anyone (including w herself). In this case there is a number higher than 1 in each of the other three rows, so w may not veto A. In the figure this is marked with a minus sign (−) and vetoes are marked with a plus (+). We assign pluses and minuses to each cell in the same way, marking in bold the cells in which vetoes are permitted (those with plus

signs). In this arbitrary example, it turns out that only alternative B is beyond reasonable rejection.

#1	**w**	**x**	**y**	**z**
A	1–	**8+**	4–	**7+**
B	3–	5–	0–	2–
C	0–	3–	4–	**6+**
D	1–	**9+**	2–	5–

This shows that the parties can accommodate each other's objections without any of them facing the primary question. No one needs to know whether any particular alternative can be *vetoed* by others or not to determine whether to veto it. So this version of reasonable accommodation avoids the primary question problem and is compatible with the reasonable self-servingness of the contractors.

How does this affect the democracy/contractualism analogy? Consider this case, in which x has a much weightier objection to alternative B than anyone has to any other alternative.

#2	**w**	**x**	**y**	**z**
A	1–	1–	2–	2–
B	0–	**9+**	0–	0–
C	2–	1–	2–	1–
D	2–	2–	1–	1–

Under the veto rule in the hypothetical contractual situation, person x would be able to block alternative B even after reasonable accommodation of the others. It is reasonably rejectible, but in actual democratic contexts without the veto rule, there is nothing to stop alternative B from winning if enough people vote for it. X could be a faction of any size, even 49 percent, in a majority rule system. So the point is not just that lone individuals could be oppressed.

Given the absence of a veto rule in actual democratic contexts, the democracy/contractualism analogy depends on an appropriate account of the accommodation by some voters of the reasonable interests of others.

Is there some form of reasonable accommodation in voting that is analogous to the form we have just sketched for contractors, and that would prevent proposals such as B from being able to win in a vote? The question is what voting norms can meet the following criteria: (a) voter motivations are analogous to those in the contractual situation (and so do not address the primary question), and (b) the result is some systematic tendency for alternatives that are reasonably rejectible in the contractual situation to lose in proper democratic contexts.

Recall that contractors accommodate one another by refraining from vetoing a proposal unless this leaves some alternative that is not subject to as weighty an objection from someone else as their own objection. Devising an analogous form of accommodation for the case of real voters is not a simple matter. How can the idea of rejecting a proposal be translated into some approach to voting *for* proposals? To avoid the primary question voters should somehow vote against proposals on the basis of burdens to themselves, though qualified by some reasonable accommodation of others, and in a way that supports a strong tendency for reasonably rejectible alternatives to be electorally rejected. I can see no way of making this work, though no exhaustive investigation is possible here.

We have no account of appropriate voters' motives (as distinct from *contractors'* motives) that shows how to incorporate reasonable accommodation while avoiding the primary question. If democratic procedures do (or could) tend to produce just outcomes by contractualist standards, the explanation does not lie in any analogy between the way in which a contractor is reasonable, and the way in which a public interested voter is reasonable.

Conclusion

My objection to the democracy/contractualism analogy, then, can be broken down into these steps.

(1) The contractors cannot address the primary question, the impersonal question of reasonable rejectibility in general or "anonymous rejectibility," but only rejectibility for their own personal reasons.

(2) Without the contractors addressing anonymous rejectibility, the veto power is crucial to contractualism.

(3) Actual citizens, if they behave analogously to the hypothetical contractors, will not address the question of anonymous rejectibility. This follows directly from step 1.

(4) Actual veto power would be crucial to the analogy (from 2 and 3).

(5) The unanimity/veto decision rule is not an appropriate decision rule in real and large democratic choice procedures.

(6) Under any appropriate rule, then, there would be a veto gap: proposals that are rejectible in the contractual situation might yet win in actual democratic procedures (from 4 and 5).

(7) Conclusion: the democracy/contractualism analogy is too weak to provide any support for the tracking claim (from 6).

Democratic participation modeled on the contractualist situation would be self-serving within the limits of reasonable accommodation of others. Voters would not directly address issues of justice, nor would they vote against proposals simply because they were reasonably rejectible by others. As a result, many proposals that are severely unjust by contractualist standards would be bound to succeed. The difficulty is not simply that some injustice would be bound to slip through imperfect institutions and motivations. Rather, this conception of a voter's responsibilities formally protects many injustices from defeat. Reasonably self-serving motivation in actual democratic procedures does not find any justification or rationale in the fact that they would be morally sensible motives to posit in the very different context of a hypothetical contractual situation.

Some readers may have the following nagging worry about my argument: because Scanlon's contractors are nothing if not reasonable, it must be a mistake to see them as self-serving in the way the reasonable self-service conception sees them. That might seem to be objectionably selfish of the contractors in a certain way, just as it would be objectionably selfish of democratic voters to press only their own reasonable objections and not also those of others. The mistake, however, is to continue to treat the two cases as parallel. The reason it would be objectionably selfish of democratic voters to confine their attention to their own reasonable objections is precisely because others with reasonable objections do not have the veto power that the hypothetical contractors have. If voters had such a veto power and only used it appropriately, there would be no obvious objection to each voter's using her vote only to pursue her own legitimate interests. In the hypothetical contractual situation, then, there is nothing untoward or unreasonable about the reasonably self-serving motivations of the contractors. Each presses only her own legitimate interests, in a context where all legitimate interests can be sufficiently pressed by their owners due to the veto power.

Who, you might wonder, could possibly object to a person's using their political power to ensure that their own legitimate interests are met? Nobody, I suppose. But there is a crucial difference between permitting reasonable self-service among the proper motives of voting, and permitting voters to pursue reasonable self-service *alone*, without any requirement to join one's vote to the reasonable objections of others.

Once it is clear that the participants in the hypothetical contractualist situation are reasonably self-serving rather than rejection-joining, it is just as clear that the moral quality of the decisions would be hopeless if not for the unanimity rule—the procedural power of any of the participants to veto proposals. But then it is also obvious that Nelson, Cohen, and Barry do not endorse institutions that closely resemble the contractualist situation, since those writers endorse neither the motivational trait of reasonable self-service nor the rule in which a lone participant can veto proposals.[31] How, then, can they be committed to the democracy / contractualism analogy?

The explanation is partly that they seem to have interpreted contractualism in a way that makes it more similar to the democratic arrangements they endorse than Scanlonian contractualism actually supports. Contractualism's idea of the contractors' reasonable accommodation of others' claims is easily confused with the idea that each asks herself which proposals are beyond reasonable rejection. This latter idea—public-interested voting with the public interest conceived in contractualist terms—is a prominent part of Nelson's and Cohen's accounts of proper democratic voting (Barry's stays closer to the motives of the Scanlonian contractors).[32] But it would be a misconstrual of the kind of mutual accommodation that contractualism posits, as I have argued.

The other possible explanation of sympathy for the analogy is a failure to distinguish between a tendency of actual procedures to produce decisions similar to those produced by the hypothetical procedure on one hand (call this *outcome similarity*) and a structural similarity between hypothetical and actual procedures on the other (call this *procedural*

31. Barry explicitly rejects veto power for individuals or minorities despite noting that this is suggested by his democracy / contractualism analogy. See JAI, p. 107.

32. See Nelson, OJD, ch. 6. Cohen says that "when properly conducted, then democratic politics involves public deliberation focused on the common good" (DDL, p. 19).

similarity).[33] The thesis we are examining is that outcome similarity can realistically be pursued by promoting procedural similarity. That thesis faces the serious difficulties I have presented above. Perhaps the thesis of outcome similarity could be supported in some other way, such as an appeal to some power of free and open political discussion under the right conditions, in which many voters address and debate (among other things) matters of justice. I have some sympathy with that line of inquiry, but it owes nothing to a democracy/contractualism analogy. (I take no stand here on whether actual democratic procedures have justice-promoting tendencies.)

The fundamental flaw in the democracy/contractualism analogy is this: without public-interested voting and participation, it is hard to see how justice could be systematically promoted (as if by an invisible hand), since in democracy—both as it is and as it should be—victims have no veto.

33. I believe Barry's idea of an "empirical approximation" of a Scanlonian original position conflates outcome similarity and procedural similarity. See JAI, page 100, where "circumstances of impartiality," are glossed as referring to "empirical conditions that approximate those of a Scanlonian original position," but are also *defined* as "the conditions under which the substantive rules of justice of a society will tend actually to be just."