The Road from Nowhere: Towards an Anti-Foundationalist Constitutional Theory

MURRAY, KYLE,LAMBERT

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Kyle L. Murray

Abstract

What would an approach to constitutional theory grounded in morally sceptical philosophy look like? This is the core question underlying this thesis. The thesis seeks to pose some answers by first elaborating a form of moral scepticism – drawing on a linguistic anti-foundationalism inspired by the pragmatic, anti-metaphysical philosophy of Richard Rorty to set aside the idea of "objective moral truth" – and applying it to issues of constitutional theory. In drawing on the internal logic of the moral scepticism set out, with an effort to exclude as many external assumptions as possible, what results can be described as a *sceptical* contribution to constitutional theory.

The core conclusion is that *morally sceptical, anti-foundationalist philosophy has significant and constructive contributions to make in this area.* To demonstrate this, the thesis contributes to some of the most fundamental issues of constitutional theory: namely, the basis of legitimate collective decision-making authority; the potential limits to such authority; and the issue of entrenchment. The road to these contributions is wider than pure constitutional theory, however: the task at hand also requires this thesis to engage in detail with more fundamental issues of moral, political, and most prominently democratic, theory, thus laying out a sceptical take on these further topics in the process.

The results will be of interest to constitutional lawyers and philosophers alike. They will certainly come as a surprise to some, given the widely-held view of moral scepticism as an entirely destructive, debilitating, or otherwise dangerous philosophy. In a sense, then, this thesis can be seen as a counter to such negative pictures: in a climate where "post-truth" has become something of a dirty word, owing largely to recent outcomes in democratic politics, the positive and empowering contribution of this thesis, along with the robust defence of majoritarian democracy it offers, seems timely.

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Towards an Anti-Foundationalist Constitutional Theory

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A heavily abridged version of **Chapter 2, section 2.2**, on the morally sceptical perspective taken in this thesis, and of Leff's part of "The Tale of Three Sceptics" in **Chapter 1, section 1.3.1**, has recently been published in KL Murray, 'Philosophy and Constitutional Theory: The Cautionary Tale of Jeremy Waldron and the Philosopher's Stone' (2019) 32(1) Canadian Journal of Law and Jurisprudence 127, 132-136.

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It is a well-known fact that writing a PhD comes with the occasional existential crisis. With a PhD of this kind – challenging the fundamental nature of moral reality – they are a particular hazard. For this, you need all the friends you can get. There *are* many I could mention (I promise), but a few in particular stand out: *Fiona, for bringing a refreshing, and inclusive, down-to-Earth atmosphere to the PGR community upon your arrival, and for the following years of support and friendship.* Mitchell, one of my best friends, always there – importantly outside the academic bubble – to bring me back down to Earth and remind me of the other things in life I sometimes forget.

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DEDICATION

For my loving parents, Yvonne and Guylaine, for encouraging me to always think for myself and criticise everything, but mostly, for putting up with the consequences.

Chapter 1

Introduction

1.1. Prologue: Questions from the Abyss

> What would a society which rejects the idea of "objective moral truth" look like? How would a society which has set aside what might be termed the realist-foundationalist project organise its system of government? How *could* it organise itself? How should power be distributed, and decisions made, when there are no "right answers" to be found? If this fundamental tenet of anti-foundationalist thought is taken seriously, what is the point in even asking these questions? If there are no "right answers", what questions are even worth asking? Are there any?

These are some of the questions with which I grapple in this thesis. It starts from a thoroughly sceptical perspective which rejects the idea that there is any "objective moral truth" – any mind-independent, or otherwise objectively defensible moral and normative values on the basis of which to establish some normative claims as superior to others. It does so on strongly anti-foundationalist grounds inspired by the pragmatic philosophy of Richard Rorty, emphasising the linguistic strands of this thought – those which draw on the ubiquity of language and human description. This argument rejects as pointless what might be termed the *realist-foundationalist project* – viewing our normative claims as attempts to accurately represent something beyond themselves, and their validity as constrained by notions of

"objective truth" or the "intrinsic nature" of morality. As will be elaborated on in **Chapter 2** of the thesis, the character I call the "sceptic" thus stands in opposition to the moral objectivist, the character Rorty derides as 'the metaphysician'.[1] *The aim of this thesis is to show how there is a positive path from this seemingly unpromising starting point into constitutional theory – an approach to constitutional theory firmly grounded in sceptical philosophy – and to show what it is.*

In so doing, the present project returns to some unfinished business. In previous research, I set out an early version of my moral scepticism and applied it to develop a sceptical take on contemporary constitutionalist debate – focussing on the controversy between political and legal constitutionalism.[2] That project was largely destructive, rejecting contemporary constitutionalist debate as inadequate from a morally sceptical perspective. Recognising the destructive nature of that thesis, I concluded with a promise to investigate what a constitutional theory which *is* compatible with the tenets of moral scepticism would, or might, look like – to ask what *positive* contributions moral scepticism can offer to constitutional theory. This thesis is the result of that enquiry.

The thesis also runs in parallel to my recently published work interrogating the relationship between moral philosophy and constitutional theory, through a detailed case study of the work of one of the most influential constitutional scholars of recent times – Jeremy Waldron.[3] In that article, I criticise Waldron's work for its lack of a rigorous, clear, and consistent engagement with issues of core philosophy – a problem I suggest may be a symptom of his misguided "irrelevance argument" rejecting the pertinence of the

[1] See R Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989) 74.
[2] KL Murray, 'The Constitutionalist Debate: A Sceptical Take' (Master of Jurisprudence thesis, Durham University 2015).
[3] KL Murray, 'Philosophy and Constitutional Theory: The Cautionary Tale of Jeremy Waldron and the Philosopher's Stone' (2019) 32(1) Canadian Journal of Law and Jurisprudence 127.

objectivist/anti-objectivist (or "realist/anti-realist") debate to core constitutional issues surrounding decision-making authority.[4] Having dismissed that argument, and pointing out the considerable problems Waldron's rather casual treatment of the moral realist/anti-realist controversy causes for his constitutional theory, and the coherence of his thought as a whole, I suggest that there are general lessons to be learned. I conclude from Waldron's case that the 'attempt to brush aside fundamental questions of moral philosophy can lead' one's constitutional path to the dead-end of incoherence, placing one's prized constitutional theory in danger.[5] The moral of the tale, I conclude, is a cautionary one: constitutional theorists must think carefully about the philosophical background and implications of their work, taking care to set this out in a clear and thorough way.[6] This thesis is my attempt to apply this guidance to my own work – putting my scholarship where my mouth is – and to deliver on this demand myself.

In these senses, then, this thesis marks the next step forward from my previous work. The road to this contribution also, however, requires a step back. To establish a way forward from sceptical premises, this thesis will revisit the core philosophy underpinning those premises, elaborating and developing its key tenets and fundamental logic. It is important to elaborate these aspects of the theory because, as will be seen, it is these tenets and the logic on which they are based that ground the positive contributions I offer. I will elaborate more on the method later, but, briefly, it is in grounding my contributions in the fundamental

[4] See J Waldron, 'The Irrelevance of Moral Objectivity' in RP George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992); J Waldron, 'Moral Truth and Judicial Review' (1998) 43 American Journal of Jurisprudence 75; J Waldron, *Law and Disagreement* (Oxford University Press 1999) ch 8.
[5] Murray, 'Philosophy and Constitutional Theory' (fn3) 130.
[6] ibid.

features and logic of scepticism in such a way that I submit this thesis as a *sceptical contribution* to constitutional theory.

This task is something which many would reject outright as not possible, and others as an actively dangerous line to pursue. Put bluntly, morally sceptical, and anti-foundationalist philosophy more generally, does not exactly have a reputation as a *positive* and *constructive* worldview, as the following section explores.

1.2. Scepticism as the Road to Hell: "Post-Truth" as a Dirty Word

1.2.1. A Sceptical Dystopia

> Imagine a world which has fallen victim to the tenets of moral scepticism – the rejection of the idea of objective moral truths with which to ground our actions. Unable to guard against further suspect suggestions, which would otherwise be rejected as clearly "wrong", as a matter of "fact", or "Rationality" perhaps, this world has fallen further still. If only we still believed in such "myths". Instead, unable to mount a convincing and wholehearted defence of our most fundamental values, matters have gone very far indeed: not only is the world now plagued with conmen and swindlers, but, in a stark turning of the tables, fascist politics is now the mainstream, and supporters of liberal democracy the "extremists" – extreme for eccentrically still defending the political and constitutional values that had become platitudes in the Western world from the mid-20th Century onwards. Indeed, matters have gone so far that pretty much all of the advances of enlightenment rationalism have been forgotten – or rather "redescribed" (as the dominant philosophers of this world would put it) as having never been made in the first place. In the eyes of those who have resisted – those who have managed to keep sight of

Reality and its most basic moral Truths – the culture has undergone a regression to pre-civilised times, and perhaps further still. Cannibalism, for example, is a practice now accepted as part of everyday life. The moral preferences that once stood in the way are, after all, *only* "subjective", no different from one's taste or strong dislike for football,[7] or for a particular flavour of ice cream[8] – flesh-flavoured, perhaps.

To the extent that honourable and brave believers mount any defence of what is "right" or "actually the case", they are greeted with a retort along the lines of "I couldn't give a toss about 'objective truth', I know what I like".[9] Indeed this rejoinder has become something of a mantra in the postmodern culture which has developed since anti-foundationalist ideas first took told of public discourse. Perhaps they should count themselves lucky that Orwell has himself long been discarded as an inconvenient warning from the past: where would it lead if those in power took inspiration from the kind of persuasive techniques that reconditioned Winston not only to finally admit – but to *believe* – that 2 + 2 = 5, and to *see* O'Brien's four fingers as the five he insisted the Party could require them to be.[10]

Would this be a world one could be proud of? Would one even be in a position to formulate a criticism of it? Would there be anything left from which to construct a meaningful standard of "right" and "wrong" in the first place? In other words, would

[7] See R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 Philosophy and Public Affairs 87, 98.
[8] See R Dworkin, *Law's Empire* (Hart Publishing 1998) 81.
[9] Speech adapted from M Norman, 'Whoever Wins the UK Presidential Election, We've Entered a Post-Truth World - There's No Going Back Now' *The Independent* (8 November 2016) <https://www.independent.co.uk/voices/us-election-2016-donald-trump-hillary-clinton-who-wins-post-truth-world-no-going-back-a7404826.html> accessed 19 January 2019 (recounting a real-life conversation with a friend).
[10] G Orwell, *Nineteen Eighty-Four* (New Ed, Penguin Classics 2004) 286–298.

there be any way back up the road from scepticism? Crucially, *is this a road we want to risk going down at all*?

Some readers may see the above scenario as safely detached from reality, and perhaps entirely fictional. Indeed, it is a work of imagination. But not entirely so: it is constructed from a number of claims which have, at one time or another, been made concerning the consequences of an anti-objectivist outlook. Each aspect it describes – including cannibalism[11] – have been linked by objectivist critics to the dangers posed by sceptical worldviews. These dangerous phenomena are, it is commonly suggested, made more likely by the rejection of the idea of independent, objective, moral truths with which to bring our conduct into line – with which to constrain ourselves.

Such claims have led many to take on something of a self-assigned 'mission to save the world from horrible acts that are supposed to result when people become moral skeptics [sic] of any variety'.[12] As one commentator aptly notes, it is a rather common tendency among the believers in "moral truth" to suggest that the sceptic's anti-realist views are 'responsible for the Hitlers of the world and the sociopaths among us – not to mention the much less dangerous, though still despicable, garden-variety prevaricators, confidence men, and swindlers'.[13] A clear example of someone engaged in the task of "saving" society from the dangers of sceptical worldviews can be found in Leo Strauss, with his bizarre, but no doubt sincere, concern that a rejection of what he describes as "natural right" and "wrong" will

[11] The, to my mind, bizarre nature of this claim perhaps makes the following reference particularly important: L Strauss, *Natural Right and History* (University of Chicago Press 1953) 3.
[12] W Sinnott-Armstrong, *Moral Skepticisms* (Oxford University Press 2006) 13.
[13] EM Gander, *The Last Conceptual Revolution: A Critique of Richard Rorty's Political Philosophy* (State University of New York Press 1999) 51.

lead to the breakdown of 'civilised life' and – as alluded to above – 'cannibalism'.[14] Ronald Dworkin was another well-intentioned defender of civilisation – perhaps the best-known example in the legal academy. Dworkin sought to defend our ability to 'live decent, worthwhile lives' – to protect our chances of building 'fair and good' communities – from what he described as the 'denigrating suggestions' of moral scepticism.[15] His 'Pious Hope' was that we will learn to call out these suggestions for what they are: 'bad philosophy', standing in the way of the already difficult task of achieving those worthwhile, fair and just communities he wrote of, and in the way of 'lives we can look back on with pride not shame'.[16] This pious expression of hope was his last line of defence for his claim – or *instruction* – that objectivity and truth are things we had "better believe", as he announced in the title of his major article launching a series of scathing attacks on sceptical theories.[17]

1.2.2. "Post-Truth" as a Dirty Word

Some may wish to join Dworkin, Strauss, and others in the above mission, convinced by the dystopian picture painted above. Current widespread concerns over the era of so-called "post-truth politics" would certainly seem to be fuelling the appetite for an objectivist crusade. "Post-truth" – defined as 'relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and belief' – was declared Oxford Dictionaries' "Word of the Year" in 2016.[18] As explained in their announcement, this was thanks in no small part to its frequent use in media commentary in

[14] Strauss (fn11) 3.
[15] Dworkin, 'Objectivity and Truth' (fn7) 139.
[16] ibid.
[17] Dworkin, 'Objectivity and Truth' (fn7). Dworkin provides a number of other arguments to support this instruction, which I criticise and reject in **Chapter 3** of this thesis.
[18] Oxford Dictionaries, 'Word of the Year 2016 Is...' *Oxford Living Dictionaries: English* (2016) <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> accessed 19 January 2019.

the aftermath of the UK's Brexit vote, and Donald Trump's securing of the Republican nomination for the then-imminent US Presidential election.[19] In this 'highly charged' year alone, the use of the term increased by 2,000%.[20] Three years later, and Brexit – along with the ruing of what some see as a move to a dangerous "post-truth" public culture – is still at the forefront of public thought.[21] There has also been much discussion as to whether Trump is aptly described as the first "Postmodern President", with some arguing that the rise of postmodernist, and relativist thought is in some way to "blame" for – or explains – Trump's success.[22]

In this highly charged climate, where "post-truth" is very much a dirty word, blamed for the Trumps and Brexits of the world, *any* sense of an attack on the traditional idea of "objective truth" is likely to be greeted with great suspicion, to say the least. For the purpose of this thesis, it *might* be worth pointing out that the scepticism relied on here focusses on a rejection only of the idea of *moral* truth and objectivity, whereas much of the concern we are presently seeing surrounding the era of "post-truth politics" targets lies, non-truths, and infamous

[19] See, for example Norman (fn9). See generally, J Rose, 'Brexit, Trump, and Post-Truth Politics' (2017) 19 Public Integrity 555.

[20] '"Post-Truth" Declared Word of the Year by Oxford Dictionaries' *BBC News* (16 November 2016) <https://www.bbc.co.uk/news/uk-37995600> accessed 6 February 2019.

[21] L McGee, 'Post-Truth Politics Is Alive and Well in Brexit Britain' *CNN* (15 January 2019) <https://edition.cnn.com/2019/01/12/uk/post-truth-politics-alive-and-well-in-brexit-britain-intl-gbr/index.html> accessed 6 February 2019.

[22] See J Heer, 'America's First Postmodern President' [2017] *The New Republic* <https://newrepublic.com/article/143730/americas-first-postmodern-president> accessed 11 February 2019; M Kakutani, 'The Death of Truth: How We Gave up on Facts and Ended up with Trump' *The Guardian* (14 July 2018) <https://www.theguardian.com/books/2018/jul/14/the-death-of-truth-how-we-gave-up-on-facts-and-ended-up-with-trump> accessed 11 February 2019; For an alternative view, see A Hanlon, 'Postmodernism Didn't Cause Trump. It Explains Him' *The Washington Post* (31 August 2018) <https://www.washingtonpost.com/outlook/postmodernism-didnt-cause-trump-it-explains-him/2018/08/30/0939f7c4-9b12-11e8-843b-36e177f3081c_story.html?noredirect=on&utm_term=.54f58cb31a44> accessed 11 February 2019.

"alternative facts"[23] more generally.[24] Whether this would allay the concern over what does, after all, amount to an attack of *some* kind on "objective truth" and the project of realist-foundationalism is another matter. Certainly, *moral* scepticism seems to give rise to the strongest worries among critics – it is what drives Dworkin's anti-sceptic polemic, for example.[25]

The above suggests that those wishing to join the likes of Dworkin, Strauss and others on a mission to save civilisation from the dangers of moral scepticism would probably have plenty of allies. As readers will likely have gathered by now – and indeed was probably clear from the outset given the nature of this project – I am not one of them. This thesis instead presses on with the task of applying a sceptical philosophical approach to constitutional theory, and a number of related areas on the way. While I *do* see such an intervention on the consequences of scepticism as particularly timely at present, it is not for the purpose of discarding it as "bad philosophy", either on intellectual grounds, or on, ironically, pragmatic grounds of attempting to save our society, and individuals, from the harm that will supposedly ensue from its acceptance.

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[23] This was the line offered in response to claims of dishonesty from Trump's then Press Secretary. See 'Kellyanne Conway Denies Trump Press Secretary Lied: "He Offered Alternative Facts"' *The Guardian* (22 January 2017) <https://www.theguardian.com/us-news/video/2017/jan/22/kellyanne-conway-trump-press-secretary-alternative-facts-video> accessed 1 February 2019.

[24] Whether the core of the argument relied on here for discarding the idea of objective truth where values and morality are concerned – stemming from the ubiquity of language – may apply to other kinds of "fact" *outside* the realm of morality and value is a much wider issue concerning questions of epistemology that this thesis cannot consider. Furthermore, whether the argument can be contained to morality alone or not, it is important to note that none of the arguments in this thesis *require* an acceptance of anything other than scepticism in the moral, normative realm. For a rather fearless expounding of a comprehensive anti-foundationalism extending beyond moral philosophy and into other pursuits like science, mathematics, and epistemology generally, see R Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1980) (especially Part II).

[25] See Dworkin, 'Objectivity and Truth' (fn7) 89.

Rather, as well as offering a coherent contribution to constitutional theory grounded in sceptical philosophy, my hope is that this thesis could serve as something of a counter to the negative view of theories which challenge traditional notions of "objective truth". *The results of the project presented here, I suggest, show the negative view of moral scepticism to be misguided. Instead, I offer a positive account of the consequences of the form of scepticism presented, using its key tenets to construct and support a positive contribution to normative political and constitutional theory. In fact, the path to the conclusions drawn in these areas will, I contend, show how not only a coherent, but enthusiastic and strong, case for widely-cherished values such as democracy and equality can be established from sceptical premises.* This is far from the destructive, nihilistic, "denigrating", or otherwise debilitating implications imagined by critics. In light of the rise of fears concerning the dangers of anti-objectivist modes of thought in recent years, then, this therapeutic contribution to the literature on the consequences of scepticism seems particularly timely and important.

I will thus, in the early chapters of the thesis, make some comments in response to such negative assessments of scepticism. Put briefly, I see no logical or empirical connection between rejecting the idea of objective moral truth, and the holding of dangerous, violent, or otherwise uncivilised tendencies. I will offer some brief support for that claim in **Chapter 2,** but mainly intend to *show* the constructive consequences that can flow from the sceptical perspective in what follows. I will spend considerably more time combatting the view that moral scepticism is a *worthless* perspective, logically committing those who ascribe to it to a useless and debilitating nihilism, unable to argue for, or even *coherently believe in* anything. Particular attention is given to that claim in **Chapter 3** – which focusses on the versions espoused by Strauss and Dworkin – given its serious consequences for this project. If it is indeed the case that sceptics are, by reason of their rejection of the objective and

mind-independent nature of moral truth, committed to a debilitating nihilism, then the current project simply could not get off the ground. If the sceptic cannot really believe in or support anything, there can be no *sceptical theory on* anything. The implications of my scepticism for constitutional theory would thus have been exhausted with my previous – destructive – project.

Fortunately, I will contend, the arguments relied on to support such views of moral scepticism fall short; the reliance of their logic on the very realist premises and assumptions the sceptic rejects means that their claim to show how the *sceptic* is committed to a useless nihilism turns out to be a non-starter. Taken on their own terms – rather than a realist redescription of them – the sceptic is *not* committed to the hopeless, meaningless or irrelevant nihilism described by critics. The argument here – that scepticism can be a constructive perspective *when taken on its own terms* will be a core theme, especially in **Chapters 2 and 3** of the thesis.

This thesis does not merely reject these criticisms *in theory*, however. In line with its key purpose, it pushes on with the task of showing what positive contributions scepticism can provide by putting the moral scepticism developed to work on issues of constitutional theory, thereby *showing* the negative picture to be misguided. This, in turn, will involve negotiating a path through more fundamental issues of normative and political theory. *It is through setting out a clear and positive path from core sceptical philosophy, through moral and political theory, and into constitutional theory that this thesis makes a significant original contribution that it is hoped may be of interest to constitutional lawyers and philosophers alike.*

1.3. Dead-Ends and Wrong Turns: A Tale of Three Sceptics

In this section, I outline a tale of the fates of three sceptics who set out on the road from, broadly-speaking, the same anti-realist, sceptical philosophy that this thesis takes as its starting point. The purpose of these three tales is to more clearly show the significance and originality of the road this thesis attempts to take by demonstrating that it is a road that fellow sceptics have seemed to feel themselves unable, or unwilling, to make. Thus, it is both in expounding the fruitfulness of scepticism, and the purposes to which it is put in this thesis that it will seek to show its distinctiveness and difference, even in relation to the paths taken by those whom I would broadly describe as intellectual bedfellows. In each case, their journey ends negatively, and, in the view of this thesis, prematurely. I critically examine their contributions in the early chapters, but here will summarise from the outset some key points of difference which arise from comparing the path taken by these sceptics with my own road from scepticism.

I focus on these three thinkers – Richard Rorty, James Allan, and Arthur Leff – for a number of reasons. First, as already noted, their theoretical perspectives all overlap to some extent with the sceptical starting point of this thesis. As will be seen, this scepticism owes much in particular to Rorty's pragmatic anti-foundationalism, and his central premise concerning the ubiquity of language. Where he goes from this shared premise is therefore of particular interest for the purposes of this thesis. Rorty does not turn his attention to constitutional theory specifically – stopping off in the realm of political theory – but James Allan is a moral sceptic who does precisely that. Allan is well-known in constitutional scholarship for his strongly majoritarian, anti-Bill of Rights and political constitutionalist stance. The road between his moral scepticism, and his normative constitutional stance, is therefore of particular interest, given the purpose of this thesis. I offer an holistic and original analysis

of this link in **Chapter 4**. Arthur Leff is another example of a strongly sceptical legal theorist. While he does not make it into constitutional theory specifically, the reason why is of particular concern. Leff's story can be seen as evidence of the pessimistic debilitation said to be the fate of anyone who truly comes to accept moral scepticism in their worldview – something which has not escaped the attention of some moral realist critics. Indeed, his scholarship formed a key part of the destructive work I have already undertaken. I revisit his work and conclusions – and indeed my own – in order to show a positive way forward from his scepticism and away from the threat of nihilistic despair.

1.3.1. The Debilitation of Arthur Leff

The road taken by the radically sceptical legal theorist Arthur Leff ended with a premature dead-end – in some ways a tragically short journey. In a series of articles through the 1970s, culminating in his seminal 'Unspeakable Ethics, Unnatural Law', Leff grappled with the problem of defending normative propositions against challenge; as he puts it, in characteristically colourful fashion, against 'the formal intellectual equivalent of what is known in barrooms and schoolyards as "the grand sez who"?'[26] Without a satisfactory answer to this questioning, Leff claims, it is impossible to ground a legal system which is 'absolutely binding' in the normative sense – *justifiably or legitimately* binding.[27] For Leff, with God out of the picture, there *can be no satisfactory answer*. Indeed, the consequences go further than the law: Leff comes to the wholesale conclusion that there is a 'total absence of any defensible moral position on, under, or about anything'.[28] The implications of this for Leff's own thought can be garnered from how he ends his final article on the subject. Having established both 'that there cannot be any normative system ultimately based on anything

[26] A Leff, 'Unspeakable Ethics, Unnatural Law' (1979) 6 Duke Law Journal 1229, 1230.
[27] ibid.
[28] A Leff, 'Law and Technology: On Shoring up a Void' (1976) 8 Ottawa Law Review 536, 538.

except human will',[29] and that there is no way to insulate such systems from challenge via the "sez who" rejoinder such that '[t]here is no such thing as an unchallengeable evaluative system',[30] Leff is moved to end his interventions with a rather dramatic poem in which he can see nothing more to do than appeal for divine intervention. 'God help us', he cries.[31] Regardless of whether God's help is forthcoming, Leff's last word on the subject thus offers nothing more helpful than, as one commentator puts it, 'to stare into the abyss',[32] or perhaps 'the bare, black void' Leff himself identified as forming the 'hollow core of our society'.[33] Having come across this "void", Leff saw no way out of it.

Michael Moore saw this conclusion as evidence of the 'emotional dejection' he claims 'many people experience if they come to believe the truth of moral scepticism'.[34] He cites Leff as a 'well-known example in the legal academy' of the negative place to which scepticism leads: his scepticism, he suggests, 'dispirited him…to the point of debilitation'.[35] Given Leff's career moves following that despairing article, it is hard to disagree with that assessment. As Johnson notes, Leff proceeded to devote 'what ought to have been his most intellectually productive years to an extraordinary drudgery' – the writing of a legal dictionary.[36] With that, a highly respected scholar – someone described by his peers as an 'outstanding person'[37] with a 'remarkable and unique intelligence'[38] – spent what turned out to be the final act of his career, and life, working on this project at such a pace that, as he

[29] Leff, 'Unspeakable Ethics' (fn26) 1229–1230.
[30] ibid 1240 [italics removed from entire sentence].
[31] ibid 1249. The full poem is reproduced and discussed below, in **Chapter 5, section 5.3, p168**.
[32] L Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (University of North Carolina Press 2006) 291.
[33] Leff, 'Law and Technology: On Shoring up a Void' (fn28) 538.
[34] MS Moore, 'Moral Reality Revisited' (1992) 90 Michigan Law Review 2424, 2449.
[35] ibid 2449, n79.
[36] PE Johnson, 'Nihilism and the End of Law' (1993) 31 First Things 19, 22.
[37] ibid.
[38] OM Fiss, 'Making Coffee and Other Duties of Citizenship' (1981) 91 Yale Law Journal 224, 224.

himself admitted, he would not complete until the 'year 2075'[39]. This sounds very much like saying it is something he never would, and *never wanted to*, complete. Quite an intellectual crisis.[40]

The critics who paint scepticism as a debilitating and dangerous nihilism will thus no doubt take this end as giving their view some credence. Leff is led to his pessimism seemingly as a result of rejecting the idea of independent moral authority, and of natural right and wrong. This rejection forms a key part of the sceptical perspective brought to this thesis, which also, via its anti-foundationalist argument, ends up seeing the situation in much the same way as Leff when he declares that 'it looks as if we are all we have'.[41] For both of us, there are no higher order "truths", or mind-independent "facts of the matters" via which we can escape this conclusion. However, in what follows, I break through the dead-end which faced Leff. Or rather, I offer a picture in which this dead-end was only ever illusory, arguing that the very logic which led Leff to despair holds the key to a positive way forward in normative and political theory. I do this through borrowing and elaborating a metaphor from Leff's work – conceiving of individuals as "Godlets" – defending and applying it in a way which Leff did not. *Far from a cause for despair, I see the consequences of this road from sceptical premises as both fruitful and empowering.*

[39] SZ Leff, 'Some Notes About Art's Dictionary' (1985) 94 Yale Law Journal 1850, 1850.

[40] For a similar interpretation of Leff's final years see Johnson (fn36). The point in the text is that Leff apparently *intended* to leave the worlds of legal and moral philosophy behind for good. However, as it happened, Leff's career was irreversibly cut short due to his untimely death from cancer in 1981. What work might or might not have followed is therefore an unfortunate matter of speculation.

[41] Leff, 'Unspeakable Ethics' (fn26) 1249.

1.3.2. The Wrong Turns of James Allan and Richard Rorty: On the Consequences of Scepticism

While Leff never made it out the sceptical abyss, a second traveller of the road from scepticism – James Allan, well-known in constitutional theory for his strongly political constitutionalist and majoritarian stance – does make it. Allan's moral scepticism rejects the idea that there is 'some real, external component to values',[42] instead holding that 'there are no objective moral values, no moral rights and wrongs whose status as such is somehow independent of what other people, or even oneself happen to think or feel'.[43] While he sometimes indicates an apparently strong connection between this scepticism and his majoritarian stance in political and constitutional theory, this thesis will argue that this link does not stand up to scrutiny.

An initial problem one encounters in following Allan's "sceptical journey" into political and constitutional theory[44] is that the exact line he takes between his moral scepticism on the one end, and his majoritarianism on the other, is difficult to trace. The explanation behind the link he draws is not clear. What path *can* be found – following some reconstructive work – turns out to rely on his moral scepticism in nothing more than a cursory sense. His scepticism seems to do no meaningful work in supporting his stance in political theory, which owes more to his individual, sentiment-based feeling that it is "better" than the alternatives (the precise content of this "better" is itself not particularly clear). So little work does his moral scepticism do here, that his contribution to constitutional and political theory

[42] J Allan, 'A Doubter's Guide to Law and Natural Rights' (1998) 28 Victoria University of Wellington Law Review 243, 245.
[43] J Allan, 'Internal and Engaged or External and Detached?' (1999) 12 Canadian Journal of Law and Jurisprudence 5, 11.
[44] See, for example J Allan, *A Sceptical Theory of Morality and Law* (Peter Lang 1998).

is not, in the view of this thesis, aptly described as a *sceptical* stance at all – certainly not in the sense aimed for here.

Allan would perhaps reply that I ask for too much here, and that I am expressing disappointment at not reaching outcomes scepticism simply cannot ground. From the new analysis of Allan's road from scepticism offered here, it becomes apparent that he sees the usefulness and contribution of scepticism as, at best, a ground-clearing exercise. As Allan appears to see it, moral scepticism can guide the way one frames the normative issues involved in moral, political and constitutional theory, but itself has *nothing to add to those debates.* This is certainly the only role it ends up playing in Allan's thought: once he clears away the pretensions to objective moral truth, or the essential nature of "rationality", Allan argues from sentiment and preference themselves – as he believes the sceptic must. This would explain why he claims significant connections between his scepticism and his majoritarianism, which this thesis argues are markedly underwhelming.

Thus, it contends that Allan's view of the limited role scepticism can play in normative debate was a wrong turn. *It argues that moral scepticism – at least on the form presented here – <u>does</u> carry persuasive weight. It can play not merely a framing, but also a persuasive and constructive role in supporting stances in the areas considered*. Indeed, arguing from sceptical premises and the logic on which they are based leads this thesis to much the same destination as Allan – a majoritarian stance. However, contrary to Allan's argument, this is explicitly and meaningfully grounded in sceptical philosophy. *What this thesis offers in short, then, is a philosophically rigorous, sceptically-grounded defence of majoritarianism.*

A similar tale can be told of Richard Rorty. Given that the philosophical perspective taken in this thesis owes much to the pragmatic anti-foundationalist philosophy of Rorty, his road out of core philosophy is of particular interest for present purposes. Rorty never quite made

it into constitutional theory, but did seek to apply his non-metaphysical, pragmatic anti-foundationalist philosophy to political theory in the latter part of his career. I argue that this road into political philosophy, in which he set out an ethnocentric and Rawlsian-inspired political liberalism – which he commends as his ideal post-metaphysical culture – is another wrong turn. Rorty's ethnocentric liberalism is problematic on a number of substantive grounds – particularly revolving around his somewhat infamous reference to what "we" believe, or what "we" hold valuable. However, as with Allan, the bigger problem for present purposes is that it turns out that his core philosophy is in fact doing little to no work in leading him to this vision. Instead, it is Rorty's strong preference for a particular form of liberal Left-leaning politics that does the work here. Again, as with Allan, this thesis disagrees strongly with Rorty's account of the limits of anti-realist philosophy. For Rorty, the kind of philosophy that grounds this thesis has nothing substantive to add when it comes to political theory. It allows us to *frame* a normative debate more congenially – by cutting through misleading and stultifying realist artefacts – but it has nothing to *add* to that debate.

This thesis argues for a very different view. This is implicit in the very project it undertakes, which, I argue, produces results far more fruitful than Rorty suggests is possible. As such, while I do provide logical argument for this disagreement, I will mainly *show* that it is misguided, by delivering on the claims I make – *showing* what a sceptically-backed stance on fundamental issues of political theory can look like. *Ultimately, I argue that the normative and political theory developed in this thesis follows more directly and compellingly from the meta-ethical premises shared with Rorty's work than his own narrow, exclusionary, political liberalism.*

1.4. A Fourth Road from Scepticism

1.4.1. The Core Thesis

My thesis thus offers an alternative route from scepticism, and, as explained above, a road to a *positive* destination. This is in stark contrast to the negative views of moral scepticism often taken by critics, and the tired and resigning view taken by some fellow sceptics themselves. I seek to avoid the dead-ends and wrong turns summarised in the tale just told, by setting out a clear and direct route from scepticism to constitutional theory – one which provides what I submit can appropriately be described as a *sceptical contribution* to constitutional theory. To show this, I set out a theory of scepticism before bringing this to bear on fundamental issues of constitutional theory and design with the aim of establishing an anti-foundationalist take on the topics considered. In so doing, original contributions will also be made to those specific areas of constitutional theory. This road will also see contributions to moral and political theory – significant stops along the way to constitutional theory – again, *from* the sceptical perspective. This comes together to form my central thesis: *that anti-foundationalist, sceptical philosophy, contrary to how it is commonly seen and even how it has been practised by the sceptics I look at, has significant, constructive and positive contributions to make to political and constitutional theory.*

1.4.2. The Scope of the Thesis

Given the wide-ranging nature of the argument – stretching from core philosophy and meta-ethics, through moral theory, political theory, to constitutional theory and some specific issues of constitutional design – it is important to carefully delineate its scope. In this section I will attempt to make clear precisely what this thesis does and does not purport to offer, and to justify, or at least explain, the inevitable choices which have had to be made to focus it. I

say "inevitable choices" because in any work it is simply not possible to deal with *most*, let alone *all*, contributions to relevant debates, and all or even most of the issues which *could* conceivably be seen as relevant. This practical consideration is exacerbated given the fundamental and wide-ranging subject matter of this thesis.

1.4.2.1. Philosophy

The nature of this thesis – setting out a road from sceptical philosophy to constitutional theory and *applying* it to this area – requires me to set out clearly what this philosophical perspective *is*. I will also offer some words in defence of it, particularly the grounds on which it is, for me, a convincing and coherent worldview. However, it is beyond the scope of this thesis to set out a full-scale philosophical defence of it against all, or even most, of the plethora of criticisms which can be found in the philosophical literature, dating back as far as Plato. Instead, the details I provide, and the account I offer of its justification, are limited to what is necessary to *apply* it in this thesis. So, while it is hoped that readers will find the account provided persuasive, my main aim in this part of the thesis is to establish it as a coherent position in enough detail so that the remainder of the thesis – which develops and *argues from* its key tenets and underlying logic – makes sense. I would certainly not hope to *instruct* readers – as Dworkin does in opposition to viewpoints such as my own – that this worldview is something which "you'd better believe". This is perhaps just as well, given the controversial nature of its philosophical leanings, and the widespread desire for certainty, comforting absolutes, or what I at several points of the thesis refer to as "metaphysical blankets", sceptics inevitably come across on their travels.[45] Regardless, the

[45] See further Murray, 'Philosophy and Constitutional Theory' (fn3) 135–136.

main point of the thesis remains to provide a novel bridge between this philosophy and constitutional theory – to apply rather than to defend it.

This should also go some way to answering a question readers may repeatedly find themselves asking during the early parts of this thesis: why *these* philosophers and theorists? Why *not* look at *X, Y,* or *Z* philosopher? (Readers will probably have their own favourites with which they can fill in the blanks in that question). Given that the aim of this thesis is to apply the philosophical perspective which I have developed over a number of years, including in previous research, I focus on the philosophy – and *philosophers* – which inspire and guide this perspective. For this reason, considerable attention is given to Richard Rorty's pragmatic anti-foundationalist philosophy in the early chapters. My perspective draws heavily on his linguistic arguments stemming from the power and ubiquity of language and human description, emphasising his pragmatic rejection of the realist foundationalist project in which the purpose of enquiry is to accurately reflect the facts of the matter – "moral reality", "objective morality", say – as pointless. While I give some attention to contributions of other philosophers along the way, I return to Rorty's core philosophical arguments as the account I find most convincing, and useful for elaborating my own.[46]

As well as allies, I have had to choose the philosophical opponents discussed carefully. In the early chapters I focus in particular on the criticisms Leo Strauss and Ronald Dworkin make of sceptical perspectives. I look at these theorists because of the direct consequences their arguments have for the present project and its prospects. Dworkin is considered in particular detail given his reputation and significant influence as one of the most preeminent political and legal philosophers of recent times.

[46] There is nothing new with this approach. James Allan, for example, concerns himself mainly with applying his own Humean brand of scepticism to various controversies of legal theory in his *A Sceptical Theory of Morality and Law* (fn44).

1.4.2.2. Constitutional Theory

I have likewise, largely for reasons of time and scope, had to narrow my focus when it comes to constitutional theory quite carefully – and certainly significantly from when I first envisaged this project. From the outset, I had intended to provide a wholesale sketch of a "Sceptic's Constitution". However, given the significant work which needed to be done in building a bridge from scepticism to *anywhere* and the controversies which exist at this fundamental stage, this ambition had to be narrowed. It had to be narrowed further still given the sheer breadth of constitutional theory. Within the current state of constitutional scholarship, a wholesale constitutional theory would, to be complete, need to establish stances on the shape and size of a civil community; fundamental decision-making rules to apply to that community; a theory of the separation of powers; a theory of the rule of law; a view on the Bill of Rights debate; a theory of judicial review – both constitutional and administrative – a view on the shape and power of the executive and the best means of controlling this power; thoughts on federalism or devolution; the role and power of the judiciary; and much more. Put bluntly, this looks more like a career's – perhaps even a lifetime's – work than a PhD's. There is plenty of time – I hope – to apply the fundamental approach developed in this thesis to those areas in future. For the purposes of this thesis, however, I must restrict myself to the fundamentals of constitutional theory.

In **Chapter 5,** I engage at length with the issue of decision-making and legitimacy, a task which involves applying the sceptical perspective to issues of democratic and political theory, in addition to some forays into social choice theory. The way in which a political collective makes its decisions – how it distributes its core decision-making power – is perhaps *the* most important part of any constitutional system. It establishes the way in which the decisions which affect our everyday lives, and how our society is shaped, are made. I

therefore see it as a priority for any constitutional theory to provide an account of the basis of legitimate political power, and how that legitimacy should be expressed institutionally.

It is also an area of particular significance at the moment in the midst of Brexit, which has given rise to vigorous debates surrounding the authority of referendums, representative politics, and the rise of populism in popular discourse. The latter is frequently used to explain – and often criticise – contemporary political developments.[47] At the centre of current discourse on populism – whether negative or positive – is, as one commentator puts it, 'the question of what kind of democracy we want'.[48] This question, of course, is not new – it is something society has been grappling with for thousands of years – how are we best to express the democratic ideal, if, indeed, it is an ideal at all? But it has, in light of recent events, come to the fore. The account this thesis offers of the value and ideal of majoritarian democracy – and its argument that the value of majoritarianism is best served by direct over representative democracy – therefore seems a timely contribution. Timely enough to warrant the detailed attention I give to justifying and then defending from familiar criticisms (in **Chapter 6**) the ideal of democracy developed from sceptical premises.

In **Chapters 7 and 8** I focus in some detail on the related issue of the *limits* to decision-making power and legitimacy. Discussing the potential limits of decision-making legitimacy seems the logical next step from developing a theory of its basis in the first place. Furthermore, this is another issue with very significant consequences for the shape of society and the everyday lives of those within it: how one answers questions such whether there are, or should be, limits to the primary decision-maker's sovereignty, and what these should look

[47] See PC Baker, '"We the People": The Battle to Define Populism' *The Guardian* (10 January 2019) <https://www.theguardian.com/news/2019/jan/10/we-the-people-the-battle-to-define-populism> accessed 30 January 2019.
[48] ibid.

like, has clear practical consequences for those living under a constitutional system. In comparative terms this might be put bluntly as asking, is Parliament, "The People", or a codified Constitution to have supreme status? This translates into the issue of entrenchment – a concept which has long played a central role in constitutional theory. In fact, for some it plays a decisive role in determining whether a set of collective arrangements is a "constitution" at all. This can be seen in Ridley's infamous exposé of the 'embarrassing' arrangements of the UK.[49] For Ridley, these are not worthy of the name "constitution", due to the core problem of the lack of legal entrenchment.[50] Views like these – placing entrenchment at the centre of the definition of "constitution" – ground and encourage the often-heard claim that the UK at worst does not *have a constitution at all*, or at best has one that is severely deficient.[51] It is due to these practical and theoretical implications that entrenchment and the limits to decision-making legitimacy will be focussed on in particular detail.

The above areas are the focus of the constitutional aspect of this thesis. However, the underlying theory and particularly the normative implications drawn out in earlier chapters and applied to these areas will also provide a framework through which further issues can be explored in future. I see this project as the *beginning* of the road into constitutional theory.

[49] FF Ridley, 'There Is No British Constitution: A Dangerous Case of the Emperor's Clothes' (1988) 41(3) Parliamentary Affairs 340, 342.

[50] ibid 342–343. Similarly, Alexander defines "constitutions" as 'laws that are more entrenched than ordinary laws' (L Alexander, 'Constitutionalism' in MP Golding and WA Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2004) <http://www.blackwellreference.com.ezphost.dur.ac.uk/subscriber/tocnode.html?id=g9780631228325_chunk_g978063122832519> accessed 18 June 2018.

[51] A recent argument that the UK's constitution could do with a democratic reinvigoration has been set out by Jeff King, presenting what he sees as a democratic case for a "written", entrenched Constitution. See J King, 'The Democratic Case for a Written Constitution' [2019] Current Legal Problems (forthcoming).

Taken as a whole, however, it provides a significant step down that road towards a constitutional theory compatible with a thoroughly anti-foundationalist approach.

1.4.3. Methodology

It is worth setting out in more detail the method used to establish the core claims I make, and in particular the different conclusions reached about the *usefulness* of scepticism compared to intellectual bedfellows such as Allan and Rorty. As indicated above, Allan and Rorty resign scepticism to a far more limited role than I do. They see it as a ground-clearing tool, with nothing itself to add to particular substantive debates. I agree there is ground-clearing to be done – the moral objectivist pretensions of much political, moral, and constitutional philosophy must be pulled out by their roots. But scepticism offers more than this. As I will argue further in **Chapter 3**, those who deny a more positive, constructive, role for scepticism often see this conclusion as following from the logical observation that there is no necessary connection between the rejection of moral realism and any particular political or moral belief. This is logical on the grounds that these two subjects are on different planes: one concerns the *status* and the other the *substance* of beliefs. However, while it is right to reject the idea that there is any *necessary* connection between moral scepticism and any particular set of values, it is wrong to proceed as though this exhausts all possibilities for moral scepticism such that there can be no useful connection at all. Rejecting a necessary and particular connection does not mean that the sceptic – as conceived in this thesis – has *nothing at all* to say when it comes to substance.

What I offer in this thesis is not a claim as to any *necessary* connection between the sceptical, anti-foundationalist theory and any particular moral stance, or positions in political and constitutional theory. Rather, my claim is that a *persuasive* case can be made for a particular set of fundamental values, and then for particular stances in political and constitutional

theory that follow from these values, using the features of scepticism itself. My contributions draw on the fundamental logic of – and grounds for – the sceptical position.

In building an argument from these fundamental aspects of scepticism, with as few extraneous assumptions as possible, I suggest that the approach I rely on, and the contributions I offer can meaningfully be described as "sceptical" or "anti-foundationalist" in nature. As such, they are wholesale sceptical contributions to political and constitutional theory, which give us reason to question, or at least carefully phrase the claim that moral scepticism or anti-foundationalism can "make no difference" to substantive normative theory. It certainly gives us further reason to reject the claim that sceptics are incapable of taking any positive stance whatsoever, as those painting us as unavoidably useless nihilists would suggest.

1.5. A Map for the Road from Nowhere

Having already been largely summarised above, the overall direction of the thesis and the major stops along the way will, it is hoped, be relatively clear at this point. Before we begin, however, it might be helpful to piece this all together into a concise road map for what follows.

The journey begins by setting out and developing the perspective of moral scepticism brought to the thesis – a necessary first step in applying it and building a path into political and constitutional theory in what follows. This is the task of **Chapters 2 and 3. Chapter 2** sets out the particular brand of moral scepticism relied on, and the linguistic anti-foundationalist grounds on which it is held. The aim is to set this out in enough detail so as to ground the work which follows, which draws heavily on this philosophy and its internal

logic. **Chapter 3** clears the way for this task to proceed by considering and rejecting the problematic, but quite common, idea that scepticism is *incapable* of leading *anywhere.* The arguments of Strauss and Dworkin are critically examined and rejected on similar grounds – taken *on its own terms*, a wholesale moral scepticism remains unscathed by these criticisms. Having rejected the misguided caricature of moral scepticism as a uselessly debilitating nihilism, incapable of making a positive contribution to anything, this thesis will then begin the task of constructing such a contribution to constitutional theory.

In order to do this some fresh groundwork is first laid in **Chapter 4**. Following a critical examination of existing accounts of the consequences of moral scepticism from theorists whose theories overlap in various ways with the perspective taken here, this chapter sets out its own account. This comes in the form of the "Godlet Conception" of the individual, which, it is suggested, follows more directly and persuasively from the account of moral scepticism and its core logic than the existing ones considered. This conception is a useful tool for expressing the consequences, and resulting logic, of moral scepticism, and thus will feature heavily in the chapters which follow.

Having laid down this groundwork, **Chapters 5 and 6** take the thesis into political, and fundamental constitutional theory by using the perspective developed to set out an account of legitimate political authority in a constitutional system of collective decision-making. It is argued that a majoritarian approach, rooted in principles of political equality, and maximal decisiveness, best reflect the values and logic of the Godlet Conception, itself derived from the form of moral scepticism presented. In this way, it is offered as a sceptical account of legitimate decision-making authority for a collective. This is the argument of **Chapter 5**, which also sets out a vision for how to operationalise this ideal in practice, cutting through the direct vs representative democracy controversy along the way. **Chapter 6** defends the

majoritarian account provided from some common criticisms, further elaborating and clarifying the theory in the process.

Having developed a sceptical take on this most fundamental feature of a constitutional system, **Chapters 7 and 8** move further into constitutional theory. These chapters deal with the issue of entrenchment. More fundamentally, this implicates the issue of potential *limits* to legitimate majoritarianism, and as such seems the logical next step following the positive account of that legitimacy in the first place. The entrenchment debate is also where a number of fundamental controversies surrounding majoritarianism, and especially its dangers, play out. **Chapter 7** introduces the concept of, and sets out a prima facie case against, entrenchment generally – that is, on most subjects. It then considers how this case must be qualified in the specific expression of majoritarianism set out in the previous two chapters – a combination of both direct and representative elements. It also deals with the thorny issue of what the democrat could, or as it is often put, *must* do in response to an unfortunate decision to entrench taken by a democratic majority themselves. Must such a decision be accepted? What would that acceptance entail? This chapter poses some answers. That is an issue of democratic *provenance*, but as will be seen turns rather quickly back into an issue of the values underlying the majoritarian approach to democratic legitimacy.

Chapter 8 examines how much further the prima facie objection to entrenchment sketched in **Chapter 7** might have to be qualified by considering the issue of what will be termed *democratic entrenchment.* Is it acceptable, and perhaps desirable, to entrench the conditions of democracy itself? Is the democrat *obliged* to endorse this kind of entrenchment? Or are such demands themselves a contradiction of the democratic ideal? The detailed exploration of such questions in that final chapter brings forth some interesting and, what may be to some surprising, lines of logic. Whatever line one takes, the consequences have significance

not just for the democratic stance on entrenchment, but also wider issues of democratic legitimacy, the basis and nature of rights, and the consequences of scepticism for these matters.

Finally, the short conclusion reflects on the roads taken and the contributions made, and offers some thoughts on some further, significant, enquiries raised along the way.

Chapter 2

A Theory of Scepticism

'The world does not speak. Only we do'.

(Richard Rorty)[52]

2.1. Introduction

The purpose of this chapter is to set out the theoretical starting point for the thesis – the philosophical perspective from which the issues of constitutional theory considered will be explored. At its core, this perspective rejects the idea of "objective moral truth", with the idea that there are any mind-independent, or otherwise objectively defensible moral and normative values. By way of introduction, the sceptical perspective brought to this thesis can thus be described as a version of (moral) anti-realism, rejecting what can, in general form, be seen as the core realist claim that there are 'facts which are independent of anyone's beliefs or feelings about the matters in question' which 'make some moral judgements…true and others false'.[53] It rejects the realist-foundationalist idea that moral claims can be grounded in anything more than the beliefs and descriptions of particular individuals or groups, and that there is an external content to morality to constrain these beliefs and descriptions – a content with which our beliefs can be brought into line. This chapter will

[52] Rorty, *Contingency, Irony, and Solidarity* (fn1) 6.
[53] RCS Walker, *The Coherence Theory of Truth: Realism, Anti-Realism, Idealism* (Routledge 1989) 3.

set out and explain this perspective, and the grounds on which it is held, in preparation for the road into constitutional theory developed in this thesis.

Due to the scope of this thesis – seeking to *apply* the sceptical perspective with the aim of working towards an approach to constitutional theory compatible with it – the account of this perspective will be relatively brief. In particular, not all, nor even a significant amount, of the vast number of positions in the worlds of moral philosophy and meta-ethics on the issue of the nature and value of moral premises can be considered. Further, while some words of justification and defence of the approach taken will be offered, this again will be confined to a selection of the most prominent and, in terms of the present project, significant criticisms. Rather than providing a full philosophical defence of the sceptical position, therefore, the aim is to set out its key features, fundamental reasoning and logic, along with some responses to criticisms only in enough detail to allow it to be applied clearly and effectively in the chapters that follow. Thus, while it is hoped that readers will find the position elaborated persuasive, the aim of this section of the thesis is to establish it as a coherent position in enough detail so that the arguments which follow – which argue *from* its key tenets and logic – make sense, thus allowing the key purpose of this thesis to be achieved.

As will be seen, the particular brand of moral scepticism set out here draws heavily on the pragmatic, anti-foundationalist, and anti-metaphysical philosophy of Richard Rorty, emphasising in particular the linguistic aspects of his thought – his arguments stemming from the power, centrality, and ubiquity, of language and human description. These are put to work in firmly rejecting – on pragmatic grounds – the realist-foundationalist project in which the purpose of inquiry is to move towards, to more accurately reflect, the "facts of the matter" – the "true" requirements of "objective morality", say. The argument emphasised

here is that holding onto concepts of "objective moral truth", or an objective content to notions such as "moral"/"immoral", "right/wrong", "just/unjust" and so on, and the idea that this independent content can serve as a constraint on the validity of the moral claims made by individuals, is pointless. It is pointless for reasons surrounding the ubiquity of language. This argument will be elaborated in **section 2.3**. It must be done so carefully because, as will become clear in later chapters, this linguistic line of argument is central to the road from scepticism developed in this thesis. Following this, some responses to common criticisms will be offered, much of which will allow further clarification of the perspective itself (**section 2.4**).

Thus, the aim of the chapter as a whole is to establish the sceptical perspective brought to this thesis as a coherent philosophical position. The account of this perspective, its fundamental features and logic, will provide the core building blocks for the rest of the thesis establishing a sceptical approach to constitutional theory – one that is positive and constructive.

2.2. A Sceptical Perspective[54]

The sceptical perspective concerns itself with the basis and defence of moral premises at the core of normative discourse. As with other brands of scepticism, such as that put forward by James Allan, the approach taken here rejects the notion that there is 'some real, external component' or 'mind-independent' qualities with which our beliefs concerning morality – and those values – can and should be brought into line.[55] Put another way, the sceptical

[54] Much of the account of scepticism presented here has been published – in abridged form – in a section of Murray, 'Philosophy and Constitutional Theory' (fn3) (132-136).
[55] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 245.

account holds that 'there are no objective moral values, no moral rights and wrongs whose status as such is somehow independent of what other people, or even oneself, happened to think or feel'.[56] However, while Allan supports this as an empirical or factual claim, the logic presented here is different. Allan denies the existence of these features on the basis that, contrary to what is the case regarding 'factual consequences in the natural, causal world', the 'evidence seems…to be against there being any such "higher", mind independent values' – any 'external, imposed criteria' as regards issues of morality and value.[57] In contrast, the approach taken in this thesis is to drop or discard these very ideas. That is, to put aside *the idea* that these qualities exist, rather than to state that they *do not*, as a matter of "fact", exist. So while sharing core similarities with the moral scepticism of Allan – the moral anti-realist claim – the route to that claim is different. This route is key to this thesis, and central to the arguments made in the following chapters, especially **Chapter 4** laying down the groundwork for the road from scepticism into constitutional theory.

2.3. The World Does Not Speak: A Linguistic Anti-Foundationalist Argument

The argument begins by nothing the centrality and ubiquity of language here: evaluative notions such as "morality" (along with "moral" and "immoral"), "rightness" ("right" and "wrong"), "justice" ("just" and "unjust"), "goodness" ("good" and "bad"), and other such concepts central to normative discourse are terms of the human language. As Rorty points out, a consequence of this is that only if we imagine the world as either 'itself a person or as created by a person' who spoke this language (God, say), can any sense be made of the idea

[56] Allan, 'Internal and Engaged or External and Detached?' (fn43) 11. As will be explained later, in **Chapter 4**, the sceptical approach taken here leads to a view in which it is the *individual's* evaluative descriptions that are key.

[57] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 246. See also J Allan, *Sympathy and Antipathy: Essays Legal and Political* (Ashgate 2002) 89–90.

that any such notion 'has an "intrinsic nature"' or objective content which can act as some kind of constraint on how one defines and applies it in the claims they make – as a constraint on the acceptability of those definitions, and thus the claims which rely on them.[58] The problem, as Rorty neatly puts it, is that '[t]he world does not speak. Only we do'.[59] So while the 'world is out there…descriptions of the world are not'.[60] Thus, the only descriptions, and applications and definitions of the evaluative notions within them ("right", "wrong", "good", "bad", etc) available are those proffered, and preferred, by particular individuals. This seems to leave we possessors of language very much on our own – free to describe as we see fit. The consequences of this idea are pursued further in the following chapters, especially the final section of **Chapter 4,** setting out the groundwork for this thesis's route to putting scepticism to constructive use.

2.3.1 Rejecting the Realist-Foundationalist Project

It might, however, be replied that, even if the notions relied on in moral claims are the creations of human language, this does not necessarily make their content *freely* created and optional. Perhaps there is still something independent to serve as a constraint on the way we describe and apply such concepts. The realist certainly believes so. The character Rorty calls the 'metaphysician', does 'not believe that anything can be made to look good or bad by being redescribed', or, if they do, 'they deplore this fact and cling to the idea that reality will help us resist such seductions'.[61] They cling to the idea that 'deep down beneath all the texts,

[58] Rorty, *Contingency, Irony, and Solidarity* (fn1) 21.
[59] ibid 6.
[60] ibid 5.
[61] ibid 75.

there is something which is not just one more text but that to which various texts are trying to be "adequate"'.[62] Maybe we are not so alone after all.

With this approach comes the representationalist idea – with distinctions between appearance/reality, and more accurate/less accurate descriptions of "(moral) reality". These ideas offer the possibility that some claims can be established as less accurate descriptions of moral reality – descriptions 'of what only appears to be going on' (the claims of 'conformist members of a slaveholding society' for example) – whereas others can be established as more accurate, superior 'descriptions of what is really going on' (like 'believers in universal human rights', for example).[63]

However, here the ubiquity of language now becomes a problem, leading to a larger, sceptical, argument against such realist ideas of a "reality", "way things are" or objective properties beyond the beliefs of individuals to appeal to as a constraint on their acceptability, and the notion of representation that comes with it. This is the Rorty-style pragmatic argument that holding onto such ideas is pointless. It is pointless because putting these ideas to use appears practically unworkable. The 'attempt to get behind appearance' and our own preferred descriptions to some kind of independent "way things are", or "reality" is, as Rorty puts it, 'hopeless'.[64] The problem is that 'there is no way to think about the world or our purposes' *except* through language.[65] As Wittgenstein put it, it is 'only in language that we can mean something by something'.[66] Thus, as Rorty claims 'there is nothing to be known about anything save what is stated in sentences describing it'.[67] "Reality", therefore, always

[62] R Rorty, *Consequences of Pragmatism* (Harvester Press 1982) xxxvii.
[63] R Rorty, *Truth and Progress* (Cambridge University Press 1998) 1.
[64] R Rorty, *Philosophy and Social Hope* (Penguin Books 1999) 49.
[65] Rorty, *Consequences of Pragmatism* (fn62) xix.
[66] L Wittgenstein, *Philosophical Investigations* (Macmillan 1953) 18.
[67] Rorty, *Philosophy and Social Hope* (fn64) 54.

turns out to be 'reality under some or another description'.[68] The consequence of this is that "independent reality" is devoid of any useful meaning. Again, as Rorty puts, there is 'no way to divide' the "reality", or whatever within it is the focus of our comments, 'in itself from our ways of talking about' it.[69] There is no way of distinguishing between one or another description and the "objective" quality supposedly being described – whether that be called "reality", the "way things are", "the essence of X", "goodness", say, or whatever. There is no way of getting beyond our own descriptions to compare them with such independent things because to give any such thing any meaning is to immediately taint it with more description – with a way of talking about it. And to think about something is already to so taint it, on the Wittgensteinian, Rortyan grounds already noted. Thus, for practical purposes, "reality" is never 'unmediated by a linguistic description', by *our* description.[70]

With that, the realist project is doomed. "Objective reality" – a "way things are" independent of belief – becomes the name 'of something unknowable'.[71] Putting these ideas to use would, on the reasoning just set out, involve the 'impossible attempt' to step outside of our preferred descriptions to compare them with 'something absolute' – something which is more than just *another* such description.[72] The pragmatic point here is that treating as a goal of inquiry, or constraint, something which is unknowable means that there is no way of establishing when the goal has been reached, or recognising when the constraint is being violated, and that this renders the exercise futile and pointless. The very idea of an objective "moral reality" and the like – ground independent of belief – along with the idea that our claims can

[68] M Brint, WG Weaver and M Garmon, 'What Difference Does Anti-Foundationalism Make to Political Theory?' (1995) 26 New Literary History 225, 228.
[69] Rorty, *Philosophy and Social Hope* (fn64) xvii.
[70] ibid 48.
[71] ibid 49.
[72] Rorty, *Consequences of Pragmatism* (fn62) xix.

be seen as attempting to accurately represent or approximate something beyond themselves, is thus set aside on the grounds that it fuels such a pointlessly unworkable exercise.

2.3.1.1. Moral Anti-Realism

At this stage, it is worth clarifying once more the immediate target of the anti-realism set out in this thesis. As noted in the **Introduction** (**Chapter 1**), for the purposes of this thesis on applying a moral sceptic perspective to constitutional theory, the arguments will be confined to *moral* anti-realism – the discarding of *moral* reality, and *moral* objectivity. Going beyond that, and into a more thoroughgoing anti-realism would require a coherent account of other pursuits like scientific inquiry – the basis of scientific advances – mathematical "facts", and a more general account of epistemology. This would be a task far greater than can be provided in the confines of a law PhD thesis. Thus, while the linguistic arguments put forward for the moral anti-realism set out here may lead into a wholesale anti-foundationalism in which other areas – and perhaps *all* – of knowledge are seen as linguistically constructed, this possibility will not be pursued.[73] Moral scepticism is big enough. Furthermore, as already noted, the arguments put forward in the rest of the thesis do not require an acceptance of anything other than scepticism in the realm of morality and normativity.

Returning to the task at hand, the pragmatic moral anti-realist aspect of the sceptical perspective might perhaps become clearer with a particular example of a modern moral realist relying on the concepts and ideas the perspective objects to. Mark Platts provides a

[73] It is perhaps noteworthy that Rorty – whose arguments have had a strong influence on the position presented here – *does* step into a more general anti-foundationalism. See especially Rorty, *Philosophy and the Mirror of Nature* (fn24). The views presented in that work, and elsewhere, have led to Rorty's reputation as a more general 'epistemological nihilist' holding that 'nothing really is or can be known' (See, for example TV Upton, 'Rorty's Epistemological Nihilism' [1987] 3 The Personalist Forum 141, 142).

good example of the moral realist-foundationalist project in action. According to Platts, moral claims, 'like any other factual belief', present claims 'about the world which can be assessed…as true or false'.[74] Platts sees these qualities as objective – they are 'the result of the (independent) world)', and 'possible objects of human knowledge'.[75] The acceptability of moral claims – their truth value – is thus seen as constrained by a power beyond ourselves and our own descriptions – the independent world. This independent world is what we are trying to accurately describe – it is something it is possible to *know* more about.

The reliance on the ideas of representation and the distinctions between appearance and reality noted above as coming hand in hand with the realist approach is very clear here. After stating that moral claims are rendered true or false by the independent world, and that their truth or falsity is a matter of knowledge, Platts offers a suggestion as to how this knowledge can be acquired. This suggestion is revealing of the representationalist idea at work. The idea is that we 'detect moral aspects' of the world and the situations arising within it 'in the same way we detect (nearly all) other aspects: by looking and seeing'.[76] Further, as long as we pay 'careful attention to the world' while doing so, 'we can improve our moral beliefs about the world, make them more approximately true'.[77] To commend an approach which "looks" and "sees" in order to "detect" moral aspects of the (independent) world, and thereby improve our beliefs about them – our "approximation" of their content – is to wheel out a whole number of stereotypically representationalist tropes. It sets out a clear attachment to the idea of representation and appearance/reality: moral aspects, or qualities are independent in the world which moral claims are taken as attempts to approximate. These attempts can

[74] M Platts, 'Moral Reality' in G Sayre-McCord (ed), *Essays on Moral Realism* (Cornell University Press 1988) 282.
[75] ibid.
[76] ibid 285.
[77] ibid.

be improved by looking carefully in order to get our descriptions more approximately right – more accurate representations of the independent reality being described. Accurate representation is therefore taken as the key to improving our moral beliefs and to distinguishing between superior and inferior moral claims – the acceptable, or more acceptable, from the unacceptable or less acceptable.

This is thus a characteristic example of reliance on the concepts the sceptic rejects on the pragmatic grounds above. It is precisely the kind of exercise this perspective suggests we set aside as misguided, and pointlessly unworkable. The problem is that one cannot be sure that what one is "detecting" or "seeing" is anything more than the meaning *we* – the individual evaluator – give to "the world" or the so-called "moral aspects" within it. For the sceptic, Platts' valued process of "paying careful attention" to the "world", the "moral facts", "moral reality" etc cannot be shown to amount to anything more than paying attention to *our* own proffered, and preferred descriptions. Indeed, given the reasoning surrounding the ubiquity of language set out above, the sceptic finds it difficult to even make sense of the idea that it could be anything else.

With ultimately nothing beyond the preferred descriptions of individuals and groups to appeal to, all that remains are the competing claims and beliefs themselves, and those who make them. The realist project positing an external authority as a foundation for and constraint on the acceptability of our moral and normative assertions is thus firmly set aside. The sceptic rejects the idea that we can somehow 'confirm, correct, or reject our beliefs by claiming that there is...something which independent' of those beliefs.[78] This is the core

[78] U Schulenberg, 'Wanting Lovers Rather Than Knowers – Richard Rorty's Neopragmatism' (2003) 48 Amerikastudien 577, 579.

sceptical perspective from which this thesis proceeds: *a pragmatic, linguistic-based anti-foundationalism applied to the realm of morality.*

The implications of this core sceptical perspective for normative, political and constitutional theory will be drawn out in the chapters which follow. For now, some objections will be considered and responded to.

2.4. Some Objections Answered

As already noted, a full-scale defence of the perspective taken in this thesis from all possible objections is a larger task than can be attempted here. What follows, then, is an attempt to address some particularly common, and for the purposes of this thesis, problematic criticisms of the moral sceptic position, and the ideas and arguments that have been relied on. It is hoped that this will establish the perspective as a persuasive – or at least coherent and plausible – position. The responses offered will also be helpful in allowing some further clarification of the sceptical perspective's key ideas and lines of reasoning, ready to apply it going forward. The criticism that moral scepticism leaves those who ascribe to it floundering in a debilitating, useless nihilism, unable advocate or even hold normative positions and values about anything, will be dealt with in detail in the next chapter (**Chapter 3**). This attack is given particular attention in its own chapter because of the significance it would have for the current project. Put bluntly, if well-placed this criticism would leave the promise of this thesis – to set out a positive road from scepticism into constitutional theory, and indeed *somewhere* positive – unattainable.

2.4.1 Moral Scepticism: Reasons to Despair?

As noted in the **Introduction** to this thesis (**Chapter 1**), moral scepticism can be said to have something of a negative reputation. The biggest fears come from those who – unsurprisingly – strongly oppose the sceptical position. In that introductory chapter, for example, we noted Strauss' concern that 'the rejection of natural right is bound to lead to disastrous consequences', linking scepticism to the breakdown of 'civilised life'.[79] In similarly anxious fashion, Dworkin labels scepticism 'about truth in the "soft" domains of morality' as 'the most dangerous' kind.[80] The idea that scepticism leads to disastrous consequences must be taken seriously, particularly in light of the pragmatic grounds on which it was supported above.

2.4.1.1. Of Thugs and Cannibals

Strauss apparently takes as an illustration of his point the, somewhat bizarre, idea that scepticism would be linked to the rise of 'cannibalism'.[81] Absent any kind of empirical evidence for such a claim, it must be admitted that there is not much that can be said to this, apart from making the logical case that the dropping of the idea of objective moral truth – an issue of status – does not necessarily say anything of one's fundamental moral preferences – an issue of *content* (a line of logic returned to in **Chapter 3** when dealing with other parts of Strauss' attack on scepticism). However, aside from the strangely specific example of cannibalism, there is a more tenable and logical concern that the embracing of moral scepticism will, in other ways, lead to an increase in violence, and the breakdown of civilised life. This aspect of the concern can be taken more seriously.

[79] Strauss (fn11) 3.
[80] Dworkin, 'Objectivity and Truth' (fn7) 89.
[81] Strauss (fn11) 3.

Gallie summarises the concern well when considering the potential consequences of his theory of "essentially contested concepts" – that there are appraisive, evaluative concepts which are interpreted in many different ways, none of which can be 'set up as the correct or standard use'.[82] The concern is that removing the hope, as the sceptic's dropping of the realist-foundationalist project does, that a particular moral claim can be established as 'the only one that can command honest and informed approval', takes with it the hope that one 'will ultimately persuade and convert all of their opponents by logical means'.[83] The fear is that this realisation will leave 'a ruthless decision to cut the cackle, to damn the heretics and to exterminate the unwanted' but a small step away.[84] As Allan puts it, if people reject a 'belief in the existence of objective values…will they not see the hopelessness of commanding others' agreement and approval by means of peaceful persuasion and debate?'[85]

In the current author's view, such a move from peaceful debate and discussion to violence would indeed be an undesirable consequence. It is also important to address given that a large part of the argument above relied on the idea that it is unpragmatic to hold on to realist notions of moral objectivity. This objection, which is essentially over whether it is *desirable* to take the sceptic's approach of discarding the notion of moral objectivity and the realist conception of argument and inquiry, may point in the other direction. It may be argued that realism, whatever its intellectual and practical difficulties, is actually a *useful* or maybe even *essential* view to hold on to if we want to avoid a world in which debate has given way to

[82] WB Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167, 168.
[83] ibid 193.
[84] ibid 193–194.
[85] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 259.

force as the primary method of dispute resolution, and that scepticism is – pragmatically speaking – a dangerous position.

The concern can be broken into two parts; first, the more general point that scepticism undermines the enterprise of argument and intellectual discussion, and second, the more specific one that it leads to a turn to less peaceful methods of dispute resolution, or at least makes them more likely. The two are linked in that the undermining of intellectual argument as a method of handling our disagreements may itself seem to make a turn to other methods – including those abandoning dialogue altogether – more likely.

2.4.1.2. Scepticism and the Value of Argument

A first-hand example of the suggestion that an acceptance of scepticism undermines valued enterprises of discussion can be found, in Dworkin's fears. He suggests that moral scepticism, as an '*auto-da-fe* of truth has compromised public and political as well as academic discussion'.[86] This is, presumably, what he sees as one of the 'denigrating suggestions' of moral scepticism, leading him to his 'Pious Hope' that we turn our backs on this school of thought.[87]

To this concern, it can immediately be pointed out that scepticism, as set out in this chapter, is itself a position taken and defended on the basis of reasoning and argument – the reasoning set above. Disparaging argument is not the obvious consequence of taking a position which is *itself* based on argument. If anything, the opposite – a commending of the value of argument – is a better fit to the sceptic's position. Using argument and various lines of reasoning to reach a position, defend it, and engage with one's opponents along the way is evidently premised upon a more fundamental view that argument has *some* positive value.

[86] Dworkin, 'Objectivity and Truth' (fn7) 89.
[87] ibid 139.

If it were otherwise, the arguments would not add anything to the defence of the position, rendering it a pointless method to rely on.

However, the concern may also be seen as questioning what positive value the sceptic could possibly find in normative debate once the idea of working towards objective truth has been rejected. Put bluntly, it might be asked: if morality is just a matter of arbitrary preferences, and there is no truth to be had, then what is the point of argument and discussion at all? Has the sceptic not undermined the whole point of intellectual discussion? Put even more bluntly, one might be asked: "well, why do you bother arguing at all, if there's no truth to be had?" The response to such a claim is that it very much requires a realist-mindset to work as a criticism. To the sceptic, the attack begs the question because it assumes from the start that the point of argument *is* to find "truth", or to reach the "independently correct answer", such that rejecting the idea of objective truth then leaves argument without a point. But to the sceptic these are the very qualities we reject, and so this cannot be the point of argument. Put differently, it seems odd, to say the least, to be criticised for not reaching, or purporting to reach standards the sceptic does not think it makes sense to be held to. The sceptic is criticised for not treating as a goal of inquiry something it is their very point to reject as a goal of inquiry. Thus, the objection assumes the realist position from the start. To the anti-realist, it is thoroughly misguided.

This still leaves unaddressed what value the sceptic *does* attach to argument and discussion. The point can be seen as less of an objection or criticism to the sceptic's position, and more of a call for a positive account of exactly *how* the sceptic can find a place for peaceful argument and discussion in their anti-realist worldview. After all, it was suggested above that the sceptic does attribute *some* value to the enterprise of argument – as indeed the very act of writing this thesis would seem to imply. Perhaps, given that sceptics object to the

orthodox realist account of the value of argument, the onus is upon us to account for what purpose we *do* see the enterprise as serving.

The proposed answer is drawn from an observation of what we do when we make an argument or call for one to be made: we are giving or demanding reasons for or against a position, and, crucially, depending on whether we find these reasons convincing or not, then proceeding to accept or reject that position or recommending that others do so. The purpose is to justify, or to test the justification for, particular positions. Clearly, for the sceptic this is not to be taken as some kind of test for independent truth or to establish that we have the authority of a power not ourselves on our side; the idea that our practices of justification lead to truth or reveal objective truths goes with the discarding of these concepts. The sceptic has discarded them because s/he sees no way to distinguish the requirements of such standards from our own preferred descriptions – the descriptions *we* find convincing. So, on this view, to say that a position is "right" is only to say that it is, to the person making that statement, justified, and this is just to say that they find it convincing to the level that they are minded to accept it. Thus, all we are doing when justifying a position, or demanding that a justification be provided, is attempting to convince, or demanding to be convinced, that it should be accepted.

To adapt a phrase from the pragmatist William James, the sceptic's idea of what it is to put forward an argument is that it is to say something along the lines of "'Well, I feel like saying that, and I want you to feel like saying it too...'",[88] before adding to this "and here are the reasons I think you ought to". In short, the point of argument is to persuade or convince others, and at times ourselves, that a particular position is to be accepted, not accepted, modified, or abandoned – a position which helps us to make sense of the world around us.

[88] W James, *The Meaning of Truth: A Sequel to 'Pragmatism'* (Longmans, Green, and Co 1909) 74.

This is all that discussion can amount to once it is recognised that is ultimately we ourselves who are the arbiters, and accept that there is nothing beyond ourselves to be responsible to. It is worth emphasising that this is not just a case of attempting to convert *others* – it was just noted that the process of justification can help convince *ourselves* to take particular positions. This has value as a way of making sense of the world around us – a world otherwise devoid of normative meaning on the sceptic's account.

Perhaps, therefore, the utility of various argumentative devices simply *as* methods of persuasion – of coping with the world around us – in our current time and place is all that can be said about their use in discussion. Various styles of reasoning, logic, and other argumentative standards are useful devices of persuasion which happen to have developed; they are tools, or instruments, for achieving the purpose of argument just discussed, both socially and personally. Indeed, some of these standards are, in practice, so crucial to the success of an argument – so effective in determining its success or failure – that they may be described as having the level of general acceptance. Non-contradiction, for example, is a standard overwhelmingly accepted in Western scholarship and of which one can find very few, if any, who seriously dispute. To be sure, one can try and *explain* the standards relied on, and explain why one is inclined to use them, but there can be no ultimate, independent demonstration as to why we *must* take these standards for the sceptic. For example, in relation to non-contradiction, one can say that if one says both "X" and "not X" at the same time, they are not saying much of any meaning at all, and therefore nothing persuasive. But if one were to deny this, and insist that contradiction is not vicious, then there is nothing much left to say in response that has not already been said.[89] If one wants more than this –

[89] If one were to keep pushing this matter, they might find themselves facing the situation described by Rorty, that, ultimately, we can only explain 'rationality and epistemic authority by reference to what society lets us say, rather than the latter by the former' (Rorty, *Philosophy and the Mirror of Nature* [fn24] 174).. This ties into the fundamentally social account of justification developed by

something which *grounds and justifies in themselves*, *besides our acceptance*, the standards forming the boundaries of acceptable and non-acceptable arguments, and the standards which convince us to accept or reject a position – then they are demanding precisely the kind of support the perspective here rejects makes sense.[90]

In any case, it is argued that *this* account of the enterprise of argument – that it is useful in helping us to make sense of the world around us and to sort through our beliefs, and indeed to develop them – does not require the concept of moral truth to operate. If it is a coherent account of the value of argument, therefore, it is enough to satisfy the demand of establishing what value argument *does* have for the sceptic. The point is that giving up on objective moral truth need not mean giving up on argument itself as long as we provide some such account of what argument *is* for to go along with it.

2.4.1.3. Scepticism and Violence

However, perhaps the concern is not so much that a turn away from debate and possibly towards force is a logical, or even fitting consequence of scepticism – but simply one that

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Rorty in his own thought. At this level, the scope of the present thesis has been transgressed, however, and so this matter will not be pursued. For present purposes, it suffices to say that the fundamental standards of logic and argument relied on are overwhelmingly accepted, and presupposed by the terms of this thesis, perhaps adding, bluntly and honestly, that if one rejects these standards at this fundamental level, they will likely reject the arguments which they are used to support. In any case, the main burden of this section was to provide an account of how the sceptic can account for the argumentative enterprise in the absence of moral truth. It is contended that it has satisfied *this* burden at least.

[90] The above reply has parallels to that made by some proponents of the school of thought broadly known as "critical rationalism". Basically, the idea of this movement - drawing on Karl Popper's non-justificatory approach to scientific knowledge - is that the inability to justify the ultimate commitments which form the foundations of argument does not remove our ability to critically engage with the ideas we come across, in order to minimise intellectual error. On what grounds the tools of criticism can *themselves* be justified is not an issue for an approach which rejects the very idea of ultimate justification as hopeless, and therefore the idea that it is something which it makes sense to even aim for in inquiry. See the "pancritical rationalism" set out in WW Bartley III, *The Retreat to Commitment* (2nd edn, Open Court 1984) 122, 126–127.). For the work at the heart of this movement see, for example, K Popper, *The Logic of Scientific Discovery* (Hutchinson 1959).

history shows is made more *likely* by an acceptance of its tenets. This concern would persist even if it were the case that the sceptic has an account of the value of argument, even on their anti-realist view. After all, those who turn to violence are hardly likely to be deterred if it is suggested that this approach is not fitting of their philosophical perspective. Further it is hardly a consolation, if violence is the result, to point out that the sceptic finds this regrettable and not in line with value *they* attach to peaceful thought and discussion. This aspect of the concern must therefore be addressed in its own right, independently of the idea that scepticism undermines the enterprise of argument which was just rejected. The response offered is, necessarily, quite tentative, since strictly speaking assessing it lies outside the disciplines of both law and philosophy.

The response is that history and experience do not give us much reason at all to think that those who repudiate objective morality are any more likely to succumb to the 'onslaught of darker forces'.[91] To be sure, examples can be found of sceptics who also happen to be in favour of the more forceful methods of handling those whose views differ from their own. One could point to some rather unsettling comments made by one of the most infamous moral sceptics and American judges of the 20th Century, Oliver Wendell Holmes Jr, for example. Comments such as: 'when men differ in taste as to the kind of world they want the only thing to do is to go to work killing';[92] or '[w]hen [my law clerk] talks of more rational methods [of resolving international disputes], I get the blood in my eye and say that war is the ultimate rationality'.[93] With this in mind, Allan perhaps puts the point too strongly when

[91] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 260.
[92] M DeWolfe Howe, *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski Volume 1, 1916-1935* (Harvard University Press 1953) 116.
[93] RM Mennel and CL Compston (eds), *Holmes and Frankfurter: Their Correspondence, 1912-1934* (University Press of New England 1996) 70. As it is hoped is clear from the above, this aggressive conception of rationality is not one the author takes.

he responds that there is *'nothing* to point to' in making an empirical claim linking scepticism and turns to violence.[94]

That said, one could just as easily point to examples of those who believe they have objectivity on their side, or who otherwise claim to be in touch with some other power beyond themselves, taking a forceful turn; as Gallie puts it, we should 'recall that spokesmen of Reason have always brought peril as well as light to their hearers'.[95] Recalling the acts committed by various totalitarian regimes of the 20th Century is enough to show as much; these regimes were not obviously premised on the sceptical idea that there are no objectively right answers that we ought to take as our authority. Rather, as Allan points out, '[e]ach had its confident vision of what was morally right', and they were clearly not willing to entertain the idea that they did not have some superior moral wisdom or power on their side in that.[96] As history shows, 'nothing, certainly not mere individual lives and happiness, could be allowed to stand in the way of whatever moral utopia happened to be envisioned'.[97] This is one example, but it should be noted that 'the list of intolerant acts' carried out 'in the name of what is thought and asserted to be mind-independently morally right' is, as Allan puts it, most likely 'too long' to comprehensively set out.[98] If the reader wants more, one can point to the plethora of religious wars and tensions throughout Europe and the world, both throughout history and today: the Christian Crusades; violence between Catholics and Protestants; Sunnis and Shia; Jews and Muslims in Israel and Palestine to name but a few. Such worldviews, with their attachment to the ideas of divine beings or entities laying down

[94] J Allan, 'Doing Things the Hurd Way: A Map For All Reasons?' (2005) 30 Australian Journal of Legal Philosophy 59, 71 (emphasis added).
[95] Gallie (fn82) 194.
[96] Allan, 'Doing Things the Hurd Way' (fn94) 69.
[97] ibid.
[98] ibid 68–69.

independently-given unquestionable rules of conduct, are clearly far from the idea of scepticism; they are its antithesis.

The key point is that experience does not obviously establish a link between a sceptical viewpoint rejecting ideas of objective moral truths, and intolerance or violence – certainly no more connection, to put it mildly, than can be made between those who take a foundationalist and objectivist worldview and such conduct. If anything, it might be suggested that the balance of evidence on this matter points in the other direction – away from the idea that it is *sceptics* who are most likely to be the warmongers and thugs of the world, and to the idea that it is the moral *realists* that have a lot to answer for here.

Indeed, the sceptic could go on to further take the offensive and offer a line of *reasoning* linking objectivist or realist viewpoints to intolerance of others who differ. This is to turn the concern back on the critics who proffer it. The argument could go something like the following: few people who take the view that there are 'objectively correct rights and wrongs doubt that those rights and wrongs are the same as their own subjective perceptions of them',[99] or at least that they differ too greatly from their own such views. Indeed, realist theorists, once they step out of pure philosophy, will often present *their* theories and methods as the means to reaching the objective answers they are confident can be reached. For example, the realist 'natural lawyer...will claim that the development of the natural law tradition represents progress towards the truth and that it indicates the epistemic strategies' that should be encouraged to 'continue down this path' towards such truth, and further that 'the utilitarian and the Dworkinian' – for example – 'are making some sort of appalling mistake' or 'showing their invincible ignorance' in denying this.[100] For people whose

[99] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 260.
[100] Waldron, 'Moral Truth' (fn4) 86.

philosophy allows such claims to be made, tolerance of views radically different from their own "correct" ones, and of those who hold them, must be difficult to sustain.[101] Of course, a moral realist *might* be able to don something of 'a Kiplingesque mask of noblesse oblige, a willingness or felt duty to suffer the follies of the blind and the inferior', but this must take a great deal of effort to keep on.[102] At least it is plausible to suggest that it might, and the examples noted above could themselves be taken as testament to this.

A telling example might be found in some rather worrying comments made by some contemporary moral realists, taking a strongly instrumentalist approach to politics. The instrumentalist approach in which political equality gives way to reaching the "right", "best" or "maximally reasonable" moral answers is considered later, in **Chapter 6,** when dealing with elitist approaches to political power. As will be discussed there, the instrumentalist approach, as it is often found in political theory, is very much a moral realist one. Richard Arneson is a prominent example, and the point he makes about where this approach logically and on principle leads is telling. He assumes a world in which there *are* moral facts and moral constraints, and in which a particular individual – the pope, say – 'really does have a pipeline to God', and hence 'true beliefs of the utmost importance for all of us'.[103] In such a case, knowing that 'each human person can attain eternal salvation' if they accord with the moral dictates of the Church, he states, 'the pope is surely entitled, and probably morally required, to coerce the rest of us for our own good, if he happens to have sufficient military force at his disposal'.[104] The only thing blocking this entitlement, in his thoroughly moral realist world, is that 'there is no reason to believe' that the pope *does* have 'such a pipeline',

[101] Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42) 260.
[102] ibid.
[103] R Arneson, 'Elitism', *Oxford Studies in Political Philosophy*, vol 2 (Oxford University Press 2016) 159.
[104] ibid.

or *is* in touch with 'warranted true beliefs' regarding the basis of salvation.[105] Absence this epistemological doubt, Arneson's thought-experiment shows that the strong moral realist can, apparently, push ahead, with force, according to that they *know* is for "our own good". Indeed, if there was no such doubt, the knowers would be *obliged* to so push ahead. The noblesse oblige really has slipped, and it has slipped because – assuming a sound epistemology – it is possible to *know* what is "best"; one can arm themselves with moral truth and ground an entitlement to the use of force. After all, they have "Right" on their side.[106]

This perhaps lends some plausibility to the claim that moral scepticism, rather than being detrimental, may even work to lessen the risk of 'bombastic moralists...being overbearing in ways that often thwart negotiation and sometimes ignite wars'.[107] These are obviously quite large and perhaps simplistic claims – and the author is no psychologist or sociologist – but it is suggested that they are no larger or simplistic than those who would suggest a direct line from scepticism to violence and intolerance or otherwise undesirable tendencies. Perhaps, therefore, the most that can be said with any confidence is that there is *no more* of a link between these concerning tendencies and scepticism than between the same and the realist worldview it rejected; no more of either a logical or empirical link. But this is already enough to undermine this concern over the possible negative consequences of accepting the sceptical viewpoint. That concern, like the other criticisms considered above, is therefore rejected.

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[105] ibid.

[106] For the use of a moral realist-grounded instrumentalism to set aside calls to respect disagreement, see the discussion in **Chapter 6**, **section 6.2.2.1.** The rectitude evident in such moral realist approaches is what, on the argument above, might sow the seeds of something a little more sinister.

[107] Sinnott-Armstrong (fn12) 14.

2.5. Conclusion

This chapter has summarised the sceptical perspective from which this thesis proceeds. The aim was to elaborate it with sufficient detail and clarity to allow the perspective to be applied to the areas considered, and for the bridge into constitutional theory presented to be constructed. While it is hoped that the reader finds this perspective persuasive, all that is needed is an understanding of its key tenets and fundamental logic. This understanding will allow readers to follow the core arguments which follow – drawing directly on this perspective and its grounding logic – and to assess their cogency, *from these premises.*

The linguistic grounds for the discarding of the moral realist-foundationalist project recommended here are, in particular, crucial for the arguments set out in the chapters which follow. As will be elaborated further in **Chapter 4** – laying down the groundwork for the road ahead – this form of moral scepticism leaves the individual in a position of freedom to describe as they see fit, unconstrained by any higher metaphysical authority. This will be put to work to inform a sceptical conception of the individual – grounded in the linguistic scepticism set out here – as an authoritative moral legislator. The linguistic nature of this argument also grounds the case for equalising this status among individuals – an argument for what will be called "normative equality".

To clear the way for those arguments to be made, some especially problematic objections to the morally sceptical perspective set out here need to be dealt with. This chapter discussed concerns that the repudiation of objective moral truth leads logically, and in practice, to the demolition of normative debate itself as a fruitful endeavour, possibly leaving violence as the preferred method of dispute resolution. The link between scepticism and violence was rejected as empirically untenable. Indeed, it was noted that plenty of evidence might suggest

it works the other way – that it is objectivists, as history has shown, who are more likely turn to violence and coercion to force their views on others, entitled by their realism-grounded rectitude. In any case, claims that scepticism leads to violence are unfounded.

To the criticism that moral scepticism puts the enterprise of argument at risk, it was replied that this concern only makes sense on a moral realist worldview in which the point of argument and discussion is to work towards moral truth. Only then would it make sense to say that the sceptic's discarding of "moral truth" leaves argument aimless, and without value. It thus assumes the moral realism the sceptic rejects in order to establish itself as a criticism. In this sense, it is question-begging to lay this as a criticism at this stage, rather than a restatement of the underlying philosophical dispute. Indeed, scepticism is itself a position established using argument and discussion, and thus would seem to, if anything, imply a *valuing* of this enterprise rather than its denigration.

Perhaps, however, there is some point to be taken here. Perhaps, given that the sceptic challenges the orthodox view of moral argument, the onus is on us to provide a positive account of precisely what the value of argument *is*, on our view. Such a sceptical account of the value of argument was offered: to persuade both ourselves and others to accept a that particular position be accepted, modified, or rejected – positions which, through our thinking, discussion, and the employment of language, allow us to make sense of the world and the situations which arise within it.

On these grounds the sceptical perspective is presented as a coherent meta-ethical account to be carried forward in what follows. The next chapter deals with an immediate problem which some argue arises going forward in tasks such as that of this thesis: that the sceptical position is incapable of leading to *any* constructive consequences. Rather it commits those who ascribe to it to a desultory, and debilitating nihilism, in which one is incapable of

supporting or even holding any normative views whatsoever. This is dealt with in its own chapter given the devastating effect this claim – if well put – would have on the project of this thesis. Fortunately, however, it will be rejected. Following this rejection, the thesis will then be in a position to push on with the task of *showing* what a positive way forward from scepticism towards political and constitutional theory could look like. The method is to establish a persuasive account *from the sceptical perspective* by relying on the tenets and logic set out in this chapter, with as few external assumptions as possible.

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Chapter 3

The Road to Nowhere?
Scepticism as Nihilism

3.1. Introduction

Having set out in the previous chapter the sceptical position brought to this thesis, we must now begin the task of constructing a path towards constitutional theory – to *apply* this perspective. The immediate question, however, is whether this perspective can lead *anywhere* constructive. As Oppenheim notes, there is a 'wide-spread' view that it cannot, and that what he calls 'ethical relativism entails ethical indifference.'[108] The picture often painted is of scepticism as not only incapable of grounding any positive normative vision, but as *committing* its proponents to such a debilitating indifference. If such indifference is indeed entailed by a denial of the objective defensibility of moral premises, then the sceptic would not be able to consistently hold or put forward any positive normative case in constitutional theory at all. Put bluntly, they would be condemned to an entirely destructive and practically useless nihilism. In the context of a thesis seeking to develop a sceptical

[108] FE Oppenheim, 'Relativism, Absolutism, and Democracy' (1950) 44 The American Political Science Review 951, 954. For present purposes Oppenheim's "ethical relativism" is taken as synonymous with what is being described here as "scepticism". By "ethical relativism", Oppenheim means the idea that objective 'normative knowledge is impossible' and that there is 'no way of testing the truth...of intrinsic value judgements' (952). This denial of the objectivity of ethical premises is a core feature of the scepticism taken and defended here in its putting aside of the idea of independent (moral) truth.

theory of constitutionalism this would clearly be unfortunate, to say the least. Scepticism would turn out to be something of a dead-end, and this thesis would be engaged in the hopeless task of putting it to purposes it cannot serve. One might then aptly retitle the thesis "The Road *to* Nowhere". The stakes are far higher than this thesis however: if well-put, this argument would seem to condemn the sceptic in all areas of their life, unable to act on *anything* meaningfully. This possibility, and the arguments of those who pursue it, must therefore be carefully addressed. That is the purpose of this chapter.

Fortunately, it will contend the attempts to paint scepticism as a useless, entirely destructive nihilism fail. Two major versions of the argument will be considered. First, the classical argument from the political philosopher Leo Strauss – presenting a debilitating nihilism in which the individual cannot act on, nor even *believe* in anything at all, as a direct logical corollary of the sceptic's rejection what he calls "natural right" – will be closely examined, and rejected (**section 3.2**). Second, the sustained argument of Ronald Dworkin, centred on his account of the so-called "face-value view" of moral evaluation, and similarly arguing that the sceptic is committed to a self-destructive moral indifference, will be interrogated in detail (**section 3.3**).

Distinguishing existing responses to these claims, this chapter sets out a reply which goes to their very core. Both cases have in common the flaw of attempting to show that *the sceptic* is logically committed to a destructive nihilism, but attempting to do so through an argument which turns out to rely on *non-sceptic* presuppositions. This kind of argument is not fit for purpose. It cannot possibly show what proponents claim about the negative consequences of the *sceptic's* position, and in fact cannot show anything about that position, because it is ultimately not the sceptic's position that is being considered. Rather, it is a strange hybrid of scepticism and objectivism: a realism-grounded account of the sceptical position.

Showing that an unstable – unfortunately inconsistent – realist-style scepticism cannot lead anywhere positive has no negative implications for this thesis, the purpose of which is to set out a wholesale *sceptical* road into constitutional theory. The realist's attempt to catch the sceptic in inconsistency or debilitation can therefore be put firmly to one side.

3.2. Strauss: Nihilism as the Rejection of Natural Right

A classic example of the argument that moral scepticism leads to a useless, even dangerous, debilitation comes from the political philosopher Leo Strauss. According to Strauss, a 'rejection of natural right leads to nihilism – nay, it is identical with nihilism'.[109] That immediate rewording clarifies that Strauss sees a nihilism in which one cannot 'really believe' in the 'principles of our actions'[110] as an unavoidable, logical entailment of a rejection of what he describes as "natural right". By "natural right" Strauss means the idea that something is 'intrinsically good or right',[111] by 'nature right' or wrong.[112] Furthermore, it is something which one can 'acquire...genuine knowledge of' via "rationality" or "reason"[113] and which can then be used to discriminate 'between legitimate and illegitimate, between just and unjust, objectives'.[114] The sceptical perspective taken here – with its rejection of objective rights and wrongs, the idea that concepts like "goodness" or "rightness" can have an "intrinsic nature", and therefore also the idea that "reason" or "rationality" can guide inquiry to these independent qualities – thus falls firmly within those perspectives which reject Strauss' "natural right". So, on Strauss' argument, accepting the scepticism brought to

[109] Strauss (fn11) 5.
[110] ibid 6.
[111] ibid 5.
[112] ibid 7.
[113] ibid 5.
[114] ibid 4.

this thesis necessarily means that one is unable to meaningfully believe in *anything* morally or ethically substantive, and unable to consistently recommend or act on any such principle.

Strauss builds up to this negative conclusion by arguing that once we reject natural right, we are 'resigned to utter ignorance'; 'we cannot have any knowledge regarding the ultimate principles of our choices'.[115] This means that the ultimate principles we rely on 'have no other support than our arbitrary and hence blind preferences'.[116] But '[o]nce we realize that the principles of our actions have no other support than our blind choice', he continues, 'we do not really believe in them any more'.[117] Not believing in the principles we hold means 'we cannot live any more as responsible beings' while acting on them;[118] as Strauss bluntly puts it, we are left 'gamb[ling] like madmen'.[119] Thus a sceptic is condemned by their philosophy to an irresponsible life in which they cannot coherently believe in or act on anything. As Pocklington summarises the point, if one does not claim that their values 'can be validated by appeal to some independent tribunal, then one has no ground whatsoever for preferring one value to another, or for challenging the views or actions of others'.[120] This is another of the 'disastrous consequences' supposedly bound to follow from an acceptance of the sceptical viewpoint.[121]

3.2.1 Existing Criticism

Strauss' arguments – and others of its kind – claiming a logical connection between a denial of natural right and objective foundation for moral principles on the one hand, and some

[115] ibid.
[116] ibid.
[117] ibid 6.
[118] ibid.
[119] ibid 4.
[120] TC Pocklington, 'Philosophy Proper and Political Philosophy' (1966) 76 Ethics 117, 118.
[121] Strauss (fn11) 3.

kind of moral nihilism on the other – have been strongly criticised by others. For example, Pocklington responds that such a connection is not actually, as a matter of strict logic, possible. This is because the statements that are made by theories within pure philosophy concerning the meta-ethical status or groundability of moral premises – those of the kind which deny objective or natural rights and wrongs – and those that occur in substantive moral theories 'are of logically different types'.[122] They are claims of different kinds, expressing views on different topics; those occurring in the latter are 'normative judgments', describing particular 'states of affairs as good' or particular actions as 'virtuous', whereas those that occur in the former can be distinguished as 'statements *about* [those] statements'.[123] Being on such logically different planes – effectively making claims on two different subjects – undermines the idea that there are any strict, necessary logical connections between theories like scepticism, or realism, and normative theories which make claims in the realms of substantive morality.

Oppenheim also uses this line of reasoning to reject the idea that a denial of objective grounding for moral principles entails an ethical indifference or nihilism in the way that Strauss suggests. A denial that a particular course of action or state of affairs is 'intrinsically just or unjust' does not, by itself, entail anything about how one applies those terms in their substantive claims – whether this be a particular moral claim, or an indifference to all such claims.[124] Hence those of a sceptical disposition are free to, for example, 'favor discrimination or equality...practice intolerance, tolerance, or over-tolerance',[125] to 'prefer democracy, to favor autocracy, or to have no preference for either' without contradiction.[126]

[122] Pocklington (fn120) 122.
[123] ibid.
[124] FE Oppenheim, 'In Defense of Relativism' (1955) 8 The Western Political Quarterly 411, 415.
[125] ibid (footnote omitted).
[126] Oppenheim (fn108) 955.

However, while this criticism is well-put in pointing out the gap between making a moral claim, and making a claim *about* such a claim, it is suggested that as a response to Strauss in particular it is incomplete and ineffective. A closer reading of Strauss suggests that his point is not as straightforward as simply saying that one cannot reject objective moral truths without thereby rejecting the moral views themselves – as this response implies. Rather, he is claiming that they cannot '*really* believe in them any more', and cannot act on them while remaining '*responsible* beings'.[127] In this sense, Pocklington's summary of Strauss' argument as saying that the sceptic 'can give no reasons for his ethical judgments',[128] or 'has no ground whatsoever for preferring one value to another'[129] – the version which he then proceeds to attack – is slightly misleading; it is not so much that sceptics cannot give *any reasons at all* for their substantive moral judgements and actions, but that they can give no *convincing* or *adequately supported* reasons. Addressing this aspect of the argument requires attention to be paid to what Strauss counts as "really believing" in something, and to his idea of what it means to hold beliefs and act on them in a "responsible" way. This attention takes one into Strauss' own meta-ethical stance – an area both Pocklington and Oppenheim leave untouched. This is not only problematic in leaving their analysis of Strauss' argument incomplete, but it also leaves their argument against the logic of his position ineffective. For if left unchallenged, it is suggested that these meta-ethical views would allow Strauss and others who take his side to avoid such criticisms concerning the logical distance between meta-ethical and substantive claims.

A close look at Strauss' argument reveals that by "real" belief, or "responsible" action, he means something like "those backed up by plausible claims to objective rightness". This is

[127] Strauss (fn11) 6 (emphases added).
[128] Pocklington (fn120) 119.
[129] ibid 118.

clear from the moves in his argument from the rejection of natural right to the resulting 'ignorance' and the idea that we are thereby left 'blind',[130] and then on to the claim that, being blind and blindly choosing what it is right and wrong to do, we 'do not really believe' in what we are choosing at all and so do not act responsibly.[131] The problem is the "ignorance" and "blindness" *of those who reject natural right*; we can *have* commitments, we can *act* on them, but, being ignorant and blind of anything other than those preferences we cannot *adequately* support them, cannot *sensibly* believe in them, and cannot *responsibly* hold and act on them. From this argument, we can draw Strauss' view of what a "real" or "responsible" belief is: it is one which is not based on ignorance and which is not blindly held. This leads to the question: "ignorant or blind of what?"

The answer is clear from recalling the main concern of Strauss in this work, and which is repeatedly referred to in the section in which this argument is found; "*natural right*". Indeed, this seems to be the only plausible response to the question of what it is that a sceptic is apparently left blind to or ignorant of by virtue of their scepticism. It cannot be that we sceptics are blind to ourselves and our own preferences, for it is *these preferences and ourselves* which Strauss describes as "blind". Similarly, Strauss cannot mean that sceptics are left ignorant of their own preferences, because he is describing our blind reliance on our preferences as "ignorant" (there is also the question of how anyone could be said to be relying on preferences it turns out they are utterly ignorant of). So, Strauss must be referring to something over and above our own preferences and commitments; that is, for his claims to make sense he needs to say something like "blind to the independent truth of the matter", "to the intrinsic nature of, say, justice, or goodness" or "right reason", or something else independent of the individual and their preferences. For Strauss then, without the backup of

[130] Strauss (fn11) 4.
[131] ibid 6.

a plausible claim of correspondence to some kind of "natural right" or mind-independent objective moral truths or qualities one cannot, adequately, really, believe in anything.

On this reading, and contrary to the classic criticisms noted above, Strauss' argument is logically sound when taken on his own terms. If Strauss is making a claim regarding the sceptic's inability to "really believe" in anything or to act "responsibly" as concerns matters of morality and ethics, and then defines those qualities as requiring correspondence to natural right and objective truth – or at least as believing that they have such status – then a rejection of natural right and objective truth cannot *but* lead to a situation in which the sceptic does not really believe in anything. There is no logical gap here – as the existing criticism above relies on – because the meta-ethical, philosophical element has, from the start, effectively been defined into what it means to hold a substantive view at all. To *really* believe something is to believe it to have the support of something over and above the preference itself and the individual making it, or at least to believe that there is a plausible case that it could have such a foundation. This is not something the sceptic can accept, and therefore they cannot really believe in anything. Thus, on these definitions, the sceptic cannot but be – logically – a moral nihilist incapable of any meaningful substantive commitment or preference. Therefore, Strauss' claim avoids the logical criticisms of the likes of Oppenheim and Pocklington, as they present them.

3.2.2. A Thoroughly Anti-Foundationalist Criticism

However, while Strauss' linking of scepticism to an irresponsible and debilitating nihilism can be seen as logical when clarified in the way just set out, its reliance on such a reading itself renders it problematic on other grounds. These grounds stem directly from the sceptical viewpoint. The conceptions of "real" belief, "ignorance" and "blindness" which are relied on in Strauss' argument, and which were drawn out above, reveal that he is operating firmly

within a realist-foundationalist mindset; he is relying on concepts the sceptic rejects to try and establish that scepticism *itself* entails a nihilistic ethical indifference. For example, in claiming that a rejection of natural or independent right and wrong resigns the sceptic to 'utter ignorance' and "blindness",[132] Strauss first must assume there is something to be ignorant *of*, or blind *to* – otherwise the claim makes no sense (ignorant of *what*?). As already noted, this is his "natural right", or something over and above the individual and their claims, whatever specific label one uses to refer to that realist idea. The sceptic is ignorant – lacks knowledge of – 'what is intrinsically good or right'.[133] Clearly, only someone holding on to the idea of natural right can write of someone's being ignorant of or blind to it, just the same as only someone holding on to this idea can meaningfully speak of the possibility of gaining knowledge of its contents and requirements.

Thus, if one really rejects this idea, as the sceptic does, then it makes no sense to say that they are ignorant or blind to some independent "right" because there is simply *nothing to be ignorant of or blind to*. So, while Strauss repeatedly writes of a "need" for natural right[134] it is suggested here that *he* is the only person who needs it; his argument from scepticism to nihilism does not work without it. This is because only if one relies on this idea does it make sense to say that we do not "really" believe in something unless we claim authority beyond ourselves, or that in refusing to entertain such an idea we are rendering ourselves "blind" or "ignorant" and so cannot act "responsibly".

Once this is recognised, it becomes clear that the argument Strauss makes from scepticism to ignorance and so to a lack of "real" or "responsible" belief is one that can only be made

[132] ibid 4.
[133] ibid 5.
[134] See, for example, ibid 2 ('the need for natural right is as evident today as it has been for centuries and even millennia'); ibid 6 ('the seriousness of the need of natural right...').

from a realist standpoint, and therefore only if one does not actually accept the scepticism which rejects that stance and the ideas within it. Thus, there is only the link between scepticism and nihilism that Strauss claims if one is not in fact a sceptic – at least in the sense of the term used here – and *that* is not a link *from scepticism* at all; it is a link from a peculiar combination of both scepticism and realism. Taken on their own terms, the sceptic is not condemned to a meaningless nihilism and is free to hold and argue for their commitments. All a sceptic is prevented from doing is claiming the status of an objectively justified commitment. But *that*, of course, is scepticism's very point. It is therefore submitted that the link from scepticism to nihilism is not established.

3.3. Dworkin: Nihilism as the Rejection of "Face-Value" Morality

Another, more recent, argument seeking to show a moral nihilism in which the individual can no longer believe in, consistently hold, or act on any moral convictions as an entailment of scepticism comes from the influential legal philosopher Ronald Dworkin. Dworkin's argument centres on the claim that '[i]f anyone is persuaded to give up' what he calls 'the face-value view of morality, he must surrender morality along with it'.[135] This "face-value view", which Dworkin claims 'you and I and most other people have', holds that our moral views are "true", and "objectively" so.[136] So, for example, holding the view that 'genocide...is wrong, immoral, wicked, odious' means that '[w]e also think that these opinions are true'.[137] Indeed, we may even be so confident so 'as to say that we know they are true', meaning that 'people who disagree are making a bad mistake'.[138] But more than this, on the "face-value

[135] Dworkin, 'Objectivity and Truth' (fn7) 97.
[136] ibid 92.
[137] ibid.
[138] ibid.

view" '[w]e think that our opinions are not just subjective reactions to the idea of genocide, but opinions about its actual moral character'.[139] In other words, 'it is an objective matter – a matter of how things really are – that genocide is wrong'.[140]

The sceptic Dworkin targets with his argument appears to reject this "face-value" view. They reject the idea that practices like slavery or genocide, for example, 'are *really* wrong, or that their wrongness is "out there" in reality' as opposed to such 'moral convictions' being the 'products of our invention or manufacture'.[141] Events and states of affairs are not 'right or wrong good or bad, apart from our emotions or projects or conventions'.[142] The perspective set out earlier in this thesis is thus one which seems incompatible with the "face-value" view set out by Dworkin. Its rejection of the concept of "intrinsic natures" leaves no room for the idea that opinions can be taken as descriptions of the "actual moral character" of particular actions or states of affairs. The claim that those opinions can be true independently of what people believe – as a "matter of how things really are" – goes with its discarding of the idea of objective morality and the claim that something can have a certain moral quality – goodness, rightness, wrongness etc – independently of what particular individuals or groups describe it as. So according to Dworkin, the scepticism taken here is committed to rejecting morality as a whole as a consequence of claiming to reject the "face-value" view of moral convictions.

Dworkin has made this suggestion several times throughout his work. For example, in *Law's Empire* he claims that one cannot hold a moral commitment without maintaining the view that it is objectively – as a matter of how things really are – true; one 'cannot intelligibly

[139] ibid.
[140] ibid.
[141] ibid.
[142] ibid.

hold the first opinion as a moral opinion without also holding the second'.[143] Likewise in his final work, *Justice for Hedgehogs*, Dworkin writes that 'no one can coherently embrace' a substantive moral claim such as that 'torture is always wrong without' *also* embracing a second judgement along the lines of 'the wrongness of torture is a matter of objective truth that does not depend on anyone's attitudes'.[144] The consequence is that one 'cannot discriminate' among these and suppose 'that only the latter were mistakes'.[145] So, for example, if the sceptic rejects the idea that any moral judgement 'really is better than any other, he cannot then add that in his opinion slavery is unjust'.[146] The sceptic cannot 'reserve his skepticism for some quiet philosophical moment, and press his own opinions about the morality of slavery...when he is off duty'[147] in such a way, for the two claims – the original moral claim and the further claim concerning its objective status – come hand in hand.[148] As Allan puts it, then, Dworkin's view is that the sceptic 'has to be a first-order nihilist who is neutral on all questions of content'.[149]

3.3.1 The Core of Dworkin's Case: Collapsing the Distinction Between Substance and Status

Dworkin supports this claim by essentially collapsing a distinction between substance and status – the kind of distinction seen above in the classic responses to the scepticism-as-nihilism critique (see above, **section 3.2.1**) – within the "face-value" view the sceptic challenges. Dworkin's argument is that no meaningful distinction can be found between

[143] Dworkin, *Law's Empire* (fn8) 82.
[144] R Dworkin, *Justice For Hedgehogs* (Harvard University Press 2011) 52.
[145] Dworkin, *Law's Empire* (fn8) 82.
[146] ibid 85.
[147] ibid 84.
[148] See also R Dworkin, *A Matter of Principle* (Harvard University Press 1985) 172 ('If some argument should persuade me that my views are not really true, then it should also persuade me to abandon my views about slavery').
[149] Allan, *A Sceptical Theory of Morality and Law* (fn44) 162.

first-order, substantive moral claims of the kind the non-nihilist sceptic wants to leave standing (that genocide is wrong, for example), and the supposedly second-order claims regarding the status of such moral evaluations which the sceptic rejects (that genocide is *objectively* wrong, as a *matter of how things really are*, and *would be even if no one thought so*).

The importance of this distinction is that by regarding the 'face value view – that our belief about genocide is true and that it describes an objective matter' as a series of second-order 'external' propositions concerning the 'nature' or status of moral judgements, the sceptic can reject it while leaving the first-order 'internal' propositions 'untouched'.[150] By saying that they are making claims not 'about the substance but about the status of their convictions' – merely denying their 'objective truth' – the idea is that sceptics can effectively 'have their moral convictions and lose them too'.[151] They can maintain their scepticism but also consistently continue to hold moral beliefs, judge, and act on them. The other side of this is that, if the distinction does not hold, then the sceptic cannot deny the objective truth of the moral claims they make without also denying the claims themselves. Therefore, by rejecting objective moral truth generally, the sceptic loses the ability to hold any moral convictions at all. Put bluntly, something has to give; the sceptic must either give up their scepticism or give up their substantive moral beliefs.

3.3.1.1. "Further" Claims to Objective Status as First-Order Moral Claims

To show that this distinction does not hold, Dworkin begins by imagining a situation in which he is 'speaking at length about abortion'.[152] He starts with the claim that '"[a]bortion

[150] Dworkin, 'Objectivity and Truth' (fn7) 92–93.
[151] ibid 93–94.
[152] ibid 96.

is wrong"',[153] before quickly adding a set of 'further claims' which he identifies as the 'favorite targets' of the sceptic.[154] These further statements see Dworkin claiming, among other things, that '"[m]y opinions are true"', are '"really and objectively true"', meaning that '"[t]hey would still be true...even if no one but me thought them true"', and indeed even '"if I didn't think them true"'.[155] They are '"reports...of how things really are out there in an independent, subsisting, realm of moral facts"'.[156] He then asks 'two questions...about these further claims'.[157] Firstly, 'can we find a plausible interpretation or translation of all of them that shows them to be positive moral judgments themselves – either restatements or clarifications of the original first-order' proposition they follow?[158] Secondly, can we find a plausible 'interpretation or translation of any of the further claims...that shows it not to be a first-order proposition but to be a philosophically distinct proposition instead?'[159]

In answering 'the first question yes, and the second no', Dworkin claims to show that 'archimedean neutrality is an illusion'; if one gives up 'the face-value view of morality', of which the further claims are an essential part, then one 'must surrender morality along with it', because a denial of one is a denial of the other.[160] Through their claims against the objectivity of values, then, the sceptic is committed to a first-order nihilism in which they lose all ability to hold *any* substantive moral convictions.

James Allan describes this argument as 'deeply flawed'.[161] It is flawed because, Allan argues, there is a logical difference between '[t]aking a position on the status of values', and taking

[153] ibid.
[154] ibid 97.
[155] ibid.
[156] ibid.
[157] ibid.
[158] ibid.
[159] ibid.
[160] ibid.
[161] Allan, *A Sceptical Theory of Morality and Law* (fn44) 162.

a position on 'the best content of values *provided one rejects moral objectivism*'.[162] What Allan means by this is that 'one is completely free to recognise' both '(A) "X thinks Y is wrong"' and '(A_1) "X does not think Y, or anything else, is 'objectively' wrong"', unless they see evaluation in realist terms of 'discovery, and not creation'.[163] A sceptical evaluator can hold to both propositions and 'remain consistent' because, for them, evaluation does not involve a process of discovery or representation of anything other than the preferences and convictions of the individual, and it is claims to such a status or quality that the sceptic objects to as a consequence of their own theory.[164] Thus when the sceptic says "Y is wrong" they are not making any claim to the status they deny with the rider "but not objectively so", nor indeed necessarily any claim about the status of that conviction at all.

This response is, on its own terms, logically sound; if the sceptic does not regard their evaluations as having a status over and above themselves and their preferences, then their disparaging of the idea of such a status, and the claims to such that others may make ("Y is objectively true"), leaves those evaluations ("Y") untouched. This is familiar logic, seen earlier in the classical response given to the likes of Strauss discussed above (**section 3.2.1**). However, this response does not directly address the reasoning behind *Dworkin's* linking of the sceptical rejection of claims to "objectivity" to a denial of first-order moral claims. It does not address the collapsing of the very distinction this kind of response relies on that Dworkin engages in.

As outlined above, that reasoning was more focussed on what the further claims surrounding "objectivity" that the sceptic rejects in the "face value view" amount to than on what the original moral claims they wish to leave untouched mean. Dworkin's point is that the further

[162] ibid 162–163.
[163] ibid 163.
[164] ibid.

"objectivity" claims *are to be interpreted* as reiterations or clarifications of the original moral claims and hence that rejecting them entails a rejection of the latter, not that the sceptic's moral claims are purporting to have an external status which the sceptic wants to deny, meaning that the sceptic undermines their own moral claims in the process. Allan's pointing out that a sceptic would not interpret their own moral evaluations in this external way in the first-place addresses only this latter criticism, leaving Dworkin's argument surrounding the interpretation of the further "objectivity" claims untouched.

3.3.1.2. Back to Scepticism: Whose Claims are they Anyway?

However, by drawing attention to the sceptic's own understanding of moral evaluation, Allan's response shows a focus on the views and interpretations *of the sceptic* which it is suggested here is important when drawing out the logical consequences of their position. Taking this focus leads to a more fundamental, and on-point criticism of Dworkin's approach of relying on a particular interpretation of the further claims the sceptic is taken to oppose.

Assume for the moment that Dworkin is right in his claim that the only plausible interpretation of the further claims to "objectivity" made by those who hold the "face-value" view is as themselves just another way of putting the original, clearly substantive first-order moral judgements. That is, assume that this is the reading 'that captures what anyone who made [them] could plausibly be thought to believe', so that it can serve as the best indicator of what those making the further claims actually mean by them[165] (this claim will also be challenged below, however. See **section 3.3.3**).

This does not carry the significance that Dworkin claims it does for the sceptic – that they undermine the moral judgements they wish to leave standing as a result of their scepticism

[165] Dworkin, 'Objectivity and Truth' (fn7) 97.

about the further objectivity claims. It does not carry this significance because Dworkin's argument is focussed on what those making the kinds of further claims the sceptic appears to object to should be taken as meaning by those claims, while his conclusion is focussed on what *the sceptic* is committed to accepting or rejecting. Yet what those making the further claims mean by them says nothing of what *the sceptic* means when they make the claims *they* do regarding the lack of objective defensibility of moral convictions.

This gap is problematic for Dworkin given that he clearly intends his arguments as a criticism of *the sceptic*. Dworkin's conclusion is that it is *the sceptic* who cannot be sceptical about moral objectivity while leaving substantive morality untouched. It is *the sceptic* who cannot deny that their moral claims are "objectively true" independent of what anyone, themselves included, happen to think or believe while continuing to press their own opinions on, say, the (in)justice of slavery,[166] and it is *the sceptic* who Dworkin claims cannot 'reject the thesis he opposes...that moral judgments are candidates for objective truth, without also rejecting the first-order, substantive moral declarations he wishes to leave standing'.[167] Surely in making a claim as to what someone is logically committed to saying or not saying on the basis of the claims they make it is essential to establish what *they* say, and what *they* mean by it. It would certainly be surprising, to say the least, to find that someone is committed to a particular outcome because of what *someone else* says. Thus, the crucial factor in determining whether the sceptic is committed to a rejection of all morality, their own included, as a result of rejecting the objective validity and defensibility of moral convictions is what *the sceptic* means by their denial of objective moral truth, and how *they* understand the kinds of ideas they are objecting to. What Dworkin, or anyone else for that matter, means when they claim objective validity for their moral claims says nothing directly

[166] Dworkin, *Law's Empire* (fn8) 85.
[167] Dworkin, *Justice For Hedgehogs* (fn144) 59–60.

of this and, as a result, Dworkin's interpretive argument risks suffering the fatal flaw of irrelevance to the conclusion he wishes it to support.

So, if Dworkin's interpretations of the further objectivity claims are to have any chance of establishing his conclusion that the sceptic's rejection commits them also to the rejection of first-order moral claims, he must first establish a link between his or others' interpretations of those objectivity claims – claims which the sceptic does *not* make – and what the sceptic is committed to saying on the basis of the claims they *do* make. Without such a link, there remains a problematic gap between what the sceptic denies in their rejection of the objective validity of moral claims, and what Dworkin interprets the "face-value" view's acceptance of such validity as meaning. If there is a gap between what the sceptic intends to deny with their rejection of claims to objectivity, and what those who claim objective validity for their moral claims mean to accept in such claims, then it would seem that the sceptic is not denying the "face-value" view after all. Put another way, if the "face-value" supporter does not mean to claim anything other than their first-order substantive support for the moral claim at hand when they add the further propositions concerning the objective validity of that claim, the immediate implication is that they are not saying anything the sceptic objects to after all. Dworkin would have clarified away the substance of the apparent disagreement. It is thus imperative that Dworkin draws a link between what *he* claims those taking the "face-value" view of morality mean in making, and what *the sceptic* means in denying, the claims to objectivity.

3.3.2 Tying the Sceptic to the "Face-Value" View

It is difficult to find any such explanation, at least an explicit one, in the article where this argument is made in its most detailed form,[168] but, given that Dworkin seems to – and indeed needs to – to assume that there is such a link in his argument it is perhaps important to try and construct one, in order to give his case a thorough hearing.

3.3.2.1 Keeping the Sceptic Relevant: Dworkin's Interpretive Favour

A possible link could look something like the following: while what people mean in making the further claims of the same form – that is, expressed using similar wording – to those the sceptic rejects in their own anti-objectivist claims says nothing directly of what the sceptic means by their denial, it does say something about the *relevance* of what the sceptic says. If it turns out that when people make claims concerning the objective validity of their moral assertions they are saying something different to what the sceptic claims to be denying via their theory then their scepticism would be irrelevant – the sceptic would be attacking a straw-person and arguing straight past their actual opponents. Perhaps, therefore, in order to save the sceptic from irrelevance we should interpret their arguments in a way that targets claims people *actually* make and this is why it is important to consider closely what the further claims amount to as intended by those who make them. This would make the issue of how those claims can or cannot plausibly be interpreted of some significance, as a guide to working out what people generally mean by them, and what the sceptic must therefore be taken to be objecting to *if they are to be engaged in a genuine disagreement.*

While this is not explicitly stated by Dworkin in his main article on the subject, it does fit with what he has written elsewhere. For example, in *Law's Empire* he writes that '[w]e do

[168] Dworkin, 'Objectivity and Truth' (fn7).

better for [the sceptic]...by seeing how far we can recast his arguments as arguments of internal skepticism', by which he means, seeing if we can 'understand him to be accusing us [realists or objectivists] of moral rather than metaphysical mistakes'.[169] This is apparently "better" for the sceptic because otherwise they would be left attacking 'absurd claims we [Dworkin and the objectivists] do not make'.[170] The point is that if the sceptic wants to show that those making the further claims to objectivity are mistaken, 'he needs to match [their] reasons and arguments, [their] account of [themselves] as participants, with contrary reasons and arguments'.[171] Similarly, in *Justice for Hedgehogs* Dworkin claims that '[a]ny skeptical thesis that is pertinent cannot be external' to morality and neutral concerning first-order moral propositions in the required sense.[172] In other words, a *relevant* scepticism cannot do anything *other* than address the moral claims the sceptic wants to avoid addressing. To be otherwise, the sceptic would have to be able to 'find something in [the] further claims, something that is not a moral claim and yet whose denial has skeptical implications'.[173]

These comments may explain Dworkin's move from what *he* thinks the further claims should be taken as meaning, to what *the sceptic* is committed to in their apparent denial of them. They suggest something like the argument constructed above; unless the sceptic means to deny what other people actually mean by their claims to objective validity, they are not saying anything relevant in their theory, and it is therefore in their interests to be interpreted in line with the most plausible interpretation of those they are taken as targeting. So, perhaps, rather than suffering the pain of irrelevance in tying the sceptic to what others say, Dworkin is doing the sceptic *a favour*, presenting them in the best light possible by assuming that

[169] Dworkin, *Law's Empire* (fn8) 83.
[170] ibid.
[171] ibid.
[172] Dworkin, *Justice For Hedgehogs* (fn144) 55.
[173] ibid.

their rejection of the idea of the objective status of moral claims are denials of the most plausible interpretation of the claims that people make in those terms. Contrary to above, Dworkin would be saving the sceptic from the pain of irrelevance themselves.

3.3.2.2 Rejecting the Link

However, while Dworkin's apparent concern to do scepticism this favour is admirable for someone otherwise so trenchant in dismissing it throughout his career, it is contended that it suffers three flaws.

Firstly, if the main point of this interpretive strategy is that in attacking a position one needs to match the 'reasons and arguments' of those holding it, on their own 'account of [themselves] as participants, with contrary reasons and arguments' in order to be relevant,[174] then Dworkin is not really addressing the criticism raised above that this is precisely what *he is not* doing to the sceptic he claims to be attacking. Dworkin's attack on the sceptic does not attack them *as they define and regard themselves and what they say.* Rather, Dworkin attacks the sceptic interpreted quite strongly in light of what *he himself and others* say. As such he is not living up to his own standard. Indeed he seems to be doing precisely what he wants to save the sceptic from doing to others – attacking 'claims we do not make'.[175] This approach is ill-fitting – to the point of being *disingenuous*, even – of someone who, when it comes to *his own* claims and those of other objectivists he wishes to defend, is otherwise at pains to draw attention to what 'people actually say'[176] and what they 'actually' mean by the words they use.[177] If the sceptic does not intend to deny the first-order moral claims with their rejection of moral objectivity, and instead claims to deny something external, Dworkin

[174] Dworkin, *Law's Empire* (fn8) 83.
[175] ibid.
[176] Dworkin, 'Objectivity and Truth' (fn7) 99.
[177] ibid 98.

would, on his own standards, have to accept that they do not contradict themselves as he contends. Thus, it seems that when Dworkin wants to attack the sceptic, his own principles rather conveniently go astray.

Secondly, what reasons *can* be found for Dworkin's holding the sceptic to a particular interpretation of the claims of others – that they should be presumed to object to what those others most plausibly mean by those claims – treat the sceptic's position, and its purpose, as defined completely by a denial of Dworkin's so-called "face-value" view of morality. In other words, scepticism is seen as an entirely reactionary theory, existing only as the shadow of others and forced to adopt the vocabulary of others. But this definition is objectionable; the sceptic's perspective is not merely a response to those who claim "objective" validity for their moral assertions (whatever they see that claim as amounting to), any more than the realist or objectivist position is merely a response to those sceptics who reject that status. It is itself an account of what moral claims can or cannot amount to, how they are best understood, and of what issues arise from this. Such an account was offered in **Chapter 2**. Of course, a *consequence* of taking this perspective is that those theories which contradict its standpoint on the status and defensibility of moral claims are rejected to the extent that they differ (again, that extent depends on a symmetry between both the sceptic's account of what they are denying, as well as their opponent's account of what they are accepting), but this is different to saying that sceptic's own account of the status of moral claims – their understanding of moral evaluations and the issues these raise – *depends* on the claims of objectivists, or anyone else for that matter.

Thus, if it turned out that no one actually thinks, nor has ever thought, that a particular state of affairs could be right or wrong even if no one regarded it as such, the account of moral beliefs as being mind-dependent that the sceptic puts forward would remain much the same.

The sceptic's linguistic anti-foundationalist account of moral evaluation would still stand. The sceptic could still argue, on those grounds set out in the previous chapter, that this is a convincing account of moral evaluation. In short, the sceptic's account and the issues it raises – along with account of the road into normative, political and constitutional theory offered in this thesis – live outside the so-called "face-value" view of morality Dworkin is concerned with, rather than existing only as some kind of shadow of that view. As a result, it would be relevant on whatever interpretation of the further claims to objectivity one takes, and indeed even if no such claims were made at all. Dworkin's interpretation of the sceptic's claims in light of his favoured interpretation of the "face-value" view is therefore misguided. It is in effect an attempt to dominate the vocabulary of the sceptic, inappropriately chaining them to the language of the objectivist.

Finally, to suggest otherwise – and to tie the sceptic's views to what Dworkin sees as the best interpretation of the further claims within the "face-value" view – on the grounds Dworkin appears to would, logically, and simultaneously, lead to the reversal of his own argument. It would have the strange consequence that the so-called "face-value" view would *also* have to be defined in opposition to the scepticism Dworkin opposes, and with that Dworkin's entire argument could be easily reversed. This is because the further claims concerning the objective defensibility of moral propositions would need to be interpreted in a way that opposes what the sceptic *actually* says on that topic, or else suffer irrelevance in the same way he seems to suggest the sceptic might, on the logic set out earlier in this section. If the logic is, as noted above, that one must respond to opponents on their *own* account of their arguments, then this simply must be the case. Thus, Dworkin fails to recognise that, if his logic works at all, it works both ways.

So if the sceptic's point is that moral convictions have no validity independent of what people happen to believe, and *they* regard this as a second-order claim about status rather than merely a repetition or clarification of whatever first-order moral proposition is being discussed, then the further claims to objectivity within the "face-value" view must be read in the same way, in order to themselves be pertinent. The further claims to objective validity independent of what people think would now have to claim the status the sceptic rejects, and thus would have to be taken as more than restatements of the original substantive moral claims – the exact opposite of the interpretation Dworkin wants. This undermining of his own argument surely cannot be the consequence intended by Dworkin, yet it is the result of following the logic set out above. We "do better" for Dworkin therefore – to adopt the sometime Dworkinian technique – by setting this already questionable logic aside. His argument surrounding the interpretation of the "face-value" view and the further claims to objective validity within it is therefore left misdirected at the sceptic; its relevance is itself questionable and it cannot show what Dworkin claims.

The link between the "face-value" view of objective morality – on Dworkin's interpretation – and the sceptic's rejection of that concept – is therefore wholly unconvincing, and his argument unfit for purpose.

3.3.3 The "Face-Value" View of Morality: A More Plausible Interpretation

However, the flaws with Dworkin's attack on the sceptic do not end there. Even leaving aside the problems with Dworkin's technique of tying of the sceptic's perspective to an interpretation of the so-called "face-value" view, and assuming that Dworkin has successfully and coherently established the pertinence of this interpretive strategy, it is suggested that it does his own argument no favours. This is because his assertions of what

the further claims he draws from the "face-value" view amount to or most plausibly mean are themselves unconvincing.

To see why, we must return to Dworkin's interpretive argument and the reasoning within it. Recall that Dworkin's argument depends on a specific answer to the two questions he raises about the further objectivity claims he identified as the "face-value" view. His case is that '[i]f we answer...yes' to the question of whether a 'plausible interpretation or translation of all of' the further claims 'that shows them to be positive moral judgments themselves' can be found, and then 'no' to the second question of whether 'we can find an interpretation or translation' of any that shows it to be anything other than a first-order, substantive moral proposition, then 'neutrality is an illusion'.[178] The sceptic cannot deny the "objective status" of moral claims without thereby denying the substance of the moral claims themselves.

3.3.3.1 Reading Objectivists "Naturally": Dworkin's Assertion

Dworkin argues that it is 'easy enough to answer the first question yes', as he does, 'because the most natural reading of all of the further claims shows them to be nothing but clarifying or emphatic restatements or elaborations' of the original moral proposition – in his example, the original claim that 'that abortion is wrong'.[179] Someone who adds 'in a heated moment, "It is just true that abortion is wrong"' does so as no more than an 'impatient restatement' of the substantive position they just declared – that abortion is morally wrong.[180] Dworkin accepts that '[s]ome of the other further claims do seem to add something to the original claim', but read naturally they do this 'only by substituting more precise [first-order moral propositions] for it'.[181] For example, those who use the terms '"objectively" and "really" in a

[178] ibid 97.
[179] ibid.
[180] ibid 97–98.
[181] ibid 98.

moral context do so to *clarify the content* of their opinions' –they mean to 'distinguish' those opinions from 'other opinions that they regard as "subjective"', that is, as 'just a matter of their tastes', like a dislike for football[182] or a particular flavour of ice cream.[183] What Dworkin means by this is that '[t]he claim that abortion is objectively wrong seems equivalent...in ordinary discourse, to another of the further claims...that abortion would still be wrong even if no one thought it was.'[184] This, again 'read most naturally, is just another way of emphasizing the content of the original moral claim...that abortion is just plain wrong, not wrong only because people think it is'.[185] This is the explanation Dworkin offers as to why a "plausible" translation of the further claims as themselves substantive moral claims, either repetitions or clarifications of the original claims they attach to, can be found; it can be easily found because that is the most natural interpretation of those claims.

What is immediately striking, however, is how little substance the above line of reasoning actually has. It amounts to saying that a substantive interpretation of the further claims as repetitions, clarifications or elaborations of the original moral claims can indeed be found, and should be taken, because that is how the claims are most naturally understood, that they are most naturally understood that way because that is what people actually mean by them, and that we can tell that this is what most people actually mean by them because it is what the claims mean when read most naturally. This is just mere assertion and repetition of the idea Dworkin is trying to establish – that his interpretation, on which his argument against the sceptic depends, is the most plausible – and as such, it begs the question: *is* this interpretation how the further claims are most naturally understood? *Is* it what people should be taken as meaning by them? On this basis, it is suggested that if this vacuous and circular

[182] ibid (emphasis added).
[183] Dworkin, *Law's Empire* (fn8) 81.
[184] Dworkin, 'Objectivity and Truth' (fn7) 98.
[185] ibid.

argument is the basis on which we are supposed to accept that when people make the further claims to objectivity they "actually" or "really" mean them in the way Dworkin claims undermines the sceptic – or should be taken as such – then it is plain unconvincing. It *cannot* be convincing because Dworkin's argument has moved nowhere from the original claim he is making – that the further claims should be understood as substantive repetitions or clarifications.

3.3.3.2 Reading Objectivists Naturally: A More Plausible Interpretation

Furthermore, in addition to being merely asserted, it is contended that a close analysis of the further claims shows that Dworkin's reading is *not* the "most natural" interpretation of the further claims to objectivity. To begin with, there could be said to be something of a presumptive case against Dworkin's interpretation, or at the very least that one should treat with suspicion the assertion that the further claims are intended to say much the same thing as the original claims, despite the different wording, and despite their coming alongside the original claims already made. Dworkin's argument must satisfactorily answer the following question: why would one bother to make the further claims at all if they were not intended to add anything more or different to them? If the intention were merely to repeat the original claim, then why not simply *repeat the original claim*? But then Dworkin does concede that they may indeed add *something*, it is just that what they do add is apparently nothing significantly different; they 'clarify' and provide 'more precise' versions of the same first-order propositions they attach to.[186] The extra precision provided is the statement that, for

[186] ibid.

example, 'abortion is just plain wrong, not wrong only because people think it is',[187] or as he later puts it that its 'wrongness...does not depend on anyone's thinking it wrong'.[188]

As we noted above, Dworkin relies on the idea that these last claims are 'just another way of emphasizing the content of the original claim',[189] but it is not clear that they are. The most obvious and natural interpretation of this formulation is, it is suggested, as a separate claim regarding the status of that moral judgement. If something would still be wrong even if no one actually believed it to be so, and if its wrongness therefore does not depend on anyone's thinking or declaring it to be so, then the implication has to be that "wrongness" is a quality outside of, and independent of, people and their beliefs. If it were otherwise, and not a commitment to the idea that wrongness has a belief-independent intrinsic nature – one that would be correct whether anyone described it that way or not – then its content and application would *depend on belief* after all and the claim would be undermined. If it turned out to be the case that no one, including the evaluator, believed that something was wrong, and wrongness had no external content or criterion outside of belief, then it logically follows that that something would not be wrong. Thus, it is difficult to see what this can be if not a positing of the existence of such a quality or property; the idea that "wrongness" has a discoverable intrinsic nature to serve as a criterion for its application independent of one's descriptions of it. That is, a content which would still exist regardless of whether anyone described it that way or not.

If the idea of such intrinsic content or external properties sounds absurd, it is argued, that is because it is; it is problematic for the reasons set out in the previous chapter when setting out the sceptical stance taken in this thesis, and the grounds on which the realist-

[187] ibid.
[188] ibid 99.
[189] ibid 98.

foundationalist is rejected. But its flaws do not speak on the issue of whether this is what the further claims most obviously, and most plausibly amount to on the logic above. The plausibility of a particular argument, and the plausibility of a particular *interpretation* of that argument are distinct issues. After all, if we somehow had to sympathetically understand and interpret all arguments in a way which removes their flaws and makes them convincing – if we strengthened and consistently rolled out Dworkin's sometime-concern to 'do better' for his opponents, that is[190] – then there would never be any genuine disagreement, largely because would-be opponents would not be engaging with one another.

But the key point is that whatever its merits or demerits, the claim concerning the mind-independence of moral qualities like "wrongness" as interpreted above is not obviously a substantive claim about the substantive *content* of wrongness itself – it is one about its *nature* as independent of belief. Taken at face value, they are more obviously extra and separate claims regarding the status of the original moral claims as in accordance with something independent of, and beyond those beliefs. This undermines the basis of Dworkin's positive answer to the first question he posed – that a plausible interpretation of the further claims as moral propositions can be found because they are most naturally interpreted as repetitions or substantive clarifications of whatever proposition they are applied to.

As the interpretation Dworkin relies on turns out to be a forced and unconvincing one, his argument that if the sceptic wants to reject 'that moral judgments are candidates for objective truth' then they must also reject the 'first-order, substantive moral declarations he [or she] wishes to leave standing'[191] is likewise unconvincing, even assuming that Dworkin's interpretive claims about what the "face-value" view of morality amounts to say *anything* of

[190] Dworkin, *Law's Empire* (fn8) 83.
[191] Dworkin, *Justice For Hedgehogs* (fn144) 59–60.

what the sceptic means by their sceptical understanding of moral evaluation. Like Strauss' therefore, Dworkin's attempt to show that the sceptic is committed to a nihilistic undermining of their own moral convictions is unsuccessful, to say the least.

3.4 Conclusion

This chapter has dismissed attempts to paint scepticism as a dead-end, setting one out on a road *to* nowhere – a conclusion which would be fatal to the purpose of this thesis. The attempts to show that scepticism collapses into a debilitating nihilism, and therefore offers no way forward from core philosophy, it is contended, are unsuccessful.

The two accounts considered in detail – Strauss's classic "natural right" argument, and Dworkin's sustained interpretive strategy – have a fatal flaw in common: they attempt to substantiate their claim that *the sceptic* is committed to a nihilistic indifference by reading in their own presuppositions into the sceptic's arguments. The fatal – and somewhat obvious – flaw with that kind of approach is that it does not show that *the sceptic* is committed to anything. It cannot show this, because it is not the sceptic's position being considered, but a strange objectivist humouring of that position. Strauss's argument essentially takes only the shell of the sceptical argument – its broad form – and fills it with objectivist, realist, content to show what the sceptic is apparently committed to. Dworkin's does the same with his, for his purpose necessary, but wholly implausible interpretation of the "face-value" view and the sceptic's meaning in denying the objective status of moral claims. These kinds of argument are not fit for the purposes to which they are put.

Dworkin's more complex argument has the merit that he at least makes clear that he is tying the sceptic's arguments concerning the lack of objective status to the "most plausible"

interpretation of the claims of others – "objectivists" – evident in the so-called "face-value view" of morality. However, while his argument has this clarity, the interpretive strategy – forcing the sceptic into apparently internal moral claims based on what *other* people say, and then pointing out the disastrous implications – is fundamentally misguided. What logic can be found to make such a parasitic interpretive strategy pertinent does not work, and, ironically, would also lead Dworkin to the opposite conclusions to those he wants. It seems rather convenient that he fails to recognise this in his polemic against the sceptic. More than that, however, even accepting its relevance, Dworkin's claim to be relying on the most plausible interpretation of claims to objectivity in the face-value view of morality – his claim to be relying on what most people *actually* mean when they claim objective status for their claims – is vacuous, and, it turns out, rather forced. A more convincing account of what claims to objectivity amount to – a claim about *status* not *content* – was offered.

It is thus concluded that arguments that the sceptical position collapses into a useless nihilism are fundamentally misguided. We can dismiss these arguments for what they are: incoherent or otherwise wholly unconvincing realist strategies which fall wide of their intended target. The dead-end of nihilism disappears once one takes the sceptic on their own terms, focussing on the claims they actually make, based on the logic they actually use. The sceptic is thus, in theory, free to move forward, out of the realm of meta-ethical disputes and onto the road towards constitutional theory.

This chapter therefore clears the ground for the key contribution made by this thesis: showing that a *positive* case can be made in normative and constitutional theory, firmly grounded in sceptical philosophy. Having rejected arguments to the contrary *in theory*, the rest of this thesis will *demonstrate* what positive, constructive consequences, moral scepticism can offer.

Chapter 4

Groundwork for the Road from Nowhere: Consequences of Scepticism

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4.1. Introduction

Having in the previous chapter rejected the argument that the sceptical position leads unavoidably to a debilitating, useless nihilism, incapable of existing alongside any substantive commitments on the part of those who ascribe to it, this chapter begins the task of constructing a positive road from sceptical philosophy. It thus sets the thesis off onto the positive road from scepticism – with its anti-realist roots – into political and constitutional theory, which forms its core contribution. Having cleared the ground in the previous chapters, this chapter lays down some essential groundwork for this journey.

The first two sections examine in detail the roads taken – and, as will become clear, *not* taken – by two thinkers whose theoretical perspectives overlap with the sceptical viewpoint at the heart of this thesis: James Allan, and Richard Rorty. The purpose of this critical examination is to inform, and distinguish, this thesis's own road from scepticism. Allan is of interest as a moral sceptic who is also a well-known voice in constitutional theory – known for his strongly political constitutionalist and majoritarian approach. Of particular interest for present purposes is the relationship between these two aspects of his thought: his sceptical stance in moral philosophy, and his majoritarian approach to political and constitutional theory. While not making it quite as far as constitutional theory, Rorty's road

into political philosophy is of interest given the strong influence of his pragmatic anti-foundationalism on the scepticism presented here. As set out in **Chapter 2**, the scepticism taken in this thesis owes much to Rorty's arguments surrounding the ubiquity of language and human description in evaluative thought. Where Rorty goes from this shared premise is thus of particular interest. It is contended in this chapter that both of these existing journeys take wrong turns. In both cases, the link they draw between scepticism and their desired political theory is problematically reasoned at worst, and disappointingly weak at best.

An original, detailed analysis of Allan's road from his scepticism – claiming a link between his scepticism and his majoritarianism – is offered in **section 4.2**. While Allan indicates that his scepticism is playing some role – and indeed often suggesting quite a significant role – in setting him on the path to majoritarianism, it will be argued that this purported link is rather difficult to pin down. Following a close examination, and some reconstructive work, what link can be found turns out to be a rather indirect, cursory, and from the perspective of this thesis, disappointing one – one in which the sceptical perspective is doing little to no meaningful work (**section 4.2.3.1**). At best, the sceptical perspective performs a framing role, dismissing misguided pretensions to objective moral truth, and clearing the way for his sentiment-based argument that majoritarianism is "better" – with better consequences – than alternative approaches to political theory. Crucial to the argument of this chapter is that scepticism itself plays no – and in Allan's view apparently *can* play no – meaningful role in guiding the content of this "better". At least not in a sense which this thesis would see as meaningful.

This criticism gives rise to a discussion concerning the role scepticism *can* play in normative and political discourse – a matter on which Allan and this thesis differ (**section 4.2.4**). This thesis's argument might be seen as demanding that scepticism be put to purposes it is not

suited to, rendering the disappointment expressed at Allan misplaced. Indeed, it becomes apparent that Allan sees the consequences of scepticism as exhausted by its anti-objectivist ground-clearing exercise, something which then leaves him in a position to argue directly from sentiment and preference – as he believes the sceptic must. At this stage, having cleared the ground, he suggests, scepticism has nothing of interest to add to the substance of normative, moral and political debates – no substantive contribution to make to these matters. In contrast, it will be contended here that moral scepticism – at least on the form presented here – has more to offer normative theory than this, and in particular when it comes to political theory.

A similarly critical account of Rorty's road into political theory is set out in **section 4.3**. Rorty's anti-foundationalist contribution to political theory sees him set out a strongly ethnocentric political liberalism, inspired by the work of John Rawls. Rorty's contribution is centred on his somewhat infamous appeals to what "we" believe – a style of argument which has been heavily criticised by others. These criticisms are discussed in **section 4.3.2**. As with Allan, however, the more pertinent criticism this chapter offers surrounds the link between this approach, and anti-foundationalism: it turns out that Rorty's core philosophy is in fact doing little to no work in grounding his ideal political vision. Rather, it is Rorty's strong preference for a particular form of Leftist politics that is doing the work here – his own fundamental moral premises and not his anti-realist premises.

This reveals a, by this point familiar, point of contention regarding the limits and contribution of anti-realist philosophy (**section 4.3.5**). For Rorty, once the misguided artefacts of realist foundationalism are cleared away, the kind of philosophy which grounds this thesis has nothing substantive to add when it comes to political theory. Thus, as with Allan, for Rorty it allows us to *frame* a debate more congenially but can offer nothing helpful

to the debate itself. Its use has been exhausted by this early point of the sceptical journey. It will be seen that this has been a widespread view, and Rorty is often taken as authority for the point that anti-foundationalism has nothing to offer political theory. This chapter offers a different view, again contending that scepticism itself can play not merely a framing, but also a persuasive and constructive role in supporting stances in normative and political theory. Relying on the core features and underlying logic of the sceptical approach, with as few external assumptions as possible, allows one to construct a persuasive argument which can meaningfully be described as "sceptical".

The final part of the chapter begins the task of demonstrating this point, setting out what will become the key link between sceptical philosophy and political, and then constitutional theory in the chapters which follow. Putting this method into action and relying on the core features and underlying logic of the sceptical approach, **section 4.4** elaborates and argues for a particular conception of the individual which will inform the rest of the thesis. What will be termed the "Godlet Conception" conceives of the individual as an authoritative moral legislator. The individual is *the* authoritative moral legislator, and their evaluative descriptions are – like God's – performative: they do not describe "moral facts", they *create* them. Crucially, however, this authoritative aspect of the Godlet Conception is equalised among individuals.

The key to both of these features is the linguistic basis and logic of scepticism itself, as set out in **Chapter 2**. Once morality is seen as the construction of language, and the idea of any extra-linguistic constraint on its content is dropped, the language-bearing individual is left in position of evaluative freedom. Put bluntly, in the absence of any higher authority, the holder of language steps into the metaphysical shoes that "the way things are", "Truth" – and often God – once filled. This conception of the individual is thus offered as a more

persuasive consequence of scepticism than the road taken by Allan and Rorty; it flows persuasively and directly from the underlying features and logic of scepticism itself. In this sense it is commended as a sceptical conception of the individual. As will be seen in the following chapters, this conception is key to the moves this thesis makes in political and constitutional theory. This section thus forms a core part of this thesis's contribution.

4.2. James Allan: From Scepticism to Majoritarianism

Allan is prominent in constitutional scholarship as a majoritarian – and a proudly 'unashamed majoritarian', at that.[192] He is a strong critic of "counter-majoritarian" devices, such as judicially-enforced Bills of Rights, favouring an unbridled political majoritarianism for societal decisions, particularly those concerning rights.[193] For present purposes, what is of particular interest is that Allan is also an ardent *moral sceptic*. As noted earlier in **Chapter 2 (section 2.2)**, his rejection 'of the existence of objective or "real" or higher order or mind-independent values'[194] has significant overlaps with the scepticism offered in this thesis. As such, Allan's moves from philosophy and into constitutional theory are of particular interest for the purposes of this thesis.

A particularly pressing question concerns the relationship between these two aspects of his thought: what, if any, is the link between Allan's majoritarian inclinations in political and constitutional theory, and his sceptical stance in moral philosophy? As we will see, Allan has indicated a number of times that there is *some* link between the two, but in precisely

[192] J Allan, 'An Unashamed Majoritarian' (2004) 27 Dalhousie Law Journal 537, 537.
[193] See further, for example, J Allan, 'Bills of Rights and Judicial Power - A Liberal's Quandary' (1996) 16(2) Oxford Journal of Legal Studies 337; J Allan, 'Rights, Paternalism, Constitutions and Judges' in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002).
[194] Allan, *Sympathy and Antipathy* (fn57) 89.

what way, if at all, does Allan's scepticism inform, or perhaps even justify, his majoritarianism? Answering this question – or at least attempting to do so – seems a useful point of entry into the task of exploring the broader question of the positive implications of moral scepticism for political and constitutional theory.

4.2.1. Linking Scepticism and Majoritarianism

In some of Allan's work, one does find indications that scepticism is doing some significant work in setting him on the path to his majoritarianism when it comes to decision-making. In fact, at times, quite a direct link is suggested, presenting his majoritarian outlook as a *consequence* of his moral scepticism. For example, in an essay in which Allan purports to consider 'scepticism and its ramifications',[195] he writes that a 'consequence of translating values into a function of human sentiments' – which on his sceptical view, is all they can be in the absence of any mind- independent content – 'is that "rightness", to the extent that it has any external or non-subjective element, becomes a shorthand for the sentiments of the majority'.[196] Similarly, he declares, '[o]nce [normative values] are tied ineradicably to the…feelings and sentiments of people there can ultimately be no criteria for "what values are right"' *apart* from widely held human 'dispositions'.[197] Thus, on this view, '"[g]ood" consequences are those that promote, respond to and enhance regularly shared sentiments'.[198] It seems, then, that a majoritarian outlook is put forward as a *consequence* of scepticism – of seeing values as based on nothing more than the preferences of people. This would be to suggest quite a strong link between the two: once scepticism is accepted,

[195] ibid 98 ('Is the Right Road Wholly Lost and Gone?'). Earlier versions of this piece can be found in Allan, 'A Doubter's Guide to Law and Natural Rights' (fn42); and in various parts of Allan, *A Sceptical Theory of Morality and Law* (fn44).
[196] Allan, *Sympathy and Antipathy* (fn57) 90.
[197] ibid.
[198] ibid 91.

majoritarianism is apparently, in some sense, an obvious – perhaps even unavoidable – next step.

A strong link is also implied in Allan's "sceptical" theory of rights. Here – on the 'topic of rights' – he suggests, the 'implications of scepticism are most stark'.[199] After pointing out the obvious implication that, for the moral sceptic, 'non-legal rights do not exist from any perspective that insists on their being linked to "true", "real" statuses or objective senses', Allan adds that the 'sceptic can actually say something more than this'.[200] What Allan does go on to say, apparently in his capacity *as a moral sceptic*, turns very quickly once again into a majoritarian outlook.

While the 'sceptic certainly must start by conceding' that rights and their supporting values are 'mere contingent preferences at core', this is not a problem.[201] Rather, 'as fragile' as such a basis for rights and their grounding moral standards may be, Allan recommends that one 'simply shrug one's shoulders and press on with the task of seeing which values are…widely held'.[202] And, unlike the realist project, this task *is* achievable, because unlike mind-independent moral values, there *are* 'certain feelings' which are 'held by most people'.[203] There are 'moral standards or moral criteria' which, in particular times and places, 'are generally regarded…as setting acceptable limits on conduct'.[204] Where there is such convergence, 'these feelings do, in an amorphous and inexact way, give rise to expectations, standards, and entitlements', such that if these standards were to be contravened, one could talk of 'the infringement of a non-legal right'.[205] Thus, on Allan's

[199] ibid 96.
[200] ibid 97.
[201] ibid.
[202] ibid.
[203] ibid.
[204] ibid.
[205] ibid.

view of rights, 'anytime there is extensive convergence regarding what is acceptable conduct someone could be said…to have a right'.[206] To be clear, majoritarianism is at the core of this theory: the standard of "convergence", or "generally regarded", required in order to give rise to a non-legal right in this sceptical account is 'majority sentiment'.[207]

What this amounts to, then, is a suggestion that one of the "*ramifications*" of scepticism – which Allan argues is particularly clear when looking at rights – is a majoritarian view in which entitlements, obligations, and the realms of acceptable conduct are linked to majority preferences.

4.2.2. Defending the Link

4.2.2.1. A Sceptical Chain

Allan presents this apparently strong link between scepticism and majoritarianism more formally and clearly in his earlier work – *A Sceptical Theory of Morality and Law* – in the following chain of logic:

> 'i) virtually everyone feels a particular way about something (say, that X be done);
>
> ii) morality itself is nothing more than a function of human feelings;
>
> therefore iii) in this case, where there is a near consensus of feeling, X ought to be observed;'[208]

This provides a clear expression of the chain between scepticism and majoritarianism which Allan draws, and a useful starting point for analysing this apparent link in his work. The

[206] ibid.
[207] ibid.
[208] Allan, *A Sceptical Theory of Morality and Law* (fn44) 195.

above scenario starts with an empirical observation that a particular feeling or evaluation as to what ought to be the case is held by most people (i). It then moves, via the moral sceptic premise in ii) – that morality has no content other than the feelings/preferences of humans – to the conclusion in iii) that, where this is the case, whatever the *majority feels* should be done *should* indeed be done. That conclusion is in effect a statement of majority rule. This is also clear from an example Allan gives of the consequence of his view: an implication of the "ought" in iii) is that 'if most people, as it happened, were in favour of robbing jewellery stores then they should be robbed', and also that this "should" would disappear 'if people felt otherwise'.[209]

The question arises, what is the precise route from the fact, such as it may be, of a majority-held view, to the claim that this ought to be observed? Further, and of particular interest here: how, precisely, does *moral scepticism* play a part in this? More formally put, what is the argument behind the "therefore" which links ii) and iii), above?

4.2.2.2. Keeping the Chain Together: Avoiding Illicit "Is"-"Ought" Relations

Where this concise summary is found, Allan's defence of this chain revolves around the shift between the "is" in i) – a *descriptive* report of a majority preference happening to be held on X – to the "ought", set out in iii) – an apparently *prescriptive* claim about what *should* be followed; that X ought to be observed. The worry, he notes, is that to some this move might seem to fall foul of the so-called "Hume's Law" that an "ought" cannot be derived from an "is"; 'that the prescriptive "ought" and the descriptive "is" are of logically different relations', such that an attempt to derive one from the other is logically invalid.[210]

[209] ibid.
[210] ibid 194.

Allan accepts the validity of this rule of logic – 'that there is no deductive ground for the move from premises which are empirical facts…to a conclusion which is…a normative, unconditional imperative' – but denies that the chain of logic set out above falls foul of it.[211] This is because, he argues, his move from the "is" of majority to sentiment, to the "ought" of majority rule (via moral scepticism) is a merely *descriptive transition,* rather than a *logical derivation*. Rather than deriving an "ought" from an "is", Allan responds, he 'merely noted that where, *as a fact*' majority sentiment converges, 'then, *as a fact,* that gives rise to expectations, standards and…rights'.[212] As a merely 'causal chain from "is" to "ought", *not* a justificatory chain', there is no invalid shift from an "is" relation to an "ought".[213] In fact, there is no shift at all, on this view, because for Allan's sceptic, 'the "ought"' is nothing other than a 'creature of prevailing human sentiments, of "ises"'.[214] The prescriptive "ought" therefore dissolves into the description of converging sentiment, and becomes of the same logical order.

However, this clarification – even assuming it is convincing – leaves the more fundamental question unanswered, because it says *nothing* about the basis of the transition that *does* take place. Clarifying the logical category of the final "ought" statement and declaring it to be the result of a mere "transition" between two "ises" still does not provide any detail on the grounds for – or even the *content* of – that move. That is, the basis of the "therefore" in the causal chain set out above is still left unexplained and unaddressed. This is the crucial question with which we are concerned, because this is the move in which Allan has suggested scepticism is playing a significant role – both in the chain set out, and in various other comments noted at the beginning of this section. The importance of explaining this

[211] ibid.
[212] ibid 194–195.
[213] ibid 195.
[214] ibid.

move does not decrease merely by presenting it as a "causal" or "descriptive" transition. We are, then, still left wondering as to what the basis of that link, or that transition, is supposed to be.

In fact, Allan's argument concerning the nature of the transition from "is" to "ought" *adds* to the puzzle, for this argument itself relies on the majoritarian outlook, again, without explaining it. The response relies on reducing the "ought" in iii) – the apparently normative claim that the content of majority sentiment be followed – to the "is" of the fact of a collection of sentiment forming a majority. However, while the "ought" is thereby framed as a fact rather than a prescription, it is problematic that the supposedly descriptive "ought" refers to the fact of *widely-held* sentiments. This is because it then amounts to nothing more than saying that there is a move from the "is" of widespread sentiment to the position where the "ought" is determined by that widespread sentiment, on the basis that this is how the "ought" is defined. This reveals another significant way in which majoritarianism is informing Allan's thought – here moving him to take a wholly majoritarian definition of "ought" – but it does nothing to explain the basis on which it is held, nor the role of scepticism in this. Indeed, it merely *assumes* majoritarianism from the start, in a thoroughly circular fashion. This would suggest that it is *majoritarianism* doing most of the work here, not *scepticism*.

Despite this, however, we are told once again, in the pages following the "is"-"ought" discussion, that the 'basis of the transition *is a rejection of moral realism of all sorts* and acceptance of an areasonable, *sceptical* characterisation of morality'.[215] Once again, then, a strong link is drawn between scepticism on the one hand, and the move to a majoritarian

[215] ibid 196 (emphasis added).

stance, complete with a majoritarian account of "ought" and statements of entitlement, on the other. And once again, the basis of that link is left unclear.

4.2.2.3. Reasons for Majoritarianism? The Roads Not Travelled

The need for an explanation for this link is particularly pressing in light of the fact that there are a number of alternative bases in which to ground "ought" evaluations which, *as Allan himself notes*, could follow from the sceptical premise rejecting the project of realist-foundationalism. In *A Sceptical Theory*, for example, Allan points out that, in light of scepticism, '[n]othing simply *is* right or wrong'.[216] Rather, 'questions like "what sorts of actions *are* virtuous or vicious" can only be answered in terms of what is *generally regarded* as such, ***or*** of what the *evaluator* regards as such'.[217] Likewise, in *Sympathy and Antipathy*, Allan writes that, for his sceptic, prescriptive evaluations as to what "should" be the case depend on 'what sentiments and feelings happen to exist'.[218] As a result, the sceptic can 'relate majority sentiments, and call these "should", *or he can relate his own sentiments*, and call these "should"'.[219] And elsewhere Allan offers further alternatives still for where to ground prescriptive claims. In the absence of mind-independent foundations, he declares, 'any prescriptions offered by the sceptic must follow either from her own subjective sentiments or from the existing majority sentiments or community standards (*or some other sub-group's existing standards)* that happen to exist'.[220]

So, despite his sometime suggestions that once moral objectivism is rejected it follows directly that the sceptic appeals to majority sentiment, at one stage even going as far to

[216] ibid 191.
[217] ibid (emphasis added on 'or').
[218] Allan, *Sympathy and Antipathy* (fn57) 10 (emphasis added).
[219] ibid (emphasis added).
[220] Allan, 'Internal and Engaged or External and Detached?' (fn43) 12; Allan, *Sympathy and Antipathy* (fn57) 11 (emphasis added).

suggest that '*there can ultimately be no criteria'* for moral evaluations *other than* 'allegedly universal…human dispositions',[221] Allan in fact identifies a range of alternatives which could just as easily follow from this morally sceptic stance. In light of these alternatives for grounding "ought" evaluations, the rather quick move to majoritarianism is puzzling. It becomes even more crucial to explain the basis on which Allan chooses to dissolve prescriptive "should" claims into the "is" of widespread, majority sentiments, rather than any of the alternatives he himself identifies. Put briefly, why *this* (majoritarian) "is"?

In light of the alternatives, there must be some *reason* – however implicit – for opting for the majoritarian road. Given that there are a number of alternative courses of action it seems that Allan has indeed in some sense *chosen* this route over others. Given the strength with which Allan promotes and relies on majoritarianism in various areas of his constitutional scholarship – and indeed elsewhere (even on the acceptability of "parental spanking" to take a somewhat more removed example)[222] – there must surely be something leading him to see this way forward as particularly compelling. This therefore gives us reason to question the soundness of Allan's claims to have remained entirely descriptive, found in his response to the "Is"-"Ought" concern. At some point, there must be a normative, evaluative claim, however implicit, that one *ought* to dissolve "oughts" into majority sentiment; that one *should* take this road over others – unless, of course, the move is entirely arbitrary.

[221] Allan, *Sympathy and Antipathy* (fn57) 90 (emphasis added).

[222] Allan's majoritarianism plays a role in the suspicion with which he treats campaigns to criminalise the "parental spanking" of children, see ibid ch 6 ('Taking Spanking Seriously'). For example, he suggests that the fact that, in New Zealand, a majority of parents see some level of spanking as acceptable means that the 'burden of persuasion' lies with the abolitionists, suggesting some kind of presumptive force to the preferences of the majority (118). See also 127, describing propositions to criminalise the conduct of the majority as 'suspect at the best of times', even where 'there is solid evidence of the waywardness of the majority's conduct', suggesting that this force may even go beyond the presumptive.

Without an argument for this move, it would be hard to resist labelling Allan's majoritarianism as an example of what Leff called the 'classic normative copout[]'.[223] "Good", or "right", 'becomes just a function of nosecounting',[224] because that is *just how it is defined by Allan*. To an asserted definition like this – such as that "right is what the majority prefers", or "good is what the majority considers good" – there is not much which can be said. Having rejected the idea of "intrinsic natures" to notions such as "good", or the idea that these notions are constrained by something beyond themselves and the definitions which happen to be preferred by individuals and groups, there is nothing to which one can appeal to show that it is "incorrect". That is, if one takes the scepticism presented earlier, then we appear indeed to be in the situation described by Leff: 'all definitions are permitted to the definer so long as clearly enough made'.[225]

But that observation does not support Allan's position. Firstly, it leaves unargued the claim, cited above, that his definition is a "consequence" of moral scepticism. Its relationship to scepticism itself is yet to be established. Secondly, if *all* definitions are permitted, then why *this one*? This is not to deny that it is an *option,* a *possible* definition – as just mentioned, there is no basis on which the sceptic can do this once it is recognised that there are no intrinsic natures or external constraints on the descriptions we ascribe. Rather, it is to say that, *as there are many equally possible options available*, we want a *reason*, an *argument*, as to why the one taken is recommended to be accepted. Otherwise Allan has nothing convincing to say to someone who takes another equally possible option; that is, no hope of persuading anyone to accept his definition who does not do so already.

[223] A Leff, 'Economic Analysis of Law: Some Realism About Nominalism' (1974) 40 Virginia Law Review 451, 455.
[224] ibid.
[225] A Leff, 'Memorandum' (1977) 29 Stanford Law Review 879, 886.

In the relevant chapter of *Sympathy and Antipathy* – where Allan considers the ramifications of scepticism – the closest that one gets to even explaining the preference for majoritarianism is this passage:

> 'After investigating the potential consequences, after weighing likely outcomes, what better to do, in the light of continued discord, than to make majority sentiments the final arbiter? In the end, all that is left to the moral sceptic are consequences and feelings'.[226]

It seems, then, that Allan's move to majoritarianism is based on the "feeling", or sentiment, that it is "better" than alternatives.[227] One may ask precisely what the content of this "better" *is*, and indeed, this is not particularly clear at this stage; his immediate point that it is better in light of "discord" does not seem determining given that there are many ways of resolving lack of agreement and co-ordination in society. The need for a central, co-ordinating body, says nothing in itself of *who* is to make those decisions. This is not to say that Allan could not present persuasive reasons for describing majoritarianism as "better" – indeed perhaps he has set out the content of this "better" in more detail elsewhere. Perhaps it has something to do with the respect it gives to the capacities of individuals – what he commends as a 'potent moral stance' – as compared with the air of 'self-righteousness and disdain (or condescension)' that he smells around those taking anti-majoritarian stances, implying a strong equality-based preference on his part.[228] Regardless, however, what is of more concern here is, once again, the question of what role *scepticism* is playing in such a claim.

[226] Allan, *Sympathy and Antipathy* (fn57) 91 (footnote omitted).
[227] See also Allan, 'An Unashamed Majoritarian' (fn192) (putting the same sentiment the other way around: 'I think the least bad procedure for resolving disagreements within a society...is to let the numbers count').
[228] ibid 550.

If Allan's linking of scepticism and majoritarianism is to be as strong and meaningful as he has suggested, and if this "better" *is* the content of his move to majoritarianism, then it would seem that the claim must be that majoritarianism is in some sense "better" *because* of scepticism. This takes one back to the "therefore" between ii) and iii) of the chain set out above: for this "therefore" to hold, Allan must be saying that majoritarianism is better in some sense *as a result* of it being the case that mind-independent moral truths, or independent foundations for moral evaluations do not exist.

4.2.3. Severing the Link?

However, an immediate problem arises at this point because Allan *also* at times rejects the idea that scepticism itself is capable of providing anything like this support. Relying on a distinction between the status of values – something which his form of moral scepticism takes a stance on – and the content of values (which it does not), Allan rejects the idea that a consistent scepticism has *any* concrete consequences on the issue of which normative outlook to take. For example, Allan earlier writes that the sceptic's 'rejection of the existence of objective values' – a question of status – 'tells us nothing whatsoever about [their] preferred values or political orientation' – a question of content.[229] This is not merely an empirical claim – that as a matter of fact whether one is a sceptic or not is not a reliable way of deciphering their stance in political theory or on any normative matter. Rather, Allan goes as far as to say that 'moral sceptics seem to have nothing to say about the *content* of morality, about which moral evaluations are right and which are wrong'.[230] Rather than establish a connection between scepticism and the preference for majoritarianism this would seem to sever it entirely. In light of that last claim, Allan is effectively saying that scepticism is

[229] Allan, *Sympathy and Antipathy* (fn57) 93.
[230] ibid 44.

incapable of providing *any support whatsoever* for majoritarianism; majoritarianism is a preference grounded in sentiment, and scepticism says nothing about the content of moral preferences.

On the most hopeful explanation of Allan's move to majoritarianism, then, it is Allan's own sentiments – his preference-based assessment of the likely consequences as "better" – that moves him to a majoritarian outlook. Whatever the content of this assessment may be, this initially seems wholly contrary to his claims that the basis of this move is the acceptance of scepticism, or that seeing standards of "right" or "good" in terms of the "is" of majority sentiment is a *ramification* or *consequence* of scepticism, noted earlier and which formed the starting point of this analysis. Now it seems that Allan is saying that scepticism *cannot* inform a case for majoritarianism – at least not in the strong sense involving consequences or implications of a direct nature. On this view it is certainly not capable of grounding the "therefore" step between scepticism and a majoritarian view of "ought" which he suggested it might.

4.2.3.1. An Indirect Link?

However, given the frequency with which Allan has suggested *some kind* of connection between scepticism and majoritarianism, we should perhaps be slow to dismiss the former's relevance entirely. It may still be playing *some,* albeit less direct, role in his political thought. But the question still remains of what the precise nature of this role is. Taking into account all of the comments noted above concerning the implications of scepticism, its normative limitations, and what little substantive support *is* offered for the majoritarian premise, it seems that the most Allan can be suggesting – if he is to remain consistent – is that his scepticism is informing the *form* of his argument for majoritarianism, but not the *content* of that move.

The content of that move is the evaluative claim that majoritarianism is "better". The relevance of scepticism is that in the absence of a mind-independent content to such evaluative notions, this assessment of "better", for Allan, can only be based in any meaningful way in sentiment and subjective preference. But scepticism says nothing about what this "better" is in substance. This account of the relationship between scepticism would not only explain that link in a way which renders the various seemingly conflicting comments noted above consistent – allowing Allan to say that majoritarianism is in some sense *causally* linked to this scepticism, while maintaining that scepticism does not point in or inform any particular *normative* direction – but it would also account for the significance that Allan seems to attach to his point that '[i]n the end, all that is left to the moral sceptic are consequences and feelings'.[231] In short, scepticism means that normative claims can only be framed in terms of sentiment and consequences, and, for Allan, these happen to point to majoritarianism as preferable.

Thus, while the inquiry of this section arose out of a number of suggestions of a link between scepticism and majoritarianism – with quite a close link being suggested at times – it seems that when pushed and interrogated further, Allan's scepticism is actually playing, at best, a rather modest role. On the most tenable interpretation, it informs the *style* of argument which Allan thinks is available for his majoritarian outlook. This amounts to something along the lines of "I think it is better", with the "better" having itself little to do with the sceptical premise. Whether a persuasive account of this preference then follows or not, what is significant for present purposes is that it then seems that, despite indications to the contrary, Allan's scepticism plays only a very limited role in his moves into constitutional and political theory.

[231] ibid 91 (footnote omitted).

4.2.4. Wider Ramifications: What Can Scepticism Do?

Having concluded that, on the most tenable and consistent interpretation of Allan's path from sceptical philosophy into political and constitutional theory, moral scepticism and its underlying theory is, in fact, playing a merely tangential role, it might be asked what more one could have expected. Notwithstanding Allan's suggestions that scepticism had something more significant to add to political theory – in the form of a case for majoritarianism – one might wonder at the disappointment expressed here. Perhaps this limited, merely framing, role is the most scepticism can offer to normative theory.

Perhaps Allan would share this wonder. Taking the comments in which Allan severs scepticism from the substance of his political theory at face-value it seems that this is indeed how he views moral scepticism. This might perhaps also explain why Allan clearly sees the role scepticism plays in informing his own path into political and constitutional theory as far more significant than it is seen here. Thus, there is a more fundamental issue at play here, broader than just that of the relationship between scepticism and majoritarianism. It concerns what it is reasonable – and realistic – to expect of moral scepticism in normative theory.

It has already been argued – in **Chapter 3** – that claims that moral scepticism is *damaging* to the prospects of normative theory are fundamentally misguided – an issue of the negative implications of scepticism. A further issue concerns what, if anything, sceptical theory can *add* to normative discourse. Is moral scepticism destined to be limited in the way Allan suggests? Is the *most* sceptics can say merely that normative arguments cannot ultimately be framed in anything other than preference, which one either accepts or not? Does the sceptical position and its underlying theory have *nothing positive* to say in its own right? These questions go to the very core and purpose of this thesis in developing a sceptically-grounded constitutional theory, one which takes as its starting point and guiding motif a

wholesale moral scepticism. As such, much of what follows in the rest of this chapter – and indeed in the remainder of this thesis – can be seen as constructing an answer to those questions.

As a preliminary answer, however, it is submitted that matters are not as straightforward as Allan, on the above reading, suggests. Allan is right to point out a logical difference between status and content, such that, strictly speaking, a statement concerning the status of moral evaluations cannot alone be used to decisively deduce a substantive moral commitment. Such attempts are wholly unpersuasive. Indeed, this logical point was raised in **Chapter 2** of this thesis, as part of the response to concerns that scepticism inevitably and logically leads to destructive consequences, or that it logically commits one to a dangerous – or at best useless – nihilism (see **Chapter 3, section 3.2.1**). The point there was – in line with Allan – that the sceptic is not, in a strict sense, logically *committed to,* or *prohibited from,* holding any particular moral stance. Indeed, in the absence of an "intrinsic nature", or "way things are" on normative matters, it is difficult to even make sense of such an idea. But while it is correct to say that there is no *necessary connection* between scepticism and a substantive moral stance within a debate, this does not mean that the sceptic – as conceived in this thesis – *has nothing* at all to add to substantive political theory.

As will be set out later in this chapter, it is argued that a *persuasive* case can be made for a particular set of values using the features and arguments behind scepticism itself. These values are embodied in a conception of the individual – the "Godlet Conception" – which it is submitted flows compellingly from the underlying arguments for the sceptical position as set out **in Chapter 2**. To be clear: this case does not claim that the conclusion is a *logically unavoidable or mandated* consequence of scepticism, or that the connection drawn is "true", or "necessary" in any independent sense. Rather, it is an outlook which is hoped will be seen

as *persuasive* from this perspective. The method used of basing the argument on the reasoning which leads the current author towards scepticism, while actively discounting as many assumptions external to scepticism and the presuppositions of these arguments as possible, allows the normative claims which are put forward to be presented as *from the sceptical perspective* in a meaningful sense.

In the next chapter – **Chapter 5** – the normative groundwork laid down through this conception will be developed into a full-blown, detailed argument for majoritarianism. The immediate point, however, is that while the endpoint in political theory (majoritarianism) and the starting point in philosophy (scepticism) overlaps to a large extent with Allan's, the *route* is different. The last part of this chapter sets the groundwork for a clear road from scepticism into political theory that turns out to be more direct, and indeed more fruitful than Allan's: a *truly sceptical* contribution to political theory.

4.3. What "We" Believe: Richard Rorty's Anti-Foundationalist Ethnocentrism

The second road into normative and political theory to be considered is that taken by Richard Rorty. Having strongly critiqued the metaphysician's world view, and in particular the idea that concepts such as "morality", "justice", "good", "bad" etc have an "intrinsic nature" or "essence" independent of our optional descriptions, Rorty turned his hand to political philosophy. The results are set out and developed in a number of key works throughout the latter part of his career and life. It is these works that are considered in this section.

Rorty's road into political philosophy is useful to consider given the strong influence of strands of his anti-realist, anti-metaphysical, and strongly anti-foundationalist philosophy on the scepticism outlined in the previous chapter, and which grounds this thesis. This influence

makes his later works, in which 'Rorty attempts to show what implications a nonmetaphysical outlook has for personal values and collective arrangements',[232] or, to use his own words, to 'enlarge on how various areas of culture (particularly science and politics) look from a nonrepresentationalist perspective',[233] of particular interest for the present task of developing a sceptical path into constitutional theory.

4.3.1. Rorty's Ethnocentric Liberalism

As Hutchinson notes, '[h]aving purged himself of metaphysical assumptions and ambitions, Rorty…throws in his nonmetaphysical lot with liberal democracy'.[234] For Rorty, the ideal 'post-metaphysical culture' takes the form of what he calls a 'liberal utopia'.[235] He begins to sketch this political vision in any real detail in *Contingency, Irony, and Solidarity.*[236] Specific details will be discussed in what follows where relevant to the argument; for now, what is of particular interest is the *approach* Rorty takes in getting to this substantive political theory.

In his early political writings, Rorty presents his liberal political vision as the result of a pragmatically ethnocentric, and 'thoroughly historicist'[237] approach inspired by the later work of John Rawls – in which he advocates a "political, not metaphysical" liberalism.[238] On this approach:

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[232] AC Hutchinson, 'The Three "Rs": Reading/Rorty/Radically' (1989) 103 Harvard Law Review 555, 563.
[233] R Rorty, *Objectivity, Relativism, and Truth* (Cambridge University Press 1991) 12.
[234] Hutchinson (fn232) 563–564.
[235] Rorty, *Contingency, Irony, and Solidarity* (fn1) xv–xvi.
[236] Rorty, *Contingency, Irony, and Solidarity* (fn1).
[237] R Rorty, 'The Priority of Democracy to Philosophy' in M Peterson and R Vaughan (eds), *The Virginia Statute of Religious Freedom* (Cambridge University Press 1988) 262.
[238] See J Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 Philosophy and Public Affairs 223.

> 'What justifies a conception of justice is not its being true to an order antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.'[239]

On this view, political philosophy 'tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a democratic society and the public traditions of their interpretation', in the hope that such a conception will be supported by what Rawls terms an '"overlapping consensus"'.[240] As Bacon notes, Rorty champions Rawls's work as 'an account that best develops the idea that philosophy ought to draw on common vocabularies and common hopes', rather than appealing to transcendental, realist notions.[241] Adopting this approach, Rorty describes his own goal as to 'suggest how such liberals might convince our society that loyalty to itself is morality enough' – to convince 'our society that it need be responsible only to its own traditions, and not to the moral law as well'.[242] Thus, Rorty's project is to draw on common vocabularies and intuitions in the wholly contingent community we happened to be part of – to 'invoke what *we* do' as the basis of political philosophy.[243]

The result is a strong ethnocentric strand running throughout Rorty's political writings, laden with appeals to 'our culture';[244] loyalty to 'our society' and its 'traditions'[245]; 'our

[239] J Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 Journal of Philosophy 515, 519 cited by Rorty in; Rorty, 'The Priority of Democracy to Philosophy' (fn237) 265; Rorty, *Contingency, Irony, and Solidarity* (fn1) 58.
[240] Rawls, 'Political Not Metaphysical' (fn238) 225–226. Cited at length by Rorty in 'The Priority of Democracy to Philosophy' (fn237) 262.
[241] M Bacon, *Richard Rorty: Pragmatism and Political Liberalism* (Lexington Books 2008) 59.
[242] R Rorty, 'Postmodernist Bourgeois Liberalism' (1983) 80(10) Journal of Philosophy 583, 585.
[243] Rorty, 'The Priority of Democracy to Philosophy' (fn237) 265.
[244] Rorty, *Contingency, Irony, and Solidarity* (fn1) 57.
[245] Rorty, 'Postmodernist Bourgeois Liberalism' (fn242) 585.

practices';[246] 'our community';[247] the 'convictions to which we are already committed by the public, shared vocabulary we use in daily life';[248] 'the general principles on which we have been reared'.[249] More specifically, Rorty refers to the 'sociopolitical culture of…"the rich North Atlantic democracies"'[250] and the 'moral and political vocabularies typical of the secularized democratic societies of the West', [251] references which he often uses interchangeably with yet more specific labels like '"we twentieth century liberals"',[252] 'our bourgeois liberal culture',[253] 'our liberal society',[254] '[w]e Western liberals'[255] and we members of 'modern liberal societies'.[256] Rorty's focus is on 'our self-image as citizens of such' a community – the "liberal", "Western", "bourgeois" democracy to which he frequently refers – and, along with Rawls (on Rorty's reading), does not seek to 'offer a transhistorical template for liberalism'.[257] Rather, as Hutchinson summarises, he 'treats liberal institutions, and…liberal vocabulary as a contingent expression of society's best contemporary self-image'.[258]

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[246] Rorty, *Contingency, Irony, and Solidarity* (fn1) 57.
[247] ibid 59.
[248] ibid xiv.
[249] ibid 196.
[250] Rorty, *Objectivity, Relativism, and Truth* (fn233) 15.
[251] Rorty, *Contingency, Irony, and Solidarity* (fn1) 192.
[252] ibid 196.
[253] Rorty, *Objectivity, Relativism, and Truth* (fn233) 204.
[254] ibid 206.
[255] ibid 207.
[256] Rorty, *Contingency, Irony, and Solidarity* (fn1) 63.
[257] Hutchinson (fn232) 564.
[258] ibid. Rorty's inter-subjectivist interpretation of Rawls is based on his theory of justice as presented in a series of later lectures and articles which culminated in J Rawls, *Political Liberalism* (Columbia University Press 1993). At times, however, Rorty suggests that this later work merely clarifies the nonmetaphysical and purely inter-subjective outlook that has always been the basis of Rawls's theory, even as presented in his earlier seminal work *A Theory of Justice* (Harvard University Press 1971). See Rorty, *Objectivity, Relativism, and Truth* (fn15) 183, n21, suggesting that Rawls's later work serves to clarify the 'ambiguity' resulting from his use of the original position for the purpose of making 'vivid...the restrictions that it seems reasonable to impose on arguments for principles of justice and therefore on those principles themselves' (Rawls, *A Theory of Justice* 18). The ambiguity between '"reasonable" as defined by ahistorical criteria' or as meaning something like "as defined by the considered convictions of our particular modern society", is purportedly

4.3.2. Rorty's Ethnocentric Liberalism: Existing Critiques

As Baruchello and Weber point out – in their survey of his use of the term "we" – from the early 1980s onwards, the phrase '"we so-and-so"…became a characteristic feature of [Rorty's] writing style',[259] coming hand in hand with his appeals to "ethnocentrism".[260] Indeed, even a 'non-comprehensive' list of the various group-labels he declared to fall under this "we" is 'nothing short of impressive'.[261] In addition to those listed above, these include: 'we moderns'; 'we in the twentieth century'; 'we Anglo-Saxons'; 'we decent, liberal, humanitarian types'; the less catchy 'we contemporary inheritors of the Cartesian distinction between mind and matter'; the somewhat bizarre 'we new fuzzies', and, possibly the most general of his references, simply 'we humans'.[262] However it is, as the authors point out, fair to say that the 'positive appraisals' of Rorty's appeals to "we", and more fundamentally his ethnocentric approach, have been notably 'rare'.[263] This fundamental aspect of Rorty's anti-foundationalist political project has been heavily criticised on a number of grounds. Indeed, as Rorty himself recognises in addressing some criticisms of his early papers on political

resolved by Rawls's later work in favour of the latter nonmetaphysical, non-objectivist interpretation (Rorty, *Objectivity, Relativism, and Truth* [fn233] 183, n21). The persuasiveness of this interpretation, and the issue of whether there are genuine differences between the theory of justice - and particularly the method of justification for that theory - as found in these two works, or whether the latter is merely a *clarification* rather than amendment is not a matter which will be pursued here, the focus being on the approach Rorty *himself* takes. For discussion of the controversy concerning the differences between the earlier and later Rawls see, for example, J Hampton, 'Should Political Philosophy Be Done Without Metaphysics?' (1989) 99 Ethics 791; R Martin, 'Rawls's New Theory of Justice' (1994) 69 Chicago-Kent Law Review 737; P Sarangi, 'From Metaphysical to Political: John Rawls' Revised Version of Liberalism' (1994) 29 Economics and Political Weekly 1396; MP Zuckert, 'The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?' (1994) 11 Constitutional Commentary 227.

[259] G Baruchello and R Weber, '"Who Are We?" On Rorty, Rhetoric, and Politics' (2014) 19(2) The European Legacy 197, 198.

[260] ibid 206.

[261] ibid 198.

[262] ibid 198–199.

[263] ibid 199.

philosophy, it is accurate to say that many people on all sides of the political and theoretical spectrum 'have been annoyed' by his arguments.[264]

4.3.2.1. Conservatism and the Complacent Maintenance of the Status Quo

A particularly frequent criticism of Rorty's approach appealing to "what *we* believe" is that it amounts to a privileging of the status quo. This is what Singer rejects as '[c]omplacent pragmatism',[265] and what Bernstein terms 'an *apologia* for the status quo'.[266] In falling back on 'what he sees as the presumably shared values of "our democratic culture"', for example, Rorty's political theory comes across as 'inherently conservative'; it 'equates "democracy" and "freedom" with established institutions'.[267] Not only is this privileging unwarranted, but it allows existing power structures, and to many the injustices they come with, to be maintained. Indeed, appealing to an apparently already existing "we" makes it difficult to challenge such structures. This criticism thus often comes with a Leftist, or radically critical bent, invoking concepts of social justice. As Singer argues, through its use of 'unreflective common sense', Rorty's version of 'pragmatism fails to consider social problems from the perspective of different social groups'.[268] In similarly critical, and radical, fashion, Comay accuses Rorty of downplaying the significant divisions and challenges caused by class, gender, and race within Western society, ultimately reinforcing dominant values unquestioningly, something which he is, in her view, quite comfortable doing, '[s]ecure in his privilege'.[269] Hutchinson, after making the similar point that Rorty's approach 'assumes

[264] R Rorty, 'Thugs and Theorists: A Reply to Bernstein' (1987) 15 Political Theory 564, 564.
[265] JW Singer, 'Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism' (1990) 63 Southern California Law Review 1821, 1831.
[266] RJ Bernstein, 'One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy' (1987) 15 Political Theory 538, 541.
[267] Singer, 'Property and Coercion' (fn265) 1825.
[268] ibid 1831.
[269] R Comay, 'Interrupting the Conversation: Notes on Rorty' (1986) 69 Telos 119, 123–124.

a tired, if reluctant, resignation to a reformed status quo' leaving 'dominant and often oppressive institutional arrangements…seemingly unchallengeable', goes as far as to declare it to be 'the last refuge of the ironic scoundrel'.[270]

4.3.2.2. "Who Are We?"

The *content* of Rorty's "we" has also been heavily criticised. First of all, it is pointed out, frequent appeals to "we" are of no real use in expounding *anything* unless it is clear what this actually refers to. 'Who', Bernstein asks, 'precisely constitutes this "we"?'[271] What exactly, it may be added, *do* we believe in "our culture"? What *are* "our traditions", and what *are* "our values"? As above, Rorty does often attach potential identifiers to his "we" – "we democrats", "we Westerners" etc – but without more, these broad group labels add little clarity concerning the content of "our" supposed beliefs, to which he claims to be referring. Indeed, as Comay points out, there are so many of these identifying labels that it seems as though Rorty's "we" remoulds to 'fit any available space'.[272] As such, they still merit the above questions.

This problem of a lack of clarity may have some connection to the first, set out above, concerned with the conservative leanings of an ethnocentric "we"; as Radin suggests, 'failure to ask, "Who is [sic] "we"?' may be at least partly to blame for leading 'some pragmatists into complacency and over-respect for the status quo'.[273] Singer logically draws a similar connection pointing out that Rorty's description of the 'democracy and social justice' to which he frequently appeals is 'remarkably terse', indicating that he 'seems to

[270] Hutchinson (fn232) 566.
[271] Bernstein (fn266) 554.
[272] Comay (fn269) 120.
[273] MJ Radin, 'The Pragmatist and the Feminist' (1990) 63 Southern California Law Review 1699, 1711.

believe it needs no elaboration'.[274] This lack of elaboration comes across, Singer suggests, as though Rorty thinks that 'there is either an obvious meaning' to the culture he appeals to, or else 'that there is a general consensus' about its key institutions and 'how to implement them'.[275] As will be discussed below, both of these possibilities have been rightly criticised. Either way, given that Rorty ends up apparently appealing to 'institutions that currently exist' – the message is that '"our" political institutions pretty much define liberal democracy'.[276]

Rorty himself seemed to appreciate the harm the lack of clarity in his ethnocentric appeals was doing to the integrity of, and especially the reception to, his early political interventions. 'Astonished, and alarmed' to find himself 'lumped' with the likes of contemporary 'neoconservatives',[277] and particularly surprised to find himself strongly criticised by 'some of [his] oldest friends', Rorty recognised that 'there must be a better way of presenting' his position.[278] This led him to set out what he described as a 'political credo', as the 'best way to answer Bernstein's question about who I mean by "we"'.[279] Answering directly, Rorty stated that the "we" he is referring to is 'made up of the people whom I think of as social democrats'.[280] This time he provides some specifics as to precisely what this involves, in his view – that is, what "we social democrats" believe. To this end, he sets out 'eight theses' which he sees this "we" as, at least to some extent, ascribing to.[281]

[274] JW Singer, 'Should Lawyers Care About Philosophy?' [1989] Duke Law Journal 1752, 1752.
[275] ibid.
[276] ibid 1761.
[277] Rorty, 'Thugs and Theorists' (fn264) 565.
[278] ibid 564–565.
[279] ibid 565 (footnote omitted).
[280] ibid.
[281] ibid.

These tenets include socialist economic views – those seeking to overcome 'the greed and selfishness which are still built into the motivational patterns impressed on our children' and describing the 'rich…reasonably democratic' First World as 'notably selfish and greedy'.[282] Further, "we" have an idea of reform of the First World which will ideally be 'along increasingly egalitarian lines', and, more specifically, 'lines that would lead to the eventual realization of Rawls's two principles of justice'.[283] Rorty blames the lack of "progress" in this regard on the 'political right', which, on this view, is 'made up of people who have no interest in increasing equality'.[284] "We" also have, apparently, some rather specific (perhaps dated) views on the so-called dangers of 'Soviet imperialism',[285] and further, repeated concerns to conform to 'Rawls's two principles of justice' and the sustaining of vital institutions like 'freedom of the press, an independent judiciary' and open universities for this purpose of tackling '*real* inequality'.[286]

This credo, intended to 'convey the line' Rorty wants 'to take on lots of other subjects, and to pin down [his] use of "we"', [287] does indeed bring a level of specificity and clarity to his at times vague ethnocentric approach. His eight tenets together form a rather specific definition of "we", which Rorty concretises with some particular substantive views. The result is that the ethnocentric "we" is openly clarified as referring to a particular moral group identified through attachment to some specific moral inclinations. Thus, the criticisms concerned with a vacuous and vague "we" would appear, to an extent, to be answered – at least this marks significant progress towards answering them. The criticisms of the way society is currently structured, and particularly the references to reforms needed in order

[282] ibid.
[283] ibid 565–566.
[284] ibid.
[285] ibid 566.
[286] ibid 567.
[287] ibid.

achieve, what in his view, would be a fairer, more equal society should also give some pause for thought to those who criticise Rorty for uncritically defending the status quo – indeed this seems to have been Rorty's intention in making this direct response. But Rorty is left open to a further criticism.

4.3.2.3. Disagreement

The problem is that, in appealing to a supposed consensus concerning "our" culture, or what "we" believe, and identifying it with a particular substantive vision, Rorty appears to ignore or assume away widespread disagreement over precisely this issue. That disagreement consists in competing conceptions of what "we" believe in "our" society, and how these values should play out in practice. Disagreement abounds over, to borrow words from the Rawlsian approach noted earlier, what the 'basic intuitive ideas that are embedded in the political institutions of a democratic society' actually are, and precisely what the 'public traditions of their interpretation' amount to.[288] As Bernstein argues, to point to '"social practices," "shared beliefs," a "historical consensus"' is to 'point to a tangled area of controversy'.[289] This is because, the 'overwhelming historical fact is that individuals' basic intuitions conflict'.[290] This fact is one that Bernstein suggests Rorty 'tends to gloss over'.[291] This criticism was made *before* Rorty's clarification above, but given how specific Rorty is seemingly defining his "we" in his response, this would seem to be strengthened, rather than alleviated, by that reply.

The above does indeed seem well-placed given the inescapable, and well-noted, fact of contemporary society that we often 'find ourselves living and acting alongside those with

[288] Rawls, 'Political Not Metaphysical' (fn238) 225–226.
[289] Bernstein (fn266) 552.
[290] ibid 550.
[291] ibid 552.

whom we do not share a view about justice, rights or political morality', and many other matters besides. [292] If Rorty is assuming that his political credo is what "we" generally believe in society then he would seem to be falling into the tendency that Waldron has identified among fellow liberals. For Waldron, 'liberals' have not done a particularly 'good job of acknowledging the inescapability of disagreement about the matters on which they think we *do* need to share a common view'.[293] This is despite, again, disagreement being 'the most prominent feature of the politics of modern democracies', as Waldron puts it.[294]

To take a concrete example from the above, what Rorty emotively describes as "greed" within our economic and social structures, others will take quite differently. As Bernstein colourfully puts it, others will want to say, in similarly emotive terms, '"Hey Rorty…[l]et's face it, what you call "greed" is nothing but good American entrepreneurship'.[295] In fact, 'you should take some pride in those characteristics that have made our democracy so great…!"'.[296] To add a further example here, in reply to Rorty's charge that the political right are not concerned with "equality" some will want to say, no doubt relying on one of the vast number of definitions of the concept,[297] "Hey Rorty, you don't know what *real* equality is. Allowing people to make the most of their talents, abilities and drive, without constraint by these principles of distributive 'justice' you speak of *is* 'equality'", or perhaps, on Nozickian lines,[298] "it is not 'just' or 'fair' to expect the most well off, who make the

[292] Waldron, *Law and Disagreement* (fn4) 105.
[293] ibid 106.
[294] ibid (footnote omitted).
[295] RJ Bernstein, 'Rorty's Inspirational Liberalism' in C Guignon and DR Hiley (eds), *Richard Rorty* (Cambridge University Press 2003) 137.
[296] ibid.
[297] See, for example, D Rae, *Equalities* (Harvard University Press 1981) 133 (suggesting as many as 108 interpretations - descriptions, to use Rorty's language - of 'equality').
[298] See generally, R Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) (for the well-known disagreement with Rawls's principles of justice, see Chapter 7).

most of their abilities and talents, to sacrifice their gains to assist those who are less well off. Such luck egalitarianism smacks of the green-eyed monster".[299]

These are but colourful ways of putting the key point that "our" culture, and the particular institutions within it, are open to many differing interpretations. They can be described in a number of conflicting ways, even where it is apparently agreed that notions like "equality" are in fact relevant at all. This can only be exacerbated by the fact that, to take Rorty's own words, 'anything can be made to look good or bad by being redescribed' – indeed this is something of a mantra for Rorty's post-metaphysical, ironist hero which he places at the centre of his work in *Contingency, Irony, and Solidarity.*[300] Taking this anti-foundationalist point about the power of redescription seriously *should* lead one to realise that appeals to "our" culture, or "our values" will come to mean many different things to many different people. It will come to mean *positive* things to some and *negative* to others, rendering it problematic – if not wholly useless – as a reference.

In short, then, it seems that Rorty either assumes away, or else sets aside, disagreement over the fundamental features of "our" culture, and what "we" believe, as well as how they are best interpreted and put to work. This may be problematic, as it is for Bernstein, for making a supposed 'historical consensus' or 'tradition…into something more solid, harmonious, and coherent than it really is'[301] – a problem concerning the *accuracy* of Rorty's description of "our" beliefs as they actually stand. From the perspective of this thesis however, if this criticism concerning disagreement is well-put, it is more problematic for placing what turn out to be *Rorty's own* beliefs and *preferred* interpretations at the heart of "our" public

[299] ibid 229. For further criticism of the "envy" overtones of luck egalitarianism see E Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287.
[300] Rorty, *Contingency, Irony, and Solidarity* (fn1) 73.
[301] Bernstein (fn266) 551.

culture. This is, it is contended, an unwarranted privileging of his own substantive, and controversial, political theory over and above the views of everyone else – including those within the group he claims to be identifying with. This is contrary to what will be termed "normative equality" in the final section of this chapter, and which it will be argued follows more directly and persuasively from an anti-foundationalism such as Rorty's and that set out in **Chapter 2**.

4.3.3. From Anti-Foundationalism to Ethnocentrism: A Closer Look

However, the above largely-existing criticisms aside, the most significant issue of concern for the purposes of this chapter is the *approach* Rorty takes, and more precisely, its links to his anti-foundationalist and anti-metaphysical philosophical premises. As with Allan's moral scepticism and his majoritarianism, Rorty has on a number of occasions suggested a link – and sometimes a strong one – between his anti-foundationalist leanings, and his later ethnocentrism. This purported link requires a closer look.

4.3.3.1. Ethnocentrism as a Consequence of Anti-Foundationalism

As already noted, Rorty throws his theoretical weight strongly behind the ethnocentric approach of the later Rawls. The grounds on which he praises this Rawlsian pragmatic approach appear to give some insight into his moves towards the ethnocentric outlook. He praises Rawls's political philosophical approach as one which is ideal to 'serve as the vocabulary of a mature (de-scientized, de-philosophized) Enlightenment liberalism'.[302] It is "mature" because it lets go of any metaphysical yearning, and instead would 'happily grant that a circular justification of our practices', grounding our culture in nothing but 'our own

[302] Rorty, *Contingency, Irony, and Solidarity* (fn1) 57.

standards, is the only sort of justification we are going to get'.[303] This approach is, he commends, a 'triumph of the Enlightenment'.[304] Similarly, Rorty uses this argument to defend Rawls's work from a familiar criticism – levelled at his "original position" device in particular – that it is built around a particular set of principles from the start. Rorty sees this as no criticism at all on his pragmatic interpretation. Rather, the criticism is just another way of saying that Rawls is successfully doing what political philosophy ought to. The 'frequent remark that Rawls' rational choosers look remarkably like twentieth-century American liberals is perfectly just', he says, but nothing more than a 'frank recognition of the ethnocentrism which is essential to serious, non-fantastical, thought'.[305]

So here Rorty suggests that the appeal of this sensible ethnocentrism is that it takes seriously the anti-metaphysical, anti-representationalist aspects of his philosophical outlook. If one does, there is simply no alternative to falling back on our own standards when engaged in justification – there is no higher order which can be used to break out of the ultimate circularity of human description and redescription. This would seem to be why he suggests that it is "essential" to serious thought: if there is nothing else to appeal to, there can be nothing other than ethnocentric justification – an appeal to the standards of *some* ethnos. Indeed, Rorty puts this argument even more strongly at other times in his early forays into political philosophy. For example, he clearly sees a strong link between anti-representationalist anti-foundationalism and ethnocentrism when he argues that 'an anti-representationalist view of inquiry leaves one without a skyhook with which to escape from the ethnocentrism produced by acculturation'.[306] Further, he describes it as a 'consequence of anti-representationalism' that 'no description of how things are from a God's-eye point

[303] ibid.
[304] ibid.
[305] Rorty, *Objectivity, Relativism, and Truth* (fn233) 30, n12.
[306] ibid 2.

of view', or any other such 'skyhook…is going to free us from the contingency of having being acculturated as we were'.[307]

Thus, Rorty suggests that once the realist outlook, with its misplaced metaphysical and representationalist promises, is set aside, an ethnocentrism such as his becomes something of an *inevitability*. That is, at least if one is remaining "mature" and "non-fantastical" in their anti-foundationalism. With that, the basis of Rorty's moves to the ethnocentric "we" in his political theory is clearer: he presents it as the full flowering of a sensible anti-foundationalist view of justification.

4.3.3.2. "There's No 'I' in 'We'": Collective and Individualistic Ethnocentrism

It is noteworthy, however, that on the above line Rorty very quickly moves into such a *collectivist, community-based* ethnocentrism. Not only is this indicated from the start by the collective label "we", but Rorty also at times makes explicit a community-centred view of morality. For example, he states – praising particular aspects of Oakeshott's approach – that 'we can keep the notion of "morality" just insofar as we cease to think of morality as the voice of the divine part of ourselves', but rather 'as the voice of ourselves *as members of a community, speakers of a common language'*.[308] Morality, for Rorty, is – Sellars-style – a matter of '"we-intentions"'; the result is that the meaning of '"immoral action" is "the sort of thing *we* don't do"'.[309]

This community-based focus is, however, problematic. The anti-foundationalist/anti-representationalist point that, ultimately, one cannot get beyond circularity of *some kind* in justification, seems well-placed: in the absence of higher order truths or a position outside

[307] ibid 13–14.
[308] Rorty, *Contingency, Irony, and Solidarity* (fn1) 59 (emphasis added).
[309] ibid. Citing W Sellars, *Science and Metaphysics* (Routledge & Kegan Paul 1968) chs 6 & 7.

of belief to appeal to, it is indeed the case that all we have is human description upon human description. Indeed, the inability to escape our own linguistically-constructed descriptions was the central theme of **Chapter 2** of this thesis; the consequence of this, as will be expanded upon further in the final section of this chapter, is that there is nothing beyond ourselves to appeal to. The consequence is that we must ultimately, Cavell-style, rest upon oneself as our foundation in normative thought.[310] However, the anti-representationalist point that a circular, self-referential justification of our own practices is all we can ask for does not itself immediately point to the idea of ethnocentrism in the collective sense, where morality is taken to refer to '*our* practices'[311] as speakers of "common languages". It does not immediately follow that we must fall back on the values of "our" society. It is equally plausible to rely instead on the beliefs which an "I" – as an individual – hold in their preferred descriptions.

A similar point is made by Foucault in response to Rorty's criticism that 'there is no "we" to be found in Foucault's writings'.[312] Foucault's reply was to ask whether there must always be a 'pre-existing and receptive "we"', or whether it could not also be the result of actions performed by an "I".[313] That is, for Foucault, it is always a question in point whether it is 'actually suitable to place oneself within a "we" in order to assert the principles one recognizes and the values one accepts'.[314] As will be argued in the final section of this chapter, appeals to the fundamental beliefs and descriptions of an "I" – logically prior to any collective "we" – follow more directly and persuasively from anti-foundationalist

[310] See S Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford University Press 1979) 125 ('it may be learning enough to find that I just do; to rest upon myself as my foundation').
[311] Rorty, *Contingency, Irony, and Solidarity* (fn1) 60.
[312] R Rorty, *Essays on Heidegger and Others* (Cambridge University Press 1991) 172.
[313] M Foucault, 'Polemics, Politics, and Problematizations: An Interview with Michel Foucault' in P Rabinow (ed), *The Foucault Reader* (Pantheon Books 1984) 385.
[314] ibid.

premises than do Rorty's "we"-based appeals. The immediate point, however, is that it is, in addition to Rorty's "we"-based approach, a further *possibility* that needs considering. This is enough to raise the question of *why* Rorty moves straight to the "we" over the "I".

Perhaps Rorty's point, noted above, that we lack any "skyhooks" which can be used to escape our own "acculturation" – to 'free *us* from the contingency of having being acculturated as *we* were'[315] – suggests that he sees it as impossible for acculturated and socialised individuals to appeal to anything other than collective values and standards evident in the traditions of the community, which must, in some way, have influenced their own moral and political views. The claim in short is that the individual is *unable* to break out of thinking in terms of the collective values of the community.

However, such a claim that one cannot look past the community would plainly be contrary to experience. History is full of examples of thinkers who have cut sharply against the dominant strands of thinking in their community: examples include early feminists, atheists, gay rights activists and those arguing for racial and other forms of equality. More problematically for this explanation for the "we" focus, however, is a point internal to Rorty's thought. It ends up putting forward a conception of the individual as unimaginative, and weak in their thought, which does not sit well with Rorty's own championing of the idea of self-creative autonomy. This idea of self-creative autonomy, and the power of redescription, is also a key theme in *Contingency, Irony, and Solidarity*, and central to Rorty's ironist – the ideal citizen of his liberal utopia.[316] Descriptive 'autonomy' is the goal of Rorty's ironist – 'to get out from under inherited contingencies and make his [or her] own contingencies, get out from under an old final vocabulary and fashion one which will be all

[315] Rorty, *Objectivity, Relativism, and Truth* (fn233) 13–14 (emphases added).
[316] See Part II of Rorty, *Contingency, Irony, and Solidarity* (fn1) especially ch 5.

his [or her] own'.[317] In placing this as the defining goal and criteria for success of his ironist hero, Rorty surely must regard it as a *possibility* that such autonomy can be achieved to some extent. If so – if Rorty's ideal post-metaphysical culture is not to be, rather unpragmatically, impossible to achieve – Rorty must surely have greater confidence in the descriptive and imaginative capabilities of the individual evaluator as able to break out of inherited contingencies than this first interpretation of his claim would suggest.

However, if the individual *is capable* of achieving this – and indeed Rorty offers theorists like Nietzsche as coming very close, if not all the way, to succeeding in this self-creative task[318] – then there must be another reason for Rorty's attachment to the collective "we"-based ethnocentrism. Put simply, if it is not the point that the individual *cannot* escape appeals to a collective "we", Rorty must be saying that they *ought not* escape; that one *ought, should* appeal to such a "we" in preference to one's own "I". At least, they should when it comes to political theory, and the public political culture of society.

4.3.3.3. Public Collectivism and Private Irony: A Public/Private Divide in Rorty's Ethnocentrism

In fact, this view seems clear from Rorty's use of another key building block in his political theory as set out in *Contingency, Irony, and Solidarity:* the public-private distinction. As Rorty succinctly puts it, his defence of ironism 'turns on making a firm distinction between the private and the public'.[319] Rorty invokes this distinction to thoroughly privatise the radically redescriptive and critical project of the ironist, in which they attempt to come out from underneath the inherited contingencies of the group into which they have been

[317] ibid 97.
[318] ibid 98ff.
[319] ibid 83.

socialised. The ironist project and way of thinking is thus dismissed as 'largely irrelevant to public life and political questions'; it is 'invaluable in our attempt to form a private self-image, but pretty much useless when it comes to politics'.[320] So it does not, after all, seem to be the case that Rorty thinks one is *unable* to escape entirely the acculturation of one's society, such that they are destined to a life of unimaginatively appealing to common sense in the pure sense of the term. Rather, Rorty's vision is that they *should restrain themselves,* and leave their irony and doubts at home. When engaging in politics, wholehearted, firm appeals to the collective "we" are apparently to be the order of the day.

That the champion of the power of description and redescription should now wish these abilities and projects to be left at home as *"irrelevant"* might come as some surprise. It surely cannot be the case that Rorty means to say that ironism has no connection or pertinence whatsoever to public life, political questions, and the way these are approached (as the ordinary meaning of "irrelevant" would suggest). If, as Rorty sees it, '[i]ronism…results from an awareness of the power of redescription',[321] and is characterised by a recognition of the contingency of these descriptions and the vocabulary in which they are phrased,[322] then it is difficult to see how it could *not* be relevant in all areas involving human description. And, for a thorough anti-foundationalist like Rorty, this is simply *all areas per se*, on the grounds surrounding the ubiquity of language, and the thorough de-divinisation of the world set out in **Chapter 2** of this thesis. Moreover, politics, it is contended, is an area where the power of language and redescription are at their strongest. As testament to this, consider the 'normative valence' associated with the concept of

[320] ibid.
[321] ibid 89.
[322] See Rorty's description of ironism and the ironist at ibid 73–74.

"democracy"[323] – the advantages gained from describing a set of arrangements as "democratic", and the 'damning' effect of describing an opposing view as "undemocratic".[324] Another good example is the similarly powerful and appraisive concept of "the rule of law", which often finds its way into arguments in both academia and public life more generally.[325] It would thus be surprising – not to mention thoroughly misguided – for an anti-foundationalist of Rorty's kind to dismiss the relevance of descriptive autonomy to political and public discourse.

On a closer look, it seems instead that Rorty's point is a pragmatic one – that the creative and autonomous nature of ironism is "irrelevant" to *particular purposes*, rather than generally impertinent. Something like this is suggested by Rorty's further comment that it is 'useless when it comes to politics'.[326] Clearly, the question immediately arises: "useless for *what purpose?* What is the standard of utility here?" In other words, what is the end to which Rorty is putting this aspect of his philosophy? Rorty provides some insights into his purpose here on a number of occasions. As he summarises it in the final chapter of *Contingency, Irony, and Solidarity*, Rorty's purpose in this section of the book is to show 'how ironist theory can be privatised, and *thus prevented from becoming a threat to political liberalism'*.[327] Similarly, in those chapters, he writes that the work of 'ironist philosophers'

[323] D Collier, FD Hidalgo and AO Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11(3) Journal of Political Ideologies 211, 212.
[324] E Chemerinsky, 'The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review' (1984) 62 Texas Law Review 1207, 1260.
[325] See J Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21(2) Law and Philosophy 137. On the rhetorical force of the term "rule of law", see also J Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).; B Tamanaha, *On the Rule of Law* (Cambridge University Press 2004) 3 ('everyone is for it, but have contrasting convictions about what it is'). For more examples, and on the idea of "essentially contested concepts" more generally, see the seminal Gallie (fn82).
[326] Rorty, *Contingency, Irony, and Solidarity* (fn1) 83.
[327] ibid 190 (emphasis added).

is 'ill-suited to public purposes', by which he means 'of no use *to liberals qua liberals'*.[328] The words emphasised indicate that the reason Rorty wants the critical and redescriptive qualities of ironism – the autonomous and critical use of language to break out of existing contingencies – to be kept private is to maintain his desired liberal culture, to which he appeals with his ethnocentric "we". The ringfencing of critical irony to the private is thus a device to support and maintain *Rorty's* desired political culture – the same culture epitomised by the Left-leaning, Rawlsian tenets noted above.

Such tactical use of the public-private distinction has been noted by others. As Fraser points out, Rorty effectively restricts 'political discourse…to those who speak the language of bourgeois liberalism'.[329] The adherents of this particular – and it may be added far from uncontroversial – political theory are thus given 'a monopoly on talk about community needs and social problems'.[330] McCarthy notes that Rorty's approach amounts to the privatisation of critical political thought, with the consequence that theoretical accounts of the need to fundamentally restructure existing institutions are allowed '[n]o place'.[331] We are thus 'prevented from even thinking, in any theoretically informed way, the thought that the basic structures of society might be inherently unjust in some way'.[332] In a similarly critical vain, Singer argues that, in invoking this public-private distinction, Rorty has 'disarmed' his pragmatism.[333] Singer is concerned that privatising critical theory just serves to reinforce the

[328] ibid 94–95 (emphasis added).
[329] N Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Polity Press 1989) 105.
[330] ibid.
[331] T McCarthy, 'Private Irony and Public Decency: Richard Rorty's New Pragmatism' (1990) 16(2) Critical Inquiry 355, 367.
[332] ibid.
[333] Singer, 'Should Lawyers Care About Philosophy?' (fn274) 1759.

existing oppression and injustices caused by 'existing power relations' and structures, thus standing 'in the way of establishing social justice'.[334]

This concern depends on a particular conception of justice such that it is possible to identify existing "oppressions" that need to be corrected, but the more immediate point is that this part of Rorty's theory takes one back to the criticism that he conservatively maintains the status quo above (whether "just" or not). It is now apparent, given his account as to the purpose of his privatisation device, that this is no longer the "complacent" conservatism he has been accused of, but an *active and thoughtful* one. As noted above when setting out this criticism (**section 4.3.2.1**), the problem with this is that it sets up Rorty and those who prefer the status quo and its values in a position of unwarranted power, and this has the effect of disempowering everyone else. This is the case whether not the status quo is itself "just" or not (whatever standard is used for that substantive assessment).

What is most crucial to note for present purposes, however, is that if the above reasoning is right, then Rorty's appeals to a collective "we" turn out to be based in a self-serving desire to make *his* desired political culture – a form of Rawlsian political liberalism, with a number of controversial substantive tenets – flourish. The significance of this is that this collective ethnocentrism does *not* have any meaningful connection to his anti-foundationalist and anti-representationalist premises. His comments *sometimes* suggesting otherwise aside, what is in fact driving his approach is his desire for a particular political theory. This sets Rorty out on a different path to that pursued in this chapter, the purpose of which is to construct an argument *from* anti-realist and anti-metaphysical premises.

[334] McCarthy (fn331) 367.

4.3.4. The Later Rorty: There Is No "We" (Yet)

The above discussion and the arguments made have so far relied on Rorty's early political interventions, up until the early 1990s. However, in his later works – beginning with a series of articles through the 1990s and culminating in his work *Achieving Our Country*[335] – a different picture of the nature of Rorty's ethnocentric "we" emerges. At least it is a picture different to how the above discussion and the existing criticisms noted have interpreted this aspect of Rorty's thought. These later interventions see Rorty presenting his appeals to what "we" believe, not as an attempt to refer to any *actually existing,* tangible, community, but rather as a creative, rhetorical device, useful as a tool of persuasion. How this might change the assessment noted above, and how it might interact with his anti-foundationalism, is worthy of attention.

As he puts the idea in *Achieving Our Country,* questions concerning "our" national identity are raised 'as part of the process of deciding what we will do next, what we will try to become'.[336] On this view, '[s]tories about what a nation has been…are not attempts at accurate representation, but rather attempts to forge a moral identity'.[337] As is often the case with Rorty, he introduces this view of inquiry and description through the work of others, reading Whitman and Dewey as classic examples of this approach. On Rorty's reading, both commentators 'offered a new account of what America was, in the hope of mobilizing Americans as political agents'.[338] They were redescribing the country for political purposes, in the hope of achieving the vision they set out. So, for example, Dewey is said to be using phrases like '"truly democratic" as a supreme honorific', but when doing so 'he is obviously

[335] R Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Harvard University Press 1998).
[336] ibid 11.
[337] ibid 13.
[338] ibid 15.

envisaging an achieved America' – not an *existing* one.[339] As Rorty puts it at one point, this project is concerned with 'replacing shared knowledge of what is already real with social hope for what might *become* real'.[340] As a result, there is simply 'no point in asking whether [for example] Lincoln or Dewey got America right', for they are not attempts at 'accurate representation' of anything[341] (other than their own imagination, perhaps).

This description of references to "our country" or "our culture" gives us reason to reassess Rorty's meaning of the ethnocentric term "we" in his work. As he puts it himself in an article from 1992:

> 'I see no better political rhetoric available than the kind that pretends that "we" have a virtue even when we do not have it yet. That sort of pretense and rhetoric is just how new and better "we's" get constructed. For what people cannot say in public becomes, eventually, what they cannot say even in private, and then, still later, what they cannot even believe in their hearts'.[342]

So, at this stage in his thought, appeals to what "we" believe, or what "our society" believes are now expressly presented as political and rhetorical devices, useful in persuading others to accept the view that Rorty commends. Here Rorty explains that '[a]nti-foundationalists' think that what one may call "the better self" – an improved and progressive self – is 'the sort of self that gets created by pretending that it is already there'.[343] He illustrates this by drawing comparisons to 'the way parents create a conscience', with statements like '"You

[339] ibid 17. Rorty quotes J Dewey, 'Maeterlinck's Philosophy of Life', *The Middle Works of John Dewey, Volume 6* (Southern Illinois University Press 1978) 135.
[340] Rorty, *Achieving Our Country* (fn335) 18 (emphasis added).
[341] ibid 13.
[342] R Rorty, 'What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker' (1992) 78 Virginia Law Review 719, 726.
[343] ibid.

didn't *really* want to hurt Susy, did you?"…etc.' [344] This also works in the realm of politics, on Rorty's view. In politics, 'one says things like "America isn't *really* the sort of country that destroys villages in order to save them, is it?"'.[345] Again, these are not attempts to claim that this is actually what "we", or "our country" *really* believe; they are attempts to convince people to accept these statements – to *adopt* these beliefs.

4.3.4.1. Reassessing Existing Criticisms of Rorty's "We"

The consequences this conception of Rorty's ethnocentrism has for some of the criticisms often levelled at his work are noteworthy. Arguments that Rorty is conservatively appealing to a status quo are left questionable by this future-oriented formulation of just what appeals to "public culture" and the like amount to on Rorty's view. This is because he now appears to be attempting to create a self-image of what society should *become*, rather than appealing to what it actually "*is*" – to a self-image that already exists. For Rorty, there simply *is no "status quo"*. Rather he is commending an approach which puts forward 'a vision of a country to be achieved by building a consensus on the need for specific reforms'.[346] While not presented as a direct reply to those who criticise his political philosophy as conservative in nature, Rorty does explicitly seek to distinguish the approach he now advocates from those who seek to maintain the status quo. He praises 'The Left' for seeing 'our country's moral identity as still to be achieved', while chastising 'The Right' for thinking 'that our country already has a moral identity'.[347] Likewise, this rhetorical formulation of Rorty's approach would make the criticisms that Rorty assumes a particular picture of what "we" actually believe, discarding competing accounts, or assuming greater consensus than there

[344] ibid.
[345] ibid.
[346] Rorty, *Achieving Our Country* (fn335) 15.
[347] ibid 30–31.

actually is, less pertinent. For again, on this formulation, Rorty is not even *purporting* to be accurately describing or representing anything, let alone assuming that he has "got it right" over and above others.

However, this formulation of how Rorty came to mean his appeals to "we", and perhaps always meant them,[348] would amount to an open admission of the tendency noted above: that Rorty ends up appealing to "we", and constructs other aspects of his political theory, such as his public-private divide, for the purposes of achieving a political culture which *he* finds preferable, and working towards maintaining this culture. That tendency was briefly criticised above on premises which will be argued for and developed further in the final section of this chapter. It might be suggested that Rorty is in fact doing what an anti-foundationalist is resigned to in the absence of higher order value: appealing to one's own beliefs and fundamental values in their political interventions. Why is it then a problem that he puts his philosophy firmly in the service of his own beliefs?

However, Rorty goes further than this. With his pragmatic use of the public-private divide to privatise critical irony, and keep it out of politics, a worrying picture emerges. It now seems that Rorty is actively, and as has become increasingly clear *intentionally*, seeking to protect *his* preferred political ideology, and to have it entrenched in the public culture of society. The philosophy which follows and the various techniques and devices within it – including this restriction of irony and self-creative autonomy to the private – are used, pragmatically, to achieve this purpose. Put bluntly, the aim is to *disempower* those critical of his substantive political preferences; to disarm the critics in the public sphere, or rather to send them back home.

[348] For a suggestion that this future-oriented "we" was always Rorty's intention – or at least allows us to make greater sense of his earlier work – see Baruchello and Weber (fn259) esp. 208-209.

Putting this all together, it would seem that, despite his trenchant anti-Platonist philosophy and epistemology[349] the effect is that Rorty has, in his move into the world of *political* philosophy, ordained himself as something of the philosopher king for society. But for the sceptic, Rorty's vision is just that: *Rorty's* ideal vision, and the sceptic sees no warrant for the privileging of this vision over those of others in such a way. The power relationship that is of concern here, then, is the one which Rorty's approach creates regarding himself; that of himself and those who happen to agree with him, over others. This point, it must be admitted, comes with some normative baggage: a presumption of normative equality between individuals – it is essentially saying that Rorty's say-so is not enough, and that his views, taken back to their premises, are of no greater force than anyone else's. This is the wrong of the disempowerment and privileging just noted. This value of normative equality is one which will be defended, on the basis of the sceptical philosophy already put forward, in the next section.

4.3.4.2. Anti-Foundationalism and Rorty's New "We"

To return to the links between this approach and anti-foundationalist theory, the pragmatism – as in usefulness – of Rorty's style of arguing on this conception of "we" can be more greatly appreciated. Phrasing one's political arguments in the way the later Rorty does – with appeals to "our" traditions, and "our" values, "our society", "what we believe" etc – does indeed give those arguments an instant appeal, and persuasive force. As Baruchello and Weber suggest in their detailed deconstruction and explanation of the utility of Rorty's "we", relying on classical rhetoric literature: using this label appeals to a 'desire to be part of a larger whole engaged in a worthy endeavour' on the part of those he is seeking to

[349] See especially Rorty, *Philosophy and the Mirror of Nature* (fn24). See also **Chapter 2** of this thesis.

persuade.[350] It is also useful to 'engage his audience', producing 'as much initial agreement as possible' – or at least the appearance of such agreement – so that later points can be more readily accepted.[351] In terms of getting Rorty's political arguments accepted by others, then, this future oriented "we" does indeed seem like a useful way to proceed.

It also has the merit of being consistent with a thorough and wholesale anti-foundationalism, emphasising the anti-representationalist strands which form a key part of the Rortyan rejection of the realist project. In rejecting the idea that our descriptions are attempting to accurately describe "the way things are", it would seem logical to also reject the idea that there is an independent, objective content to a community – that there is an objectively correct way to describe "our" values, beliefs, and traditions. Rorty seems to suggest something like this when he points out that, in his view, there is no 'nonmythological, nonideological way of telling a country's story', because that would imply that there is something objective to contrast such stories with.[352] For the anti-foundationalist, however, '[n]obody knows what it would be like to try to be objective when attempting to decide what one's country really is, what its history really means'.[353]

In short, it would seem impossible – or at least disingenuous – for a wholesale anti-foundationalist like Rorty to purport to be accurately describing what "we", as a matter of "fact", "actually" believe. In this sense, it can be said that Rorty's approach, so conceived, is, in *some* way the result of his anti-foundationalism; he cannot refer to "actually existing" communities, because his theory rejects the idea of an "actually" at all, and hence refers to a *desired* community instead. It then makes sense to construct one's philosophy around

[350] Baruchello and Weber (fn259) 202.
[351] ibid.
[352] Rorty, *Achieving Our Country* (fn335) 11.
[353] ibid.

getting this vision accepted and put into practice. After all, this would fit with the conception of the purpose of argument as set out in **Chapter 2** – to persuade, both ourselves and others. Thus, in the absence of "actually" existing communities, and "correct" political preferences to describe, Rorty's later expression of his ethnocentric approach makes sense.

While consonant with anti-foundationalist premises however, this is not the approach advocated in this thesis. Rorty's ultimate aim is to construct an ideal society around his own particular political vision – persuasive to those who already accept his political premises, and hoping to persuade others who do not already do so through his rhetoric. In contrast, the project of this thesis is to construct a system around the *anti-foundationalist* viewpoint itself – to construct a system persuasive to sceptics *as sceptics.* The final section of this chapter sets out such a vision – presented through the "Godlet" conception of the individual – as flowing persuasively from the linguistic moral anti-foundationalism drawn largely from Rorty's work. It will be argued that this vision flows *more* persuasively and directly from these premises than Rorty's "we"-based approach, on *either* conception of it noted above. As such, it will be presented as a purer anti-foundationalist, sceptical, road into normative political theory, and more in line with the aim of this thesis.

4.3.5. What Can Anti-Foundationalism Do? On the Consequences of Scepticism

As with the disappointment expressed concerning Allan's approach, above, this departure from Rorty's road into political philosophy raises the more fundamental question of what anti-foundationalism *can* do – what role it can play in the development of a political theory. Similarly to Allan, it seems likely that Rorty would object to the very project in which this thesis is engaged as a misguided, perhaps even hopeless one. He would doubtless regard trying to justify particular political and moral beliefs *using* anti-foundationalist arguments as an impossible, confusing task. Like Allan, Rorty sees anti-foundationalism as little more

than a ground clearing tool, providing 'a forum in which people can talk about how to fulfil their needs, which beliefs work to get them what they want, without running into Platonic and Cartesian impasses'.[354] Beyond setting aside misleading, and stultifying realist artefacts, there is little for anti-foundationalism to do. He describes it as like 'a corridor off which innumerable rooms open', because, realism aside, anti-foundationalism is 'neutral between alternative prophecies'.[355] It is thus, for example, 'neutral between democrats and fascists'.[356] For Rorty then, as for Allan, scepticism does little more than help us get 'rid of some Platonic and Cartesian rubbish'.[357] It allows us to *frame* a normative debate more congenially, but it has absolutely nothing to *add to* that debate. That being so, the questions pressed above – seeking to discern the links between his substantive political theory, and his anti-foundationalism – would be seen as pointless, and ill-founded.

Others have indeed relied on comments such as these from Rorty to support an argument that anti-foundationalism, taken alone, is politically and morally redundant. Brint et al decisively state, for example (relying on Rorty's corridor metaphor), that 'no political programs emanate from its tenets', and therefore it can only be concluded that '[a]nti-foundationalism makes no difference whatsoever to the practice of political theory'.[358] It is clear from another statement of their position that they conclude the inability of anti-foundationalism to make *any* difference to political theory on the basis that there is no *necessary* connection. As they put their argument earlier, 'there is simply no necessary connection between anti-foundationalism and politics'.[359] By this they mean that 'no

[354] R Rorty, 'The Professor and the Prophet: Book Review of "The American Evasion of Philosophy: A Genealogy of Pragmatism" by Cornel West' (1991) 52 Transition 70, 75.
[355] ibid.
[356] ibid.
[357] ibid.
[358] Brint, Weaver and Garmon (fn68) 235.
[359] ibid 226.

particular political position, practice, principle, doctrine, set of beliefs follows from taking an anti-foundationalist stance'.[360] Again, this bears similarities to Allan's point concerning the limits of scepticism, discussed above. The response is therefore the same: while it is right to reject the idea that there is a *necessary* connection between the rejection of the realist project and any particular political or moral belief – on the logic that one concerns the status, and the other the content of particular beliefs – it is wrong to proceed as through this exhausts all possibilities, such that there can be *no* useful connection *at all.*

The argument in the next section does not claim a *necessary* connection between the sceptical, anti-foundationalist thesis of the previous chapters and any values. Rather, it attempts to establish a *persuasive* connection drawing on the features and logic of scepticism itself. This, it is suggested, is a viable, fruitful, approach, and one which gives us reason to reject the claim that scepticism is incapable of meaningfully grounding a path into political and normative theory.

4.4. Out of the Abyss: Individuals as "Godlets"

'In the beginning was the Word, and the Word was with God'

(John 1:1)[361]

We are now in a position to present an alternative way forward that will be offered as a better account to those already considered in this chapter, in the sense that it is *meaningfully* grounded in the tenets and supporting logic of scepticism. The conception of the individual

[360] ibid.
[361] *The Bible (King James Version)*.

which results forms the key to the sceptical contributions to political and constitutional theory offered in the rest of this thesis. It therefore forms a central part of the thesis.

4.4.1. The Godlet Conception

This conception can be summed up aptly as conceiving of the individual as, in Leff's term, a "Godlet".[362] The individual is presented as an authoritative moral legislator – *the* authoritative moral legislator. The utterances of each individual – their descriptions, evaluations and moral premises – are, like God's, performative: they do not 'describe facts or conform to them but instead constitute[] them, create[] them, "perform[]" them'.[363] Thus, what is declared to be "right", "good", "bad" and so on, *is* just that, *because* it has been so declared in the descriptions of the individual evaluator. This conception of the individual, and the conception of moral premises as performative utterances that comes with it is well-suited to, and it is argued flows logically from, the rejection of realist-foundationalism at the core of the sceptical perspective. This argument can now be elaborated.

4.4.1.1. The Argument: The Birth of the Godlets

The grounds for that scepticism, as outlined in **Chapter 2**, centred on the idea that morality is a linguistic construct – evaluative notions like "right", "wrong", "just" and so on are terms of the human language. The ubiquity of language also led to the pragmatic dropping of the very idea of a metaphysical authority – something outside of our beliefs to constrain our descriptions – as unworkable. The rejection of this extra-linguistic constraint leaves the individual describer in a position of evaluative freedom. Having set aside the very idea of

[362] See Leff, 'Unspeakable Ethics' (fn26) 1235–1237. As will be seen in the next chapter, while this term is borrowed from Leff, it is not one he argues for, or indeed develops in much detail at all. In fact, he dismisses the possibility that it *can* offer a way forward at all.
[363] ibid 1231.

extra-linguistic authority, the linguistically-armed individual is free to describe as they see fit.

Put that way, a parallel can be drawn with a later characterisation of pragmatic, anti-representationalist philosophy by Rorty as a 'version of anti-authoritarianism'.[364] As he writes at this stage in his thought, the 'anti-representationalist account of belief' at the heart of pragmatism is, 'among other things, a protest against the idea that human beings must humble themselves before something non-human, whether the Will of God or the Intrinsic Nature of Reality'.[365] Rorty uses this account to explain the Deweyan project of democracy. This desired project, in which 'unforced agreement' among a cooperative community takes precedence, 'requires us to set aside *any* authority save that of a consensus of our fellow humans'.[366] For only then will 'communities' come to realise that 'all they need is faith in themselves',[367] and develop the confidence and public culture in which this desired cooperative project can thrive.

However, while the account put forward in this section also draws a link between anti-representationalism/anti-realism, and an account of anti-authoritarianism – such that the conception offered could in some senses be described as "anti-authoritarian" – the nature of this link differs. The picture painted by Rorty (and, on his account, Dewey) is of anti-authoritarianism as the motivation *behind* the dropping of dubious concepts like "Reality" or "Truth". The romantic ideal of free cooperation with others is presented as lying *behind* the anti-representationalist viewpoint; the desire for an anti-authoritarian world, or one where freely agreed cooperation is central is a *reason* to accept the anti-realist account. As

[364] R Rorty, 'Pragmatism as Anti-Authoritarianism' (1999) 53(207) Revue Internationale de Philosophie 7, 7.
[365] ibid.
[366] ibid.
[367] ibid 14.

a version of authoritarianism, the concepts of independent "Truth" or "Reality" get in the way of that political ideal, and they must therefore be discarded.

The case presented here, however, puts the link the other way around: having dropped the idea of independent "Moral Truth" as unworkable, a world in which there is no authority above an individual is the consequence, rather than the motivator. This is not to say that anti-authoritarianism is not an appealing idea in its own right – indeed it is the author's view that the anti-authoritarian implications drawn are to be welcomed as positive, individually empowering consequences.[368] Rather, the point is merely that the argument as developed here does not take this as the driving force of the Godlet Conception. Thus, the argument presented here puts matters the other way around, more in line with the aim of this thesis.

Put another way, the argument is, that once it is accepted that morality is the construction of language, and once we also discard the representationalist idea that there is anything to which our descriptions are trying to be adequate, then the language-bearer steps into the metaphysical shoes that God, "Reality", or "Truth" once filled, and becomes the supreme moral legislator.[369] Thus, it is argued, the Godlet Conception of the individual is the logical, and direct result of a thorough Rorty-style de-divinisation of the world; it is the logical result of taking seriously the key tenet expressed in **Chapter 2**, and drawn from Rorty's thought, that '[t]he world does not speak, only we do'.[370] Once this process is completed, morality

[368] See Murray, 'Philosophy and Constitutional Theory' (fn3) 136.
[369] ibid. It is recognised here that, as noted in the **Introduction** to this thesis, this linguistic argument could catch not only "moral reality" but also other realms too. Does the Godlet become the legislator on factual matters too? As was justified there, this is not a matter pursued in this thesis. It might, of course, turn out that there can be distinctions made which prevents the slide into a full-blown scepticism, but in any case, the key point to note is that none of the arguments in this thesis depend on whether this is the case or not. They operate on the basis of moral scepticism alone.
[370] Rorty, *Contingency, Irony, and Solidarity* (fn1) 6.

can have no content other than that given to it by individuals through their use of language, leaving the bearers of language in control.

4.4.1.2. What "I" Believe: Contrasting Rorty's Ethnocentric Anti-Foundationalism

Here, a clear contrast to the road into political theory taken by Rorty can be drawn. On the earlier interpretation of his ethnocentrism – claiming his liberalism as a persuasive version of what "we" (actually) believe – Rorty appeals to a community-based morality or set of values. While for Rorty we are, morally, 'under no obligations other than the "we-intentions" of the communities with which we identify',[371] on the view here, "right" or "wrong" are simply what the linguistically-armed *individual* says they are, via their performative moral utterances. Thus, for Rorty, an '"immoral action" is the "sort of thing *we* don't do"'.[372] On the approach set out here, an "immoral action" is "the sort of thing *I* – the Godlet – *say* we don't do".

It is contended that the above logic setting up the Godlet Conception shows this conception of morality to be more fitting to the sceptical approach: it flows more directly from its core premises surrounding the wholly linguistic nature of (moral) belief than does Rorty's dubious appeals to ill-defined, and, as suggested from his later work, perhaps disingenuous appeals to an actual or fictional "we". For, once again, once it is recognised that reality is the construction of language, then the language-*bearer* – which reduces down to an individual – is the constructor. It is of course open to the sovereign individual to choose to join any such "we" – a decision on which Foucault pondered – but even here, the normative force of the "we" stems from the individual's tying of their moral premises to the group. In this case, "good" would come to be defined by the *individual* as "what 'we' believe". Such

[371] ibid 198.
[372] ibid 59 (footnote omitted).

a tying is what Rorty, in his earlier forays into political philosophy at least, can be seen as attempting, but it is always, on the normative plane, the *individual* that is the authority.

Likewise, in contrast to Rorty's later reading of Dewey noted above, the anti-authoritarianism which the sceptic commends is not a community-based faith that they have no 'need…to rely on a non-human power', but only themselves.[373] The faith the sceptic recommends is not in the community as a whole – that the community defines "right" and "wrong" and that there is no power over and above a freely-reached consensus – it is, rather, a faith in the individual themselves. As was noted above when discussing Rorty's "we" (**section 4.3.3.2**), the possibility that appealing to what "I" believe was equally plausible from anti-foundationalist premises showed that Rorty's ethnocentrism was not the result of anti-foundationalism itself. Here the argument is now stronger – that the Godlet's "I" is not only equally *plausible*, but *more persuasive as following more directly* from such premises and their supporting logic.

These points so far implicate the *earlier* interpretation of Rorty as attempting to appeal to a current consensus and fundamental ideas of what "we" *do* believe. The response to Rorty's ethnocentrism as he came to present it later in his career – as a hopeful attempt to construct his desired "we" around particular values, rather than a claim that they are already present – would be slightly different. The response to his "we"-based approach on that conception is simply that his project differs from that pursued here. As noted earlier, Rorty's project is an attempt to persuade groups – and society more generally – to take within their culture the values he supports. They are values *he* – Rorty – supports as fundamental premises. The project here is not to persuade groups to take on the author's values *as values per se*, but to offer a persuasive account *on the basis of scepticism*. The Godlet Conception, with its

[373] Rorty, 'Pragmatism as Anti-Authoritarianism' (fn364) 14.

component aspects to be elaborated further in a moment, and its central "I", is more in line with this project than a generally instrumental, pragmatic appeal to "we".

4.4.2. Authoritatively Anti-Authoritarian: A Sceptical Case for Normative Equality

That is the road from the anti-realist anti-foundationalist tenet at the core of scepticism to the idea that the individual is an authoritative moral legislator, constituting moral premises through their linguistic descriptions of the world, and in theory subject to no definitional constraint. This forms the first of two key aspects of the "Godlet Conception" – what can be termed the "authoritative aspect".[374] The second, crucial aspect of the Godlet Conception – elaborated in this section – holds that this normative power and authority is equalised among all individuals. Each individual has what will be called "normative equality" – equal normative force.

4.4.2.1. The Concept of Normative Equality

As Leff puts it, explaining the concept of the Godlet deployed here, the idea is that 'each person is his [or her] *own* ultimate evaluative authority', and what is true of 'God's evaluations' is now true 'of *each* person's evaluations' in the way set out above.[375] As Leff somewhat more pithily puts the idea, '[i]n this approach, God is not only dead, but He has been ingested seriatim at a universal feast'.[376] The account offered here intentionally avoids the use of Leff's own description of 'equal ethical dignity' for this idea, because from this comes the questionable conclusion that 'no one can legitimately criticize anyone else's values' on the ground that doing so would be to disrespect their ingested Godly dignity.[377]

[374] Although note again that the logic which led to it can, in a sense, be described as anti-authoritar*ian* in that it rejects the idea of external moral authority.
[375] Leff, 'Unspeakable Ethics' (fn26) 1235 (emphasis added on 'each').
[376] ibid.
[377] ibid.

The account of equalised authority offered here places no such restriction – Godlets are perfectly able to criticise the alternative descriptions of others on the basis of their own descriptions of similar concepts and situations. Indeed, that is a consequence of the individual having this definitional freedom at all. If they were unable to even criticise the descriptions of others, then they could hardly be said to have any normative force at all.[378] The issue of what happens when the preferred descriptions of Godlets differ, in situations where a common course of action needs to be taken, is dealt with in the next chapter on the topic of legitimate decision-making in society. For now, the point is that the Godlet is, on the moral plane, free to describe and criticise as they see fit, on an equal basis to others. Thus, what is equalised is not "ethical dignity", but what can be termed "moral descriptive authority".

4.4.2.2. Are Some Godlets More Authoritative Than Others? A Presumption of Normative Equality

The argument for this normative equality must now be clarified. On what basis is it claimed that individuals are, on the view offered, of equal normative force, with equalised descriptive authority? An immediate reason for taking the authoritative aspect of the Godlet Conception to be equalised flows, it is submitted, directly from the basis on which that status was granted in the first place, on the argument above. Given that the quality of authoritativeness is granted on linguistic grounds – based on the idea that morality is created by language and that *therefore* the user of language is the God-like authority – it applies to all individuals on the basis of their having descriptive powers. As long as they can describe, they can create.

[378] Flashing forward to constitutional theory, this logic could ground a strong free speech, and freedom of thought principle, in which the punishment of the expression or holding of a particular viewpoint is *never,* or extremely rarely, just. It is always a violation of the individual's Godlet status. See further, **Chapter 8**.

All users of language thus have the tools through which morality is constituted on the logic set out above.

On this basis, it is argued that, as an implication of the linguistic argument for the authoritative aspect of the Godlet Conception as described in the previous section above, there is a *presumption* of this authority being accorded equally. This presumption arises because in the argument for the individual as authoritative moral legislator – the constitutor of morality – this status has been attributed on the basis of their being armed with the constituting power of language, such that they can create moral descriptions which, in turn, constitute the content of the moral realm. Further, as set out earlier, these utterances are *performative* – they establish the content of morality on the basis of their having been created through the use of language. Those who have language can create such moral descriptions and are therefore in control of morality itself. It would thus seem sufficient to establish this Godlet status, based as it is on the constituting power of language, that one has the ability to fashion such a creative linguistic description. We should at least want a compelling explanation of why and how it can be established that, given that all linguistically armed individuals seem to have the ability to fashion moral descriptions, and to therefore be armed with the tools of morality itself, it is nonetheless the case that the descriptions of some are of greater authority than others in the moral realm.

Having explained the basis of a presumption of normative equality, which it is argued flows straightforwardly from the logic which establishes the Godlet's power over morality, the challenge is now to defend it: how, if at all, could this presumption be rebutted? Bluntly put, what could justify the alternative that all Godlets are authoritative, self-defining moral legislators, but that *some*, so to speak, *are more authoritative than others?* If, as stated

earlier, language bearers are left in control of the content of morality, what justifies the conclusion that *some language bearers are more in control than others*?

4.4.2.3. Defending Normative Equality: The "Answer Hitler" Problem

Of course, to some, the idea of normative equality just set out will be highly objectionable. History is testament to the tendency of groups and individuals to draw distinctions between themselves and others in terms of the respect due, and of their worth on the basis of one characteristic or another. Some such accounts – taking the form of political elitism – will be discussed in the next two chapters, when setting out and defending a theory of legitimate decision-making from the sceptic's perspective.[379] The defence of the conception of political equality taken in those chapters will rely on the more fundamental idea of *normative* equality set out here. The issue here, then, is of what can be said to those who reject *this* idea outright, at this level: What can be said to those who distinguish the status of individuals and groups on the basis of particular characteristics – whether they be race, gender, sexuality, class, or any other number of traditional bases for discrimination? To adapt a phrase from Rorty, what can be said to those who reject the instruction to 'extend the respect you feel for people like yourself to all featherless bipeds'?[380] Those who, like the Nazis, base aspects of their worldview on various distinctions between superior and inferior beings will surely reject – among other things – the idea that individuals are equal in terms of the normative force of their evaluative assertions. Put bluntly the language of some groups will be the language of the "inferior"– the ethically "sub-human", perhaps – rather than the basis of their Godlet status as put here. What argument can the sceptic offer in response?

[379] On the elitist challenge, see especially **Chapter 6, section 6.2**.
[380] R Rorty, 'Human Rights, Rationality, and Sentimentality', *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993) 125.

As Rorty reports, this question is a longstanding and well-known one, 'incessant[ly]' put to philosophers in the infamous form of what can be called the "answer Hitler" problem: 'we philosophers are still called upon to "answer Hitler," and abused if we confess our inability to do so', he laments.[381] This philosophical problem is a useful one to tackle when considering the defence of normative equality against those who would put forward a radically different view. While "Nazi" is often used, it will be used here as a convenient shorthand for "anti-egalitarian" (in the sense of normative equality set out). In any case, if one can answer the committed Nazi, with their particularly extreme version of anti-egalitarian authoritarianism this would seem to go some way to answering most less extreme versions.

The answer the sceptic can offer differs according to precisely how the view of the Nazi is supported. *If* a Nazi claims to be able to justify their theory of, say, racial superiority with reference to the generally accepted standards of Western science, for example, they could probably be shown to be wrong *by these standards.* In this situation, that would mean invalid *by their own standards.* If it is declared, for example, that the colour of one's skin is, by scientific standards, a good indicator that they have little to no linguistic ability, or are of non-sound mind, then they can probably be shown to be mistaken, again, *by their own standards.* That is the easy case because the terms of the investigation have been agreed by both sides. As McCarthy puts a similar point: because these arguments would draw 'on the resources of the wider culture, they could be criticised without begging the question'.[382]

The real difficulty – and for this reason the one which those who put the challenge are presumably more concerned with – comes from the committed Nazi who presents the

[381] R Rorty, 'Truth and Freedom: A Reply to Thomas McCarthy' (1990) 16(3) Critical Inquiry 633, 636.
[382] T McCarthy, 'Ironist Theory as a Vocation: A Response to Rorty's Reply' (1990) 16(3) Critical Inquiry 644, 647.

inegalitarian tenet of their ideology as a *moral, fundamental* or *foundational* premise. This would see the Nazi claim something like that particular groups are inferior and to be treated of lesser worth based on a particular characteristic – sexual orientation, say – not because this affects their abilities in any other way, or because of any empirically testable consequence claimed to arise from that characteristic. Rather, that characteristic is tied to moral responsibility *directly*. This would be an evaluative and moral claim directly contrary to the one relied on here: moral responsibility and authority is not down to linguistic capability alone, it is accorded on the basis of other characteristics. Now what we have is a direct conflict of two descriptions: for the egalitarian sceptic, moral authority is attributed purely on the basis of having the tool of language – the power of the word (the Word is with God, after all). For the Nazi, on the other hand, it is, or ought to be, attributed on the basis of, say, race, genetic lineage, religion, and so on. When it comes to such a conflict at the level of fundamental moral premises, what can the sceptic say?

If the Nazi dresses their claim up in metaphysical, realist jargon – "Jews are, inherently, as a matter of fact, of Ultimate Reality, or in their very Essence inferior" – then the sceptic can offer a quick brush-off by repeating their anti-metaphysical and anti-realist arguments. Unfortunately, however, the Nazi does not need that jargon and metaphysical dressing to hold to their moral premise. What if they continue to assert it as a mere subjective point? At this point, all the sceptic can do, it is submitted, is fall back on their own premises and something like the logic already offered. The sceptic can point out that, on their theory, normativity is the construct of language, and, as such, nothing other than language and linguistic capability is relevant in the normative realm. For the sceptic, having dropped the idea of natures, essences, or anything useful beyond language and belief, central to realist-foundationalism, there is simply nothing of any relevance to base normativity on. Nothing apart from language itself, that is. If it really is, to repeat a key anti-foundationalist tenet,

language all the way down, then nothing else *can* be relevant. The bringing in of distinctions based on anything else cannot but be arbitrary on the scepticism developed here. Put another way, race, for example, only has normative relevance if one *gives it* relevance in their descriptions. But for the sceptic this can only ever be just another description, and in this case, *it is not the one best suited to scepticism itself*, on the grounds argued in this section.

This might not satisfy either the Nazi, or those demanding answers to them. It can be reasonably expected that the response "anything other than language is irrelevant to one's normative force" is very unlikely to convince the committed Nazi. It is also, it will be noted, a rather circular response, basically repeating the arguments presented already. This can be readily admitted. This is not, however, to be treated as a fatal flaw. All this thesis purports to offer is an outlook developed from the grounds of scepticism. It is hoped that this is persuasive, but if not, there is nothing more which can be expected on this issue. Those that expect more – knockdown, irrefutable answers to opposing moral premises – are operating within a mindset that scepticism has already rejected.

Those who demand these kinds of answers to the committed Nazi are wanting the philosopher to, as Rorty puts it, 'prove Hitler wrong by finding something beyond him and us – something unconditional – that agrees with us and not him'.[383] Otherwise, it will always be open to the committed Nazi to offer an alternative thoroughgoing description, wholly contrary to that put forward to refute them. What those who want this kind of proof are asking for, then, is an independent constraint to sort between competing descriptions. One which, they hope, turns out to be on their side and demonstrates authoritatively that 'the bad guys [are] bad and the good guys good'.[384] Derrida noted this kind of desire for 'a reassuring

[383] Rorty, 'Reply to Thomas McCarthy' (fn381) 636.
[384] ibid 637.

certitude, which is itself beyond the reach of play'.[385] Indeed, this desire for reassurance is a widespread, perhaps even understandable one, which as Rorty notes seems to 'permeate' Western culture.[386] But to the sceptic, who sees a world where there is nothing but description and redescription – a world without inherent essences or independent constraints – this kind of certitude makes no sense. Those who 'believe in "a moment of unconditionality"' on these matters are still holding on to some kind of 'unveiling-reality model of inquiry'[387] to distinguish the accurate from inaccurate descriptions, which the sceptic has already rejected. The hope for reassuring certitude, and this belief, is precisely what is described in this thesis as a "metaphysical blanket".[388] This thesis throws such blankets aside.

As such, in similar fashion to what was said to those who would reject the sceptic's conception of the value of argument – and deny that their arguments have *any* force whatsoever (see **Chapter 2 section 2.4.1.2**) – it makes no sense to criticise the sceptic for not being able to provide the certitude demanded. For the sceptic, the inability to answer Hitler in the way which would satisfy the metaphysical yearning of those who push the question to this level, says more about their misguided philosophy than anything else. It makes no sense to demand the kind of knockdown, irrefutable answer to Hitler often expected. There is no independent demonstration to be had – at least, to think otherwise is not in line with the sceptical perspective. What is offered here then is, it is submitted, a persuasive general answer to those who would reject the Godlet Conception of the individual language-bearer – complete with its conception of normative equality – relying on the

[385] J Derrida, *Writing and Difference* (A Bass tr, University of Chicago Press 1978) 279.
[386] Rorty, 'Reply to Thomas McCarthy' (fn381) 636.
[387] ibid 643.
[388] See further Murray, 'Philosophy and Constitutional Theory' (fn3) 135.

features and logic of scepticism itself. Nothing more. This is in line with both the purpose of this thesis, and the pragmatic conception of argument it takes.

4.4.2.4. Defending Normative Equality: The Problem of Differences in Descriptive Powers

The above provides a general response to those who would reject the idea of normative equality put forward, based on a range of apparently distinguishing characteristics regarding the worth of individuals. The argument is that popular distinguishing characteristics either rely on ideas which are incompatible with, or at least ill-fitting to the sceptical viewpoint and its linguistic anti-foundationalism, putting linguistic power of description at the centre of moral evaluation. Qualities such as race, gender, religion, and many others besides – traditional grounds of distinguishing normative worth – are irrelevant to the linguistic basis of moral authority constructed from sceptical premises in this chapter. In this response, the idea is that, to be successful in rebutting the presumption of normative equality, the grounds of distinction would need to be relevant to the basis on which that equality was accorded from the sceptic's perspective in the first place. In line with the purpose of this thesis, it must be relevant to the account of moral description it was argued follows from sceptical premises.

With this in mind, a further potential challenge must be considered – one which *does* target the very basis on which normative equality was accorded in the first place: descriptive power. The challenge is that to accord normative force equally on the basis of each having the power of linguistic description, it needs to be further presumed that the level of this power is itself equal. However, is it not possible to argue that people's descriptive and linguistic capabilities differ – that the power of moral description is "scalene", coming in degrees rather than an absolute quality that one either possesses maximally or else not at all? Bluntly put, is it not arguable that some are "better" at describing than others? The danger

is that, if this this the case, then the basis of the Godlet's authority would itself be unequally distributed, such that it would logically follow that this authority would also be a matter of degree. Thus, the presumption would be rebutted on its own logic, and there would exist a *hierarchy* of Godlets, in contrast to the picture of normative equality painted earlier.

The main challenge in making out such an argument would be to operationalise this standard of "better" in the context of moral description. This requires setting out specific qualities that people may possess to differing degrees, and precisely how it affects their descriptive capacities so as to make some "better" or "worse" moral describers. Given that the power of moral evaluation stems from the power of language, on the account offered here, it would seem that the relevant differences would stem from the power of language itself – an unequal distribution of linguistic capability. Otherwise, the argument would risk faring no better than the broad category just dismissed.

The first question to consider, then, is in what way someone might be of greater linguistic, and in turn descriptive, capability than another. Some immediate candidates might include that some individuals have a greater arsenal of words at their disposal when engaging in the creation of moral descriptions. Perhaps, some are simply more *eloquent* in their descriptions. Perhaps they have a more elaborate language, with a greater number of metaphors or distinctions at their disposal, allowing them, it would seem, to be more "precise" in their descriptions, or at least more "vivid", perhaps. It would seem fairly straightforward to establish that differences such as these exist, or at least *might* exist – although a metric of how to measure these would need to be further established if this argument were to have any practical bite.

Even in the abstract, however, a fundamental problem arises. The key to establishing that descriptive capability is a matter of degree, for the purposes of normative authority, would

be to establish which linguistic qualities are superior *for the task in which the normatively authoritative individual – the Godlet – is engaged*. That is, *for the purposes of creating a moral evaluation through language,* because it is this ability that is central to the authoritative aspect of the Godlet Conception, and that is being presumed is equal. This must be the target of any successful rebuttal. The burden, then, would be to answer the question: in what way does a particular difference in linguistic capability, or more neutrally, linguistic practice, make one "better" at attaching moral meaning to the world through language?

An immediate possibility for giving content to this "better" can be quickly dismissed. To many, the intuitive idea might be, with analogy to the enterprise of describing non-normative matters in the practical world, that having a greater control of language allows one to describe matters *more accurately*. Perhaps a greater range of words, or a more precise vocabulary allows one to better capture or reflect what the individual is attempting to describe. This may well be the case for some matters – at least, if one is granting the realist idea that we can establish whether one is capturing "the way things are" more accurately than another, on say, physical or empirical matters. However, it is a key tenet of this thesis that the representationalist account of inquiry this view presupposes is misguided, and ultimately to be discarded, when it comes to *moral* evaluation. At detailed in **Chapter 2**, the argument is that, to the sceptic, this representationalist endeavour is unworkable given the linguistic account of morality, and the ubiquity of language. Realism has thus already been rejected on the basis of the same linguistic anti-foundationalism which it is argued leads persuasively to the Godlet Conception. It is not now open to argue that this status is unequally distributed on grounds that would take one *back into* the realist position. That would be a wholly unpersuasive attempt to rebut the presumption of normative equality because it would conflict with the very nature of the moral scepticism from which it derived.

The challenge is to establish an account of descriptive capability that does *not* fall into familiar, and on this account problematic, realist, representationalist tropes.

What else, then, can "better" mean, on a non-representationalist account? Perhaps a more eloquent describer can create more attractive pictures of their moral evaluations. Perhaps their descriptions are – on account of their larger vocabulary – more "vivid". Perhaps having a greater arsenal of words and the concepts that come with them means that one is able to avoid self-contradiction more readily. Qualities like these might be thought to lend themselves to "better", "superior" descriptive and evaluative capacity in the moral realm, even when severed from any kind of moral realism or representationalism. For that to be the case, however, it must still be established exactly what the relevance of these qualities are for the task of moral legislation in which the Godlet is engaged.

Outside of the moral realist project, where the promise that some are better at getting matters more precisely right could be maintained, it would seem that the most which can be said is that some are better able to describe in a way in which others – maybe even most – would accept as more *compelling* or *persuasive.* This fits with the pragmatic account of inquiry and justification set out in **Chapter 2 (section 2.4.1.2)**: in the absence of realist foundationalism, to say that an evaluation is "right" or "better" can only mean that we are more inclined to accept it as a persuasive, or at least tenable position, on whatever basis is taken as relevant. This seems to be the most language can be instrumental to on an anti-realist account.

However, in the present context the question then becomes: what significance does our, or anyone's, likelihood of being persuaded by the linguistic description of an individual have for the authoritative aspect of the Godlet Conception on the basis on which it has been accorded? What would this signify other than that "we" tend to find those able to produce descriptions with particular qualities more compelling (provided one accepts the standards

of what it means to be persuasive in a particular case)? For example, what does it show other than that we generally tend to be persuaded by those with more elaborate or eloquent languages? What impact does it have on the ability of the individual to create moral evaluations through linguistic descriptions – the defining feature of Godlet status? The answer to these questions, it is submitted, is nothing which would be sufficient to rebut the presumption of equality, once we recall precisely what the basis and nature of the Godlet's moral power is.

Recall that Godlet status was accorded to individuals on the basis of a thoroughly anti-foundationalist account of morality. On this account of morality as the construction of language, and the discarding of the idea that there is anything beyond language to constrain this construction, the individual bearer of language is left with the ability to control the content of morality. Language constitutes the content of moral premises, and the individual controls the use of language. There is a straight line between morality being the construct of language, and the individual, armed with language therefore having the tools needed for its construction. In this logic from linguistic anti-foundationalism to Godlet status, there is nothing intrinsic concerning doing this "well" or deploying language to create "persuasive" or "compelling" descriptions in the view of others. While it may be the purpose of argument, on the anti-foundationalist account, to persuade others to accept one's preferred moral evaluations, it is not a necessary condition of being a Godlet – a moral legislator – to succeed in persuading others. After all, moral evaluation is not regarded by the anti-foundationalist as the construct of "elaborate", "compelling", or ultimately "persuasive" language, but rather language *per se*. These qualities are tests for *justifying moral descriptions to others*, that happen to have developed, but not for the existence of descriptions themselves. Thus, Godlet status is not accorded on the basis of being an effectively persuasive bearer of language, with the ability to successfully persuade others to accept them, but rather on being a bearer

with the ability to attach meaning to the world at all, as one sees fit. In short, persuasiveness is not a necessary condition of moral description, or Godlet status. Once this is recognised, the relevance of various standards of being "better" at describing, or at using language, to the quality it is claimed is equalised among Godlets is again questionable, even absent a realist backdrop.

The above can be distinguished from the response Leff offered to those who try to set up some evaluations as superior to others. What, asked Leff, can be a plausible basis for distinguishing the 'ethical positions of the people on the Clapham omnibus' from those in the 'professorial Volvo', as many feel the impulse to do?[389] One might, he notes, feel inclined to give greater force to the position of someone who has produced it through 'deep and thorough intellectual activity', and which has the quality of fitting into 'a fairly consistent whole', than a 'shallow, expletive, internally inconsistent' one.[390] His response is that this can only be the case 'if *someone* has the power to declare careful, consistent, coherent ethical propositions "better"'.[391] His point is that this kind of claim – that these qualities are preferable and should be taken as an indicator of authority – is itself a normative proposition which can only come from another evaluator. This begs the question of the authority of these propositions themselves. 'Who has that power [to declare the conditions of authority] and how did he get it?',[392] he sceptically asks. As set out earlier, in the Introduction to this thesis (see **section 1.3.1**), and as will be discussed further in **Chapter 5** (**section 5.3**), this is a question to which no satisfactory answer can be given for Leff. *No one* has the authority to judge fellow evaluators in the way which is required to set up such a hierarchy. Thus, any attempt to set up such distinctions necessarily fails.

[389] A Leff, 'Unspeakable Ethics, Unnatural Law' (1979) 6 Duke Law Journal 1229, 1238.
[390] ibid.
[391] ibid.
[392] ibid.

The issue with this initial response is that it seems to assume the equality it purports to defend in the process of defending it. That is, it ultimately amounts to a reassertion of the original idea that individuals' moral assertions are indistinguishable without explaining why this is so. It is indeed plausible, on a thoroughgoing anti-foundationalism, that "consistency" (for example) is only important if someone says it is – it is a linguistic claim after all. But this does not, in itself, establish that everyone's "say so" is equal. Leff comes closer to such an argument earlier in his works in the following statement, with strong anti-foundationalist overtones:

> '"Good, "right" and words like that are evaluations. For evaluations you need an evaluator. Either whatever the evaluator says is good *is* good, or you must find some superior place to stand to evaluate the evaluator. But there is no such place to stand. From the world, only a man can evaluate a man, *and unless some arbitrary standards are slipped into the game, all men, at this, are equal'*.[393]

It seems that *any* distinction which one could come up with would be arbitrary to Leff.[394] However, this argument raises further questions. To work, this response needs to establish precisely what the standard of "arbitrariness" is here, so that it can be established whether particular standards are in fact "arbitrary" and to be discounted. Upon what is the necessary distinction between "arbitrary", questionable standards, and "non-arbitrary", non-questionable standards based? Would the basis of this distinction itself be arbitrary and therefore questionable on the Leffian account? The immediate point is not to suggest that Leff necessarily moves into some kind of self-defeat, but rather that his defence of the equality he ascribes to evaluators in his sceptical argument is, at best, incomplete. To work,

[393] A Leff, 'Memorandum' (1977) 29 Stanford Law Review 879, 888 (emphasis added on last clause).
[394] See Leff, 'Unspeakable Ethics' (fn389) 1239–1240.

it requires some standard of "arbitrariness", which, in turn, requires a clear account of the basis on which evaluative authority and its equality is accorded in the first place.

The argument in this section, it is submitted, provides such an account. The case for normative equality arises from the constituting power of language. If one has the power of language, one has the power to constitute morality via what was described as a performative utterance. This creates a presumption of equality because whoever has language would seem to have the power to construct performative utterances of the kind which characterises the Godlet. In the context of discussing whether there may be a relative distribution of this status – the issue of whether the authority of these utterances is equalised, or scalene in some way – the standard must be set by the grounds on which that status is itself attributed. A persuasive ground for differentiating normative authority must show that there is a difference in descriptive ability in a meaningful sense for the task at hand for the Godlet. The difference must be significant in the sense that it makes the Godlet "better" at the task of creating a moral description. This provides a standard of arbitrariness which can be used. It is arbitrary, for example, to make distinctions based on how persuasive we would generally find the Godlet on the basis of their descriptive powers and command of language, because moral evaluations need not be *persuasive* to constitute moral evaluations, and the Godlet has moral authority based on the fact that they are armed with the linguistic power to constitute moral evaluations. Evaluations are authoritative on the basis that they have been so constituted in language. Anyone who can do this much would therefore seem to have satisfied the basis on which moral authority is accorded. It is submitted that this is a more explicit and persuasive sceptically grounded defence of normative equality.

Having set out a defence of the presumption of normative equality, however, it must be acknowledged that the possibility remains that this presumption *could* yet be rebutted on the standards elaborated here. The argument above is not presented as conclusive or

determinative of the matter. It does contend that the presumption is a robust one – surviving some of the most popular attempts to establish a normative hierarchy – but the issue remains open: as long the argument could satisfy the standards of relevance set out, the presumption of equality could be rebutted. As an extreme example, there might be an argument that some individuals – possibly on grounds of severe disability – are unable to formulate meaningful descriptions at all. Precisely how one would test for this, in a way which would be immune to the arguments put in this section is an issue which would need resolving: how does one establish that someone is unable to even formulate moral evaluations on account of severe linguistic deficiencies? These kinds of issues of sound-mindedness and psychology are outside the scope of this thesis. For present purposes, it has been suggested how this inquiry would have to proceed, along with a standard of what abilities/qualities might impact on normative equality, and, crucially, *why*. For now, it can also be added that in principle any requirement of sound-mindedness should be kept as light-touch as possible. It is designed to ensure that the individual is genuinely describing with some kind of intention (as opposed to being mentally ill and not in charge of their linguistic utterances), because it is the descriptions *of* individuals that are key. An individual who is not aware of their own actions, or in some basic sense in control of their linguistic utterances is not consciously defining anything. However, it is noteworthy that this is not a particularly high threshold to pass. Further, the burden, as a consequence of the logic of anti-foundationalism set out here, is very much on those who would seek to rebut the resulting presumption of normative equality.[395]

[395] Now is also not the time to enter into protracted debates about free will versus determinism, and whether an individual is *ever* really in control of their own thoughts. These may be interesting questions, but they will have to be left to another day.

4.5. Conclusion

The aim of this chapter has been to lay the groundwork for what follows: the foundations for, and first steps on, the road from scepticism into constitutional theory. Picking up from the last chapter's theoretical rejection of accounts of scepticism as a useless, infertile nihilism, this chapter has shown that there is a positive way forward. In fact, it is contended that it has shown not only that the sceptic is capable of making normative claims and holding to values at all, but that they can set out a persuasive, and enthusiastically held vision. The results can also be distinguished from those envisaged even by those who *share* the sceptical perspective – far less ambitious in their sceptical visions.

To sum up, it is argued that the Godlet Conception, which sees the individual armed with the constituting power of language stepping into the shoes once filled by dubious metaphysical and realist concepts of "Reality" or "Truth", or perhaps God Himself, is a persuasive consequence of the scepticism posited in **Chapter 2**. The result is a conception of the individual as an authoritative moral legislator, but on an equal basis to others. The argument above set out the ways in which this conception flows from the very grounds on which that scepticism is based, with as few extraneous assumptions as possible. The key to this logic is the linguistic basis on which the argument for scepticism itself was developed. On this basis, it is offered in place of the alternative accounts of the way forward from scepticism criticised in earlier parts of this chapter; it is better suited to the version of scepticism developed in this thesis.

To some this will be unsatisfactory. They will prefer alternative descriptions of the individual, the basis and content of equality, and the status of moral assertions. The purpose of this thesis however is to explore the consequences of the sceptical position, and, on the grounds set out above, it is argued that this conception is a persuasive – direct – consequence

of that position. This conception – solidly grounded in the features and logic of the sceptical position – is the key to what follows. It forms the groundwork for the sceptical contributions offered to political and constitutional theory in the rest of this thesis.

This conclusion forms a core part of this thesis's contribution in a number of ways. First, it presents the key to much of what follows. The contributions offered to political and constitutional theory in the following chapters rely heavily on the application of this conception on a number of core issues. It thus forms a bridge between the sceptical perspective, and the realm of political and constitutional theory. In the first instance it forms the core of the defence of majoritarianism as the basis of political legitimacy in **Chapter 5**. Secondly, it is submitted, it shows just how fruitful scepticism can be (particularly when combined with the contributions which will be made in the chapters which follow). This is in stark contrast to the negative views of scepticism taken by its critics – such as those dismissed in the previous chapter – and also to the retiring view of the consequences of scepticism taken even by Rorty, Allan and Leff. Moral scepticism has been put to more than the merely ground-clearing purposes it is resigned to by the likes of Allan and Rorty. Rather it has been used to elaborate, and, it is submitted, persuasively construct an account which can, in turn, be carried forward on the road into constitutional theory. It thus sets the groundwork for a clear road into normative, political, and ultimately constitutional theory, which, it is argued, is more persuasive, and more directly based in moral scepticism than the existing accounts considered: a *truly sceptical* contribution to political and constitutional theory.

Chapter 5

From Nothing to Politics: A Theory of Legitimate Political Authority for a Sceptic's Constitution

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'If there were a nation of Gods, it would govern itself democratically'.

(Jean-Jacques Rousseau)[396]

5.1. Introduction

Building on the groundwork for the road from scepticism laid down in the previous chapters, and particularly the last, this chapter marks a significant point of entry into constitutional theory. It sees the thesis apply the sceptical account developed so far to one of the most fundamental issues in constitutional theory: the basis of legitimate political authority for collective decision-making. In doing so the chapter engages also with fundamental political and democratic theory. As noted in **Chapter 1 (Introduction)**, the way in which a political collective distributes its core decision-making power is perhaps *the* most important part of any constitutional order; it shapes the way in which the decisions which affect our everyday lives – and thus our society itself – are made. It is therefore a crucial step in bridging

[396] J Rousseau, *The Social Contract* (M Cranston tr, Penguin Books 1968) bk III, Ch IV, 114.

philosophy and constitutional theory to set out an account of the basis of legitimate political power, and the institutional expression of that account. It is the purpose of this chapter to provide such an account grounded firmly in the sceptical perspective and the principles already established.

In even posing this question – of where legitimate decision-making power should lie in society, who should make collective decisions, and *how* this should be done – assumptions are being made which, in the interests of clarity, must be made explicit and some explanation offered. Most notably, at this stage this thesis is assuming that there *ought* to be a collective decision-making procedure – a collective political power – and, prior to that, that there *ought* to be such a thing as "society" in the first place. Before dealing with the main subject matter of this chapter, therefore, **section 5.2** clarifies this assumption and provides an explanation for it. This is especially important given that the sceptical account so for – in particular the Godlet Conception set out in the previous chapter – might seem to lead most logically into a system of radically individualistic anarchy. Some account as to why this thesis avoids this route must be offered.

Following this, the argument as to what a legitimate decision-making process would look like will be set out. The key to this contribution is the method elaborated in **Chapter 1**, and already utilised in **Chapter 4**: to apply the fundamental tenets and logic of scepticism, with as few external assumptions as possible. Relying on this method, and applying the Godlet Conception of the individual developed from sceptical premises in the previous chapter, this chapter establishes a simple majoritarianism as the most persuasive basis of collective political authority consistent with the sceptical viewpoint. Further, it will be shown that the arguments on which this case is founded lead most logically and directly to a system in

which direct, participatory decision-making is at the fore. Direct decision-making is the *normative ideal*.

To establish this, the chapter proceeds as follows. Firstly, the negative and ultimately debilitating argument of Arthur Leff will be considered in more detail (**section 5.3**). This argument is important to consider given that it holds that the sceptical account that normative assertions have no basis in higher order authorities cannot, as a logical matter, lead *anywhere*, to *any* legitimate system whatsoever. Clearly, if made out, this would be problematic – to say the least – for any thesis trying to apply the sceptical position to constitutional theory. Rejecting this debilitation, however, leads to the core of the argument in this chapter: **section 5.4** will argue that a way out of Leff's normative void and despairing debilitation, consistent with the fundamental logic which led him to it, can be found in the principle of simple majoritarianism.

It will be noted that Leff's debilitation relies on an implicit account of the individual resembling that developed in **Chapter 4** (Leff does not explicitly acknowledge, or defend this account, however). In contrast, this chapter argues that the Godlet Conception – a possibility quickly rejected by Leff – does offer a positive way forward. Majoritarianism is the only collective decision-making procedure that accords with each aspect of the Godlet Conception. Offering a way forward based on that account thus offers a way out of Leff's own debilitation. The key point of this chapter, however, is that majoritarianism accords strongly with the sceptical account developed in this thesis, and thus can be described as a sceptical basis of decision-making authority.

The precise appeal of this principle from the sceptical position will then be elaborated in detail, in **section 5.5**. The account set out draws on aspects of Waldron's argument from respect, and on social choice theory analyses of the majoritarian principle. Two aspects of

majoritarianism will be identified as particularly attractive: the political equality at its heart, and its positive responsiveness to the preferences of the individuals involved. Together, these two qualities give each participant maximal decisional weight. Both aspects are appealing in that they can be described as directly reflecting the two component parts of the Godlet Conception: the individual as an authoritative moral legislator (the "authoritative aspect"), and the equalising of this status among all linguistically-armed individuals of sound mind ("normative equality"). The authoritative aspect is reflected in the positive responsiveness quality of majority rule because it gives the individual the maximum authority they can have compatible with the normative equality aspect, itself reflected in the political equality achieved by the anonymity of the aggregative process at its heart – that is, the process of according each individual one vote, and adding up the votes to determine the outcome. In reflecting both aspects of the Godlet conception – themselves grounded in the sceptical perspective – simultaneously, to the maximum extent possible, majoritarianism is commended as attractive to the sceptical perspective. Indeed, relying on social choice theory, it is shown to be the *only* collective decision-making procedure compatible with this conception, and this perspective.

That is the core of the argument of this chapter, which, it is submitted provides a more direct and persuasive link between moral scepticism and majoritarianism than does James Allan's account considered in the previous chapter. After making the theoretical case for the majoritarian principle, the chapter turns to the issue of its specific *institutional realisation* (**section 5.6**). The models of representative and direct democracy both feature heavily in this discussion. It will be suggested that the grounds on which the majoritarian principle was defended lead to a system in which individuals themselves decide directly on policy matters as the ideal.

Space precludes a thorough investigation as to how this would best operate in practice in a realistic system. However, while in this sense unsatisfactory, the issue of both theory and practice will be given more attention than often found in constitutionalist literature – which it will be noted tends to assume, without real argument, an indirect, representative system of majoritarianism, which is inherently unsatisfactory from the sceptical position, and perhaps even their own. Furthermore, the main purpose of this chapter is the normative one of identifying the main principles that a sceptical theory of legitimate decision-making would follow. That said, some suggestions, taking arrangements from currently existing systems will be made. These arrangements – involving a more central role for citizen-initiated referendums, for example – will be presented as moving towards the ideal identified. Within the confines of this thesis, this carries the benefit of being grounded in current practice, demonstrated to be practically feasible. The possibility of going even further and moving towards an even more satisfactory system in a practically feasible way will be briefly noted, but, given the large, and more speculative task of investigating that vision, this must be left for future work. The task of working out a full-scale vision for a sceptical constitution in both theory and practice is necessarily an incremental one.

5.2. The Problem of Collective Decision-Making: Some Starting Assumptions

As noted above, in posing the question of what a legitimate collective decision-making principle would look like – the basis of legitimate political authority in the constitution of a society – this thesis is relying on some assumptions which, in the interests of clarity, should be made explicit.

5.2.1. Collective Politics and an Assumption Against Anarchy: Why "We" At All?

In seeking to address the issue of decision-making power in society, it is being assumed that there *ought* to be a decision-making procedure in society, and more fundamentally that there ought to be such a thing as "society" in the first place. That is, it is being assumed that there ought to be a cooperative group in which common decisions are taken, and in which there is a general system of rules and standards applied. Were this assumption to be rejected, then the discussion which follows, and indeed the rest of this thesis would become irrelevant. Some explanation for it is therefore necessary.

A number of reasons can be offered. For example, one can point to the 'predictability, security and stability such generally obeyed rules confer'[397], and contrast this with the 'conflict' or 'lack of coordination' that would result from the absence of such rules and common standards.[398] This consequentialist assessment leads James Allan to confidently declare that 'the requirement for some [general] standards and rules seems...beyond dispute'.[399] This is perhaps putting the point too strongly, however – for a moral sceptic at least. This is because pointing to supposed benefits of common standards in such consequentialist fashion is, as with consequentialist approaches generally, to rely on a particular evaluative judgement – here, that "predictability, security and stability" are general goods – which in turn is necessarily based on the values of those making it. Allan would surely not disagree with this, given his frequent references to "sentiments" and "preferences" as underpinning the evaluative stage of consequentialist assessments.[400]

[397] Allan, *A Sceptical Theory of Morality and Law* (fn44) 184.
[398] J Waldron, 'Freeman's Defense of Judicial Review' (1994) 13 Law and Philosophy 27, 34.
[399] Allan, *A Sceptical Theory of Morality and Law* (fn44) 143.
[400] See, for example, ibid 142–143 ('underlying such consequences are particular desires, propensities and inclinations and these vary between individuals. Certain people with certain inclinations will find the consequences, including the obvious risks, of free-riding quite acceptable or even attractive') (Footnote omitted).

Consequences do not judge themselves and so, for the sceptic, this consequentialist justification – as does any – reduces to the preferred description of a particular individual. As such, this consequentialist argument is not defensible on anything more than the assertion of this preference (for stability and predictability).

Of course, it is hoped that others will find the reasons for which it is recommended persuasive, and the value-judgements on which it relies attractive – indeed this is the very purpose of argument as set out in **Chapter 2** (to persuade others to accept a position). However, if, as it turns out, they are met with a sceptical "sez who?", no knockdown response can be given. It is certainly not open to the sceptic to claim that that they have some greater authority on their side. All the sceptic can do is reiterate the reasons behind their preferred description of a system of general rules as "beneficial" or "good", and offer a description of the alternative that makes it look as bad as possible, perhaps with a Hobbes-style description of the dangers of living 'without a common power',[401] the 'Misery' of the 'Naturall Condition of Mankind'[402] in which life is “nasty, brutish and short” while noting that it is, ultimately, just that – a preferred description.

Another ground for collective decision-making is suggested by Waldron as a fundamental feature of his ‘circumstances of politics’.[403] There is, he argues, a ‘need for us to act in concert on various issues’, in recognition that ‘[t]here are lots of things that can only be achieved when we play our parts, in large numbers, in a common framework of action'.[404] This is to say, in pragmatic fashion, that we can achieve more together on many matters than we can by acting alone. In short, there is often 'a need for one decision made together, not

[401] T Hobbes, *Leviathan* (Richard Tuck edn, Cambridge University Press 1996) 88.
[402] ibid XIII.
[403] Waldron, *Law and Disagreement* (fn4) 102.
[404] ibid 101.

many decisions made by each of us alone' in order for some purposes to be effectively achieved.[405] Again, however, it must be admitted that this view is open to question from those with different preferences or a different outlook on life. The lone anarchist, or someone whose preferences lead them to quite like the idea of a Hobbes-style state of nature, perhaps finding the conflict, dangers, and lack of predictability it would bring exciting or pleasingly challenging, is free to object that *their* conception of the good and *their* goals to not require such collective action. Indeed, they might be better achieved by *abandoning* such cooperation with others. Again, the limits of the reply that could be given to such a response, if one is to stay within what might be called "the circumstances of *scepticism*" must be admitted. Consistency prevents the sceptic from claiming anything more than that the preferences on which their own account relies are recommended on *x, y,* and *z* grounds.

This might seem to some like an unfortunate concession. To some it may reveal a worryingly unsecure basis for not only one of the most fundamental assumptions underlying the approach taken here, but of our current society and its institutions; it goes to the legitimacy of the very idea of a legal system, and even the very idea of peaceful society. But, concerning or not, honesty demands that it be made. As Nozick noted, academic works – especially those based in philosophy – are often presented 'as though their authors believe them to be the absolutely final word on their subject', as if they have 'finally, thank God...found the truth and built an impregnable fortress around it'.[406] Much philosophical activity revolves around trying to maintain this image and purported authority in a process of repeatedly 'pushing and shoving' and 'clip[ping] of corners from things' so that they 'fit into some fixed

[405] ibid 144.
[406] Nozick (fn298) xii.

perimeter of specified shape'.[407] With its weaknesses effectively concealed, the image created can then be published as a 'representation of exactly how things are'.[408]

This is not the approach taken here, preferring in its place what might be termed a Nozickean intellectual honesty; to, as far as possible, present one's work along with 'the doubts and worries and uncertainties as well as the beliefs, convictions, and arguments'.[409] It is in this spirit that it is admitted that the sceptical perspective taken in this thesis cannot offer the comfort those who may be concerned by the fragility of the assumptions offered in this section would want. Scepticism is incapable of providing such metaphysical blankets, and sets the demands for such comforts aside. Anything else would be disingenuous. After noting the potential concerns surrounding these assumptions, then, there is nothing to be done but to move on with the argument, while noting once again that the acceptance of anything that follows is contingent on their acceptance.

5.2.2. *Peaceful* Decision-Making and the Assumption Against Violence

As well as a coordinated society based on a system of common standards, this thesis will proceed on the basis that this coordination over what the common course of action should be is to be achieved in a non-violent way – through a *peaceful* decision-making process. This too, of course, may be questioned by those with a preference for the violent methods of dispute resolution. It can quite easily be rejected by those who echo the words of Oliver Wendell Holmes Jr quoted in **Chapter 2** for example; that 'when men differ in taste as to the kind of world they want the only thing to do is to go to work killing',[410] or who really

[407] ibid xiii.
[408] ibid.
[409] ibid xiv.
[410] DeWolfe Howe (fn92) 116.

does take war to be 'the ultimate rationality'.[411] It was noted in that chapter that this aggressive conception of rationality and of the preferable approach to resolving disagreement and issues of coordination is not the one taken in this thesis, and the form of scepticism set out.

Instead, the value of argument is assumed by the very project of this thesis. Indeed, it is the one assumed by anyone who would see this assumption as unsatisfactory and seriously call for a justification for peaceful over violent methods of persuasion. Anyone who asks seriously for a justification for peaceful over violent methods of persuasion in order to be persuaded are themselves already engaged in the enterprise of argument and already themselves treating the peaceful giving of reasons as decisive. Those who, in the absence of reasons they find persuasive, will opt for a system of violence, or who upon hearing such reasons would be willing to accept the idea of peaceful dispute resolution are already showing a commitment to the value of (peaceful) argument, so as to make this something of a non-issue. The real challenge would come from those who put their fundamentally violent worldview into practice, and simply *do* violence, rather than call to be persuaded not to. That very characteristic puts them outside the scope of this thesis. After all, if that *is* their outlook, there is nothing this thesis – premised on the value of argument – *could* say. They would not be listening to arguments, but only planning how best to apply violence so as to achieve their ends.

On the basis of the above, it will from this point on be assumed that the relevant question is not whether we *should* have any kind of rule-based cooperative society at all, or whether these commons standards *should* ideally result from a peaceful method of decision-making, but *who* ought to decide what these rules should be, and *how* to make that decision, subject

[411] Mennel and Compston (fn93) 70.

to the constraint of non-violence. Readers who do happen to find the above assumptions unsatisfying will find the rest of this section, and indeed the rest of this thesis, of little interest.[412]

5.3. The Godlet Conception and the Debilitation of Arthur Leff

This chapter also brings forward the Godlet Conception of the individual elaborated and grounded in the logic of scepticism in the previous chapter. However, while this conception of the individual fits well with the sceptic's perspective, it is one which Leff rejects can get us anywhere on the road to finding a legitimate system of rule-making for society. Rather than taking us further forward on the road into constitutional theory, or indeed anywhere, for Leff, the Godlets lead us onto a straightforward path to a dead-end. This section therefore considers the logic behind Leff's negative appraisal, and the source of his debilitation.

Although seeing 'whether one can found a system on the premise that each person is his *own* ultimate evaluative authority' in this way is, for Leff, '[t]he obvious first move' in the search for an authoritative and legitimate system of rules – '[i]n the absence of a supernatural validator, what could be more "natural" than that?' he exclaims[413] – he argues that there is, unfortunately, a fundamental flaw. The issue is of 'who validates the rules *for interactions* when there is a multiplicity of Gods, all of identical "rank"?'[414] For Leff, the answer is no

[412] It might be noted that all political systems ultimately rely on violence, it is just that the monopoly on such is granted to the state. Indeed this monopoly on defining the remit of lawful violence is, as Heinze has noted, what in part defines the 'modern state' (E Heinze, *Hate Speech and Democratic Citizenship* [Oxford University Press 2016] 5, n32). Perhaps, therefore, the issue is not so much how to build a society that relies *entirely* on peaceful cooperation, but how to build one that minimises the use of generalised or random violence, and which satisfactorily *justifies* the violence the state must commit.

[413] Leff, 'Unspeakable Ethics' (fn26) 1235.

[414] ibid.

one; '[i[t is totally impermissible under such a conception for there to be...interpersonal comparisons of normativity: there is literally no one in a position to evaluate them against each other'.[415] Put another way:

> 'if total, final normative authority were assigned to each biological individual, and he were made morally autonomous, no rules to govern the interaction between those individuals...could be justified under the assumption of moral autonomy'.[416]

Thus, the conception of the individual taken has the effect of validating 'everyone's individual normative system, while giving no instruction in, or warrant for, choosing among them', for the very reason that individuals are seen as 'a series of autonomous monads, each of identical "dignity", each entitled to exactly the same respect'.[417] In short, the problem is that if *all* individuals, as Godlets, are their own authorities, and of equal normative status to all others, then there can be no legitimate basis for *any* decision, or for *any* rule of decision-making. No one is in a position to declare that one view should be taken over others, or to declare that anyone should defer to the outcome of a particular decision-making procedure, because no one is in a position to tell anyone else what to do. The conception of individuals as Godlets leads to a stalemate; there is, as a matter of logic, no way forward on this basis.

Unfortunately, this is also the conception Leff himself seems to take on the road to his radically sceptical conclusion concerning 'the total absence of any defensible moral position on, under, or about anything'.[418] Given his negative assessments of the prospects of a Godlet conception, that this is also the conception Leff himself seems to take goes someway to explaining the debilitating despair he was led to (see **Introduction, section 1.3.1**). The "sez

[415] ibid.
[416] ibid 1246.
[417] ibid 1235.
[418] Leff, 'Law and Technology: On Shoring up a Void' (fn28) 538.

who" critique, which Leff sees as unanswerable, with the effect that '[t]here is no such thing as an unchallengeable evaluative system',[419] is, after all, a challenge to the authority of individuals to prescribe for others. It amounts to asking, in response to a normative claim, "'Who the hell are *you*?"'[420] "Who the hell are *you* to tell *me* what is right or wrong?" For Leff, this response is always relevant, because 'if we are looking for an evaluation, we must actually be looking for an *evaluator*: some machine for the generations of judgments on states of affairs'.[421] Simply put,"'[g]ood," "right" and words like that are evaluations' and therefore require an evaluator.[422] This immediately turns the issue into one of authority. This unavoidable relevance has the effect that the speaker must even ask this – "who the hell are *you* to prescribe for others?" – of him/herself;[423] an ironic "who the hell am *I*?" But it is also always unanswerable; even the first-person "*I* say" must be taken to be an inadequate ground of authority for prescribing for others.[424] So for Leff there is no one *who can have* the authority to tell others what to do.

This logic has the consequence that all evaluative claims are always open to challenge and unable to withstand the "sez who" critique. At the same time, it also has the consequence, as he suggests at one point, that evaluative claims are *un*challengeable; once we have identified an evaluation and therefore an evaluator, '[e]ither what the evaluator says is good *is* good, or you must find some superior place to stand to evaluate the evaluator.'[425] The problem, as Leff sees it, is that 'there is no such place in the world to stand'; 'only a man can evaluate a man, and unless some arbitrary standards are slipped into the game, all men, at this are

[419] Leff, 'Unspeakable Ethics' (fn26) 1240 (italics removed from entire sentence).
[420] Leff, 'Law and Technology: On Shoring up a Void' (fn28) 541.
[421] Leff, 'Unspeakable Ethics' (fn26) 1230.
[422] Leff, 'Memorandum' (fn225) 879.
[423] Leff, 'Law and Technology: On Shoring up a Void' (fn28) 541.
[424] ibid.
[425] Leff, 'Memorandum' (fn225) 879.

equal'.[426] Here Leff makes his view of evaluating individuals as equally authoritative explicit, but *both* consequences just noted – the inability to answer "sez who" challenges to evaluative claims, and the simultaneous inability to reject the evaluative claims of others – it is suggested, reveal a conception of individuals as equally authoritative "Godlets" within Leff's own scepticism. The "sez who" is an unanswerable response because ultimately no one can claim authority over anyone else; but if so, then this also leaves the evaluations of others standing – one could only reject them and replace them with their own if one could claim authority over their author. In both cases it is the symmetry of status between evaluators that is key.

In treating all evaluators as equally authoritative, and all evaluations as therefore equally open to challenge and indefensible, yet also equally *un*challengeable in the way set out above, Leff turns *everyone* into the "Godlets" of equal rank described earlier in this thesis. Something like this is also noted by Johnson when summarising Leff's sceptical argument, focussing in particular on his comments about the sole ability of God to avoid the "sez who" rejoinder; 'with God out of the picture, every human becomes a "godlet" - with as much authority to set standards as any other godlet or combination of godlets'.[427] However, Leff only does so implicitly – he does not describe his own account using the Godlet Conception nor does he provide it with a rigorous philosophical backdrop, as was set out in **Chapter 4** of this thesis, for example. Given that it is a fitting description of the way he views individuals and normative authority, however, and given that it is precisely the conception of the individual which Leff rejects can justify *any* way forward in the decision-making

[426] ibid.
[427] Johnson (fn36) 20.

context, it should be somewhat unsurprising to find that Leff's own work finishes with an overwhelmingly, perhaps discomforting, negative conclusion.

As alluded to in the first part of the "Tale of Three Sceptics" told in the **Introduction** to this thesis (**section 1.3.1**), having established both 'that there cannot be any normative system ultimately based on anything except human will',[428] and that there is no way to insulate such systems from challenge via the "sez who" rejoinder such that '[t]here is no such thing as an unchallengeable evaluative system',[429] Leff concludes his last article with a poem in which he pleas for divine intervention:

> 'Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs.
>
> Nevertheless:
>
> Napalming babies is bad.
>
> Starving the poor is wicked.
>
> Buying and selling each other is depraved.
>
> Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot – and General Custer too – have earned salvation.
>
> Those who acquiesced deserve to be damned.
>
> There is in the world such a thing as evil.
>
> [All together now:] Sez who?
>
> God help us.'[430]

[428] Leff, 'Unspeakable Ethics' (fn26) 1229–1230.
[429] ibid 1240 (italics removed).
[430] ibid 1249.

So here is the conclusion Leff offers, on his sceptical account: “God help us”. While this makes logical sense in light of Leff's claim that only God can form the basis of an authoritative normative system, because only God, as a superior being, can withstand the crushing "sez who" response,[431] it is not helpful as a solution to the problem of how to respond to the need to make collective decisions in society in a way consistent with sceptical principles. Thus, the problem with Leff’s sceptical poem is that it is resoundingly unhelpful. Even presuming that God's help is forthcoming, Leff's conclusion in the meantime offers nothing more helpful than, as one commentator puts it, 'to stare into the abyss'[432] –something like what Leff described as 'the bare, black void' left by the 'absence of any defensible moral position on, under, or about anything' that he identified.[433] Having recognised the normative void, Leff sees no way out of it.

5.4. A Way Forward? Breaking Through Leff’s Dead-End: A Sketch

While Leff was led to this despairing conclusion, it is argued here that it is not the inescapable result of a scepticism such as Leff's or that presented in this thesis. Instead, a constructive way forward can be found which remains consistent with the logic of Leff's negative argument, and crucially with the perspective taken in this thesis, but which avoids his problematic conclusion. The approach offered in what follows is to treat the *source* of Leff's problem – the simultaneous validation of moral premises, stemming from the idea of the equal normative force of individuals as autonomous and authoritative evaluators – as a constraining principle on the choice of decision-making principle. Doing so, it is contended, offers a practical way out of Leff's debilitation, in a way consistent with its premises, and

[431] ibid 1231.
[432] Kalman (fn32) 291.
[433] Leff, ‘Law and Technology: On Shoring up a Void’ (fn28) 538.

therefore justifiable on his own terms, as well as being in line with the scepticism put forward here. This chapter thus applies the Godlet Conception in a more fruitful way than Leff saw possible, and in doing so reveals the dead-end he encountered to be unnecessary.

Given the technical nature of what follows in the rest of this chapter, it might be helpful to provide a broad sketch of the argument to be made in support of this claim. The broad argument, to be made in detail below, is that majoritarianism offers such a way forward. It is an approach which takes this problem seriously, and gives a workable, practical means of decision-making in line with the conception of the individual at its heart. This is because majority decision gives each view, and therefore each individual holding it, the maximum chance of determining the outcome of the collective process, subject only to equal authority being given to others. It therefore accords with both aspects of the Godlet Conception simultaneously, to the greatest extent possible, while also reaching an outcome at all. That is, it reflects what has been termed “the authoritative aspect”, *and* the aspect of “normative equality” which this thesis has grounded in the linguistic scepticism set out in **Chapter 2**.

Thus, the reply to Leff is that, while a strict logical consequence of the Godlet conception of the individual as an autonomous moral legislator of equal authority to others does indeed seem to be that no one can recommend *any* decision-making procedure in a way that can itself withstand the sceptical "sez who" response, majority-decision *itself* reflects this conception and so can be justified on *precisely this basis*. It can be justified on the same basis as Leff's rejection of the validity of any normative claim because it is a process which itself takes the "sez who" critique, the problem of its being unanswerable, and the premises which lead to that problem, seriously. As well as being consistent with the logic of Leff's argument, and the underlying conception of the individual it relies on, this approach carries with it a pragmatic appeal; it has the practical benefit of avoiding the unhelpful stalemate of

Leff's conclusion, and offering a solution to the decision-making problem fundamental to political theory in a way which fits well with the sceptical approach taken in this thesis. Majoritarianism is thus commended as a sceptically grounded, pragmatic political principle to be put at the core of the sceptic's constitution. Put differently, majoritarianism provides a sceptical account of legitimate political authority, while maintaining a fundamental compatibility with the radical normative individualism which flows from sceptical premises.

5.5. A Defence of Majoritarianism: A Principle Fit for the Gods

5.5.1. The Argument in Context: Existing Arguments for Majority Decision

Majority decision has a long history – traceable at least as far back as Ancient Athens, where, as Bosanquet puts it, the 'device by which an orderly vote is taken, and the minority acquiesce in the will of the majority as if it had been their own...is found for the first time as an everyday method of decision'.[434] Since then, majority decision has become widespread in many contexts, finding something of a 'ready acceptance whenever groups make decisions'.[435] Indeed, Waldron goes as far as to state that it 'has prevailed in almost every context where decisions are made by bodies comprising more than two or three individuals who regard one another as equals'.[436] Examples are not hard to find; Parliaments, throughout history and present, use it; 'colleges of bishops' use it, and even – as Waldron likes to point out – panels of judges use it (including in their supposedly "counter-majoritarian" capacity of strong-form judicial review). [437]

[434] B Bosanquet, *The Philosophical Theory of the State* (2nd edn, Macmillan & Co 1910) 4–5.
[435] M Risse, 'Arguing for Majority Rule' (2004) 12(1) The Journal of Political Philosophy 41, 41.
[436] J Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 125.
[437] ibid. See also J Waldron, 'A Majority in the Lifeboat' (2010) 90 Boston University Law Review 1043, 1044.

To some, its legitimacy as the superior decision-making method is self-evident. For example, the natural lawyer Grotius thought it clear the 'majority would naturally have the right and authority of the whole'.[438] Other political thinkers and philosophers have followed this line. Locke, for example, in an analogy to physics, argues that 'it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority'.[439] Similarly, Thomas Jefferson declared that 'the law of the majority is the natural law of every society of men' - for it is the natural means through which groups exercise their inherent 'right of self-government',[440] and, more recently, Arendt wrote that 'the principle of majority is inherent in the very process of decision-making'.[441] Whatever, its presumed legitimacy – such as it may be – such "natural" claims for political principle, or indeed any principle, clearly have no place in a sceptic's theory; these are but human descriptions of the principle, and descriptions which require justification over alternatives.

Apart from such naturalistic commendations of majority-decision, however, there have been a variety of other arguments attempting to justify the principle.[442] For example, Condorcet's classic jury theorem held that, in a choice between two options, and where each member of a decision-making body has a better than random chance of reaching the correct outcome, the chances of the body being correct are increased by use of the majority principle, and as the group size increases, so does the probability of the majority being right.[443] In more

[438] H Grotius, *De Jure Belli Ac Pacis* (1625) bk II, Ch 5, sec 17 (any edition).
[439] J Locke, *Two Treatises of Government* (P Laslett ed, Cambridge University Press 1988) bk II, para 96. For discussion of Locke's analogy, and of its normative worth, see Waldron, *The Dignity of Legislation* (fn436) 130–150.
[440] T Jefferson, *The Political Writings of Thomas Jefferson* (E Dumbauld ed, Liberal Arts Press 1955) 83.
[441] H Arendt, *On Revolution* (Penguin Books 1973) 164.
[442] For a useful overview of some of the most common, see Risse (fn435) 44–45.
[443] See the seminal Marquis de Condorcet, 'Essay on the Application of Mathematics to the Probability of Decisions Reached by Majority Vote' in KM Baker (ed), *Condorcet: Selected Writings*

modern times, this has formed the basis of defences of majority rule by epistemic democrats, with a concern for reaching the "correct" or "best" answers to the decision-problems that face society.[444]

Others have made a more procedural use of social choice analyses of majority-decision establishing that it is the only procedure satisfying a number of conditions. The most notable example is May's theorem, offering a logical and mathematical proof that majority rule is the only procedure (for deciding between two options) which satisfies each of the conditions of decisiveness (a determinate outcome is always reached), anonymity (equality of impact in the process), neutrality between options, and positive responsiveness (that it responds positively if an individual changes their preference).[445] Other arguments have drawn primarily on the idea of political equality,[446] often linking it to the more fundamental ethical

(Bobbs-Merrill 1976). While originally expressed in the context of a decision-problem between only two options, the theorem has been extended and established as applying to non-binary choices, see C List and RE Goodin, 'Epistemic Democracy: Generalizing the Condorcet Jury Theorem' (2001) 9(3) The Journal of Political Philosophy 277.

[444] See List and Goodin (fn443).

[445] KO May, 'A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision' (1952) 20(4) Econometrica 680. See also, AK Sen, *Collective Choice and Social Welfare* (Holden-Day, Inc 1970) ch 5. Strictly speaking, the theorem is not itself an *argument* for majority-decision, and May himself remained neutral on its normative value – his purpose being the analytical one of seeking to 'illuminate [its] formal characteristics' (681, n7). For this reason, it is inaccurate to refer to May's theorem as a "defence of" majority rule, as Bellamy does, for example (see R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* [Cambridge University Press 2007] 227).

However, as Ackerman notes, if one assumes the proof, then it follows that '*if* you approve of' each of the conditions, 'you are logically committed to majority rule' (B Ackerman, *Social Justice in the Liberal State* [Yale University Press 1980] 227). Ackerman puts May's conclusion to this use, arguing for its conditions via his dialogic approach, and using it as the 'basic framework' of his defence of majority rule as 'a legitimate' method of resolving disputes in his ideal liberal state (227-278). See also RA Dahl, *Democracy and Its Critics* (Yale University Press 1989) ch 10, especially 139-141 (building one of the four justifications for majority rule he offers around May's proof). Aspects of the social choice proof, and criticisms, will be considered in more detail in the argument that follows below.

[446] See, for example, J Roland Pennock, 'Responsiveness, Responsibility, and Majority Rule' (1952) 46(3) The American Political Science Review 790, 792 ('the principle of the majority is the principle of equality, the denial of the right of any minority to rule'). See also W Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) ch 2 (arguing that a procedural, majority-based conception of democracy is 'fundamentally egalitarian' [45]). For criticism of links between equality

principle of equality of interests between individuals.[447] And other arguments still, focus on what Risse calls '[m]aximization' – the idea that majority rule 'maximizes the number of people who exercise self-determination', or 'whichever property one thinks is expressed in the act of voting or realized' by winning a vote.[448]

The above is by no means an exhaustive list of all the arguments that have been, or can be made in an attempt to justify the majority principle; it is provided as a context in which the argument of this chapter can be placed. As briefly set out above, the present argument for majority-decision is that it gives each individual in the process the greatest amount of power to determine the outcome on the basis of their own preferences, compatible with an equal weight being given to each of the others. This argument – relying on a particular conception of political equality – will draw on parts of Waldron's argument from fairness and respect, making links to aspects of social choice theory where useful. Links to other defences of majority-decision will be pointed out, and key differences noted and explained, as the argument progresses. Underpinning this support throughout will be the sceptical "Godlet" conception of the individual grounded in this thesis's moral scepticism.

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and majority rule, see B Saunders, 'Democracy, Political Equality, and Majority Rule' (2010) 121(1) Ethics 148.

[447] See for example Pennock (fn446) 796. See also, T Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) (setting out an interest-based based egalitarian defence of democracy as realizing 'public equality in collective decision-making' [2] through giving 'each person an equal say' [9] in those decisions – a means to advancing the 'interests or well-being of persons equally' [2]). See further Dahl (fn445) 6 (arguing for equality of voting power on the basis of equality of interests, combined with the 'Presumption of Personal Autonomy' - the idea that each individual is most likely the best judge of their own interests [99]).

[448] Risse (fn435) 44.

5.5.2. A Sceptical Argument for Majority Rule: A Procedure Fit for the God(let)s

5.5.2.1. The Broad Appeal of Majority Rule

Waldron's argument from respect provides a useful, accessible account of qualities of majority rule that are appealing on the approach taken here. Waldron holds that majority-decision is a 'a way of ensuring action in-concert in the face of disagreement',[449] in a 'way that is respectful of the persons whose action-in-concert it represents'.[450] It displays this respect for individuals in two ways; first, 'it respects their differences of opinion about justice and the common good' in that it 'does not require anyone's sincerely held view to be played down or hushed up because of the fancied importance of consensus'.[451] Secondly, it 'embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement'.[452] It is this second aspect of "respect" – and the characteristics of majority-decision that, according to Waldron, embody it – that is of interest here.

Majority-decision is respectful in this second sense because it 'gives equal weight to each person's view in the process by which one view is selected as the group's'.[453] Moreover, it 'attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others'.[454] That is, it 'accords maximum decisiveness to each, subject only to the constraint of equality', and, as a result, is a 'fair method of decision-making'.[455] Waldron emphasises the point by contrasting this

[449] Waldron, *Law and Disagreement* (fn4) 108.
[450] ibid 109.
[451] ibid.
[452] ibid.
[453] ibid 114.
[454] ibid (footnote omitted).
[455] ibid (emphasis removed). See also Waldron, *The Dignity of Legislation* (fn436) 148.

principle with the possible “Hobbesian” alternative in which one individual is selected as sovereign. This method, in contrast, gives 'decisive weight to just one of the competing views...and little or no weight to any of the others’.[456] Thus, Waldron's argument can be neatly summarised as the point that 'according equal weight or equal potential decisiveness to individual votes is a way of respecting persons' and that majority decision is therefore a respectful and fair procedure.[457]

Breaking the above down, it can be seen that it praises two particular qualities of majority-decision as showing respect for the individual; the weight the process gives to the views of the individuals involved – their potential for decisiveness, or what Waldron calls their 'positive decisional weight'[458] – and the equality of this weight between individuals; that it applies to each and every individual without distinction. These qualities correspond to two conditions of the social choice theory analysis of majority-decision as set out by May – the 'positive responsiveness',[459] and 'anonymity'[460] of the process. Indeed, in one explication of his argument from respect, found in his *The Dignity of Legislation*, Waldron explicitly relies on May's theorem as a proof that majority-decision – and majority-decision *alone* – displays the kind of respect he has in mind.[461]

[456] Waldron, *Law and Disagreement* (fn4) 114.
[457] ibid 114–115.
[458] ibid 113.
[459] May (fn445) 682.
[460] ibid 681.
[461] Waldron, *The Dignity of Legislation* (fn436) 148. See also, 162 and 189 (citing May’s theorem as a proof that ‘majority-decision alone satisfies elementary conditions of fairness and rationality’).

Waldron's sometime use of the social choice theory analysis,[462] has led him to some common criticisms made of those who rely on such theories.[463] Some of these criticisms will be discussed later (**Chapter 6**) when we turn to defending majority rule against a number of common objections. For now, the argument for majority rule will be continued by elaborating precisely how the two qualities noted are achieved and explaining their value from the perspective of this thesis.

5.5.2.2. Majoritarianism and Normative Equality: Equal Decisional Weight

The equality of the majoritarian principle is achieved, quite simply, through the aggregative process at its heart: adding the votes up, with the most votes determining the outcome. This aggregative rule means that, as a matter of process, the outcome depends solely on the number of votes for a proposition, and not on the 'naming of the preference holders'.[464] This is captured well by the social choice theory literature's description of this quality as 'anonymity'.[465] It is formally demonstrated there by showing that 'when any two voters' preferences are interchanged, the social choice remains the same'.[466] This is achieved by the

[462] Waldron puts the point more tentatively in *Law and Disagreement*. There, he 'doubt[s] that one can prove…that majority-decision is the only decision-procedure consistent with equal respect' and appears to distance himself from the conclusiveness of the social choice theory analyses (Waldron, *Law and Disagreement* [fn4] 116). Curiously, the year of publication of *Dignity of Legislation* and *Law and Disagreement* is the same, so it is unclear whether the differences between the two noted in the text is a development in Waldron's views on majority-decision (and in which direction), a simple inconsistency, or of no intended significance. For this reason, the significance of an earlier article in which Waldron takes the more tentative line from *Law and Disagreement* (the relevant chapter of the latter being a substantial reproduction of the former) is unclear (See J Waldron, 'Legislation, Authority, and Voting' [1995] 84 Georgetown Law Journal 2185, 2212).

[463] See, for example, Risse (fn435).

[464] J Elster, 'Majority Rule and Individual Rights' in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993) 177.

[465] May (fn445) 681.

[466] C Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton University Press 1989) 59. For the technical proof that majority-decision satisfies this condition see May (fn445) 682–683.

rule which makes the outcome depend solely on the numbers of votes, and by counting each vote for one and one only.

As critics of majoritarianism point out, this immediately rules out schemes of plural voting – assigning more votes to some individuals over others, on the basis of intelligence, wisdom or competence, for example – for then the identity of the individual is being treated by the process as relevant to, and potentially determinative of, the decision taken. These objections – which, due to their challenge to the idea of equal normative authority at the heart of the form of political equality favoured by the simple majority principle, will be termed "authoritarian" or "elitist" objections – are prominent in political and democratic theory. Such challenges to the equality at the heart of majority rule are considered at length and responded to in the following chapter. Thus, a more detailed defence of this principle against these, and other criticisms, can be found there. For now, it is simply pointed out that the principle of equality of voting power, with the equal decisional weight of majority decision, directly reflects the idea that each individual is of equal normative authority. This idea was set out earlier as the second key component of the Godlet Conception.

It can also be immediately noted that the principle of equal decisional weight, and the underpinning value of normative quality attributed to it here, presumptively rule out non-simple majority rules, such as special, supermajority requirements. Requirements of supermajorities – say, a 2/3 majority – make it easier for those who prefer the status quo to get their preferred outcome (no change) than those who favour the alternative offered. Such requirements therefore inherently create an inequality of power between individuals, based on their view as to what the outcome should be. This has been noted, in the context of constitutional amendment procedures, by Sadurski with the following demonstration: in a situation where a law (or constitution) is adopted stating that future changes to a provision

'require a 66 per cent majority', and at some point 'there is a 55 per cent majority support' for change, the effect is that each member of the 55 per cent majority's vote is given less weight in the decision-making process 'than each vote of the 45 per cent minority'.[467] It takes *less* votes for those favouring the current provision to achieve their outcome, than it does for those who favour the alternative. Their votes are given greater weight – have more impact – in the process.[468]

If equality of voting power is something to be valued, as suggested here, then such effects are, prima facie, out of line with that principle, and prima facie unjustified. Such departures from simple majority rule are often found in entrenchment provisions within a constitutional system, seeking to protect a particular principle from easy change. As such, these kinds of requirements, and their acceptability will be discussed at length when this thesis turns to the issue of entrenchment and possible limitations on majority rule in **Chapters 7 and 8**. The point that such provisions are unjustified due to their effect on normative equality is a prima facie, and at this stage tentative one. The possibility that *some* provisions, in particular contexts – such as those ensuring equality of voting power itself – might justifiably be put beyond the reach of simple majoritarianism as sharing the very same basis as that principle itself is explored in **Chapter 8**.

The immediate point above concerning the power given to those who favour the status quo challenges the suggestion made, in passing, by Pennock that supermajority rules actually *maintain* respect for political equality. He argues that to 'give a power to *any* minority of, say, 40% of the electorate to prevent certain action' still means that 'all are treated alike: those who are in today's majority may be in tomorrow's minority, and *vice versa'*.[469] While

[467] Sadurski (fn446) 67–68.
[468] See also Bellamy (fn445) 227 (noting that 'all counter-majoritarian schemes involve' a 'bias towards the status quo').
[469] Pennock (fn446) 792.

Pennock is correct in pointing out that the privilege is not necessarily personalised in terms of *identity* – attaching to a 'particular group of persons'[470] – so that it is in some sense anonymous, the point remains that privilege attaches to those who favour a particular outcome by giving their votes and preferences greater weight. This difference is not significant for the argument made here; a privilege in normative power is a privilege in normative power, whatever quality it attaches to, and thus still a prima facie violation of the principle of normative equality.

The basis for the appeal of the equal decisional weight inherent in the majoritarian process – that it reflects the idea of what is being termed here "normative equality" – differs from that often found in defences of political equality in democratic theory. In Dahl's defence of democracy, for example, the argument for equality in the process of governance is based on the idea of equality of *interests* between individuals. Dahl ties the fundamental principle of the "equal intrinsic worth" of individuals, on which he bases his defence of the democratic process,[471] to the 'Principle of Equal Consideration of Interests'.[472] In turn, this interest-based focus is, as he sees it, the 'aspect [of intrinsic equality] that seems...most relevant to the democratic process'.[473] He combines this with a further proposition, which he identifies as a longstanding 'cornerstone of democratic beliefs' – the 'Presumption of Personal Autonomy':

> 'the assumption that no person is, in general, more likely than yourself to be a better judge of your own good or interest or to act to bring it about. Consequently, you should have the right to judge whether a policy is, or is not, in your best interest'.[474]

[470] ibid.
[471] Dahl (fn445) ch 6.
[472] ibid 86.
[473] ibid.
[474] ibid 99.

Combining the Principle of Equal Consideration of Interests, with the idea that the individual is the best judge of their own interests, leads Dahl to the conclusion that that 'no citizen's claims as to the laws, rules, and policies to be adopted are to be counted as superior to the claims of any other citizen'.[475]

In short, Dahl's argument is that '[i]f the good or interests of everyone should be weighed equally',[476] then each individual's views as to the policies which ought or not to be adopted should be counted equally. Similarly, Pennock supports the principle that votes are weighted equally on the basis of equality of interests between individuals, writing that '[b]ecause each alike has a life to protect and a wellbeing to further, we hold that votes should be counted equally'.[477] Likewise, Bellamy's republican defence of democracy prizes 'equal participation in the collective decision-making process', on the basis that it is 'constitutive' of non-domination and non-arbitrary rule.[478] On his account, non-domination is achieved 'so long as all citizens have an equal and ongoing chance of having their *interests* considered in the collective decision'.[479]

In contrast, however, the argument here is not based on the equality of interests between individuals. It does not argue that a democratic process based around political equality is a means of reflecting the equality of *interests* between individuals – or some intrinsic equality concerning the quality of their lives. It argues rather that the majoritarian process reflects the equality of *authority* between individuals. Reworking the words of Pennock, above, the point here can be put as that "because each alike is *an authoritative moral legislator*, with

[475] ibid 105.
[476] ibid.
[477] Pennock (fn446) 796.
[478] Bellamy (fn445) 218..
[479] ibid (emphasis added). For the fundamental concern for interests at the heart of Bellamy's thinking, see also 219-220 (suggesting that disagreements over issues of justice often reduce to conflicts of interests that inform one's judgements on those matters).

an *evaluation to further*, we hold that votes should be counted equally". This difference does not necessarily show an incompatibility with Dahl's argument, and others like it. It does not necessarily reject the moral proposition that individuals' interests are of equal worth and should be treated as so. It cannot do this, because the approach here does not necessarily say *anything* of *interests* at all. It is concerned with normative and moral judgements – not interests. A useful way of expressing this difference may be to note that the normative/evaluative judgements of concern here may *ground or inform* one's conceptions of the good, and so of interests too, but this is "meta" to the interests themselves.

Rather than showing an incompatibility with the interest-based argument of the likes of Dahl, this difference merely shows a different approach and focus. As reflected in the Godlet Conception, the focus here is on normativity, not interests, wellbeing, or any other more particular normative standard or conception of the good. This, in turn, follows from the focus of the sceptical approach which led to that conception; focussing on the nature, basis, and defensibility of *normative, evaluative premises* (see **Chapter 2**). On this basis, while Dahl sees the equal consideration of interests as the aspect of equality 'most relevant to the democratic process',[480] the nature of the perspective in this thesis, and the reasoning set out in previous chapters so far, lead it to see *normative equality* as the aspect of equality "most relevant" to the democratic process.

Reflecting this difference, the consequence of Dahl's argument is that each individual is the authority regarding their own interests, whereas the principle relied on here is that each individual is the authority of what is normatively desirable, *on whatever standard of "the good" that is being used (interests or otherwise).* The subject matter on which the individual is treated as equal is morality generally. While this differing approach does not challenge

[480] Dahl (fn445) 86.

Dahl's conclusions regarding political equality, however, it will become more significant later when responding to criticisms of the "narrow" conception of political equality favoured in the argument for majoritarianism taken, which also assume an interest-based approach (see **Chapter 6, section 6.3**).

While supporting Waldron's praising of the majoritarian process on the ground that it ensures the normative views of individuals are given equal weight in the process of decision-making, the appeal of this equality also differs from that which he provides. Waldron does not offer an interest-based justification as Dahl does; instead, as is clear from his famous argument that the right to unrestricted political participation is the "Right of Rights", Waldron's route to the value of equality of decisional weight starts from a foundational premise concerning the dignity and autonomy of the individual. To argue that citizens have a right to participate in decision-making on an equal basis,[481] Waldron starts from the premise that each individual is a 'potential moral agent, endowed with dignity and autonomy'.[482] This, according to Waldron, is the view of the individual implied by the very idea of rights; 'any right' is given in an 'act of faith in the agency and capacity for moral thinking' of the individual.[483] Yet it is also incompatible with the 'insult, dishonour or denigration that is involved when one person's views are treated as of less account than the views of others' on matters which affect them also.[484] There is, he contends, 'something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard or too important to be left to the right-bearers themselves to determine, on a basis of equality'.[485]

[481] See Waldron, *Law and Disagreement* (fn4) Ch11.
[482] ibid 223.
[483] ibid 250.
[484] ibid 238.
[485] ibid 252.

So, according to Waldron, his approach to political decision-making 'evinces a form of respect in the resolution of political disagreement which is continuous with the respect that rights as such evoke', because it relies on 'the very capacities that rights *as such* connote'.[486] There is a 'certain dignity in participation', and distributing this equally reflects the 'respect' owed to an individual as 'an active, thinking being'.[487] Alternatives, giving greater weight to some over others, represented by schemes such as entrenched Bills of Rights, are incompatible with this entailed respect, and so, insofar as those alternative approaches rely on the idea of rights, there is something of an internal tension. Harel provides a neat summary of the basis of Waldron's value of political, participatory, equality: 'Political participation...is grounded in the dignity and respect we owe equally to all people' – the ground for the attribution of rights more generally.[488]

This grounding of political equality, and majoritarianism, in the fundamental idea of the respect for the dignity and autonomy owed to rights-bearers has been subject to strong criticism, challenging Waldron's details as to what this respect does or does not require. For example, Enoch replies that '[w]e merit respect of this sort – if indeed we do – because of what we are, and perhaps even more because of what, at our best, we can become'.[489] But this is 'perfectly consistent with our being stupid, morally corrupt, almost bound to act wrongly and imprudently'.[490] He argues that is no disrespect to take this possibility seriously, and, if 'the evidence points to the conclusion' that this is the case regarding most people, then it is doubtful that either 'morality in general or the duty to treat people with respect in

[486] ibid.
[487] ibid 251.
[488] A Harel, 'Notes on Waldron's Law and Disagreement: Defending Judicial Review' (2006) 39(3) Israel Law Review 13, 17.
[489] D Enoch, 'Taking Disagreement Seriously: On Jeremy Waldron's Law and Disagreement' (2006) 39 Israel Law Review 22, 28.
[490] ibid.

particular require that we do not believe what our evidence supports', and take means to address the dangers that result from the way people actually, as a matter of fact, are.[491] Thus, on this view, the internal tension Waldron attributes to those who support the idea of rights, does not arise. In a similar vein, Raz questions the idea that we should respect the beliefs of individuals simply because they 'have come to have them by the exercise of their rational powers'.[492] Contrary to what Waldron suggests, '[r]especting people as rational self-directing agents does not require desisting from following true beliefs which those people dispute'.[493] To suggest otherwise 'confuses respect for people, because they have rational powers, with respecting their currently held views'.[494]

So Waldron's point that the very idea of rights requires – on grounds of internal consistency – the political equality he relies on in his support of the principle of majority decision is, perhaps, questionable. Moreover, the details of what respect for people as rational self-directing agents with moral autonomy requires, are also questionable on the line of argument above. Note however, the realist presuppositions of that criticism – the references to what is *in fact* the case regarding people's moral beliefs; their being *morally bankrupt*, *stupid*, out of line with the *truth*, the idea that we can justify disrespecting their currently held views as simply *wrong*.[495] To the extent that they rely on this idea of moral truth then these responses are, for the sceptic, unavailable. This point will be returned to in **Chapter 6**, dealing with elitist objections to political equality (see especially **sections 6.2.2 and 6.2.3**).

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[491] ibid.

[492] J Raz, 'Disagreement in Politics' (1998) 43 American Journal of Jurisprudence 25, 43.

[493] ibid.

[494] ibid.

[495] See also L Alexander, 'Is Judicial Review Democratic? A Comment on Harel' (2003) 22 Law and Philosophy 277, 281 ('respect cannot be demanded for erroneous moral judgments in the form of acceding to them'; 'respecting them may entail allowing those whose judgments they are to impose immoral constraints...on other people' [emphases added]).

However, the point is neither to defend, nor criticise, Waldron's specific grounding of political equality. Rather it is to distinguish the argument of this thesis. This thesis argues that the respect owed to the judgements of individuals in the political process is *not* grounded in the conception of the individual implied by the very idea of rights; it is not a rights-based justification, grounded in the implied dignity of the individual. Rather, political equality – in terms of equal political power – follows logically from the Godlet conception of the individual as normatively authoritative, but of equal authority to others, which was argued for earlier. The point is *not* that individuals are owed respect for their views because they are *rights-bearers* – although the position advanced here is not necessarily incompatible with this premise – but that they are, in the absence of higher authority, *moral legislators,* on the basis of their being armed with the constituting power of language.

Continuing the present argument, having set out part of the initial appeal of the majoritarian process due to the political equality at its heart, and the appropriateness of that equality from the perspective of this thesis, the discussion will move to the second key quality of majoritarianism.

5.5.2.3. Positive Responsiveness and Majoritarianism: Treating Godlets as Maximally Decisive

The second key quality of majoritarianism is what Waldron calls the 'positive decisional weight' the majoritarian process gives to the view of each individual:

> 'once a set of options (>1) is established, the principle of majority decision…says that in the case of each individual, the fact that that individual favours option X is a reason for the group to pursue option X, even though there is disagreement'.[496]

[496] Waldron, *Law and Disagreement* (fn4) 113.

This is again well established as a characteristic of majority-decision in the social choice theory literature. It is what May, in his classic analysis, described as majoritarianism's 'positive responsiveness' to the preferences of individuals; the process 'respond[s] to changes in individual preferences in a "positive" way'.[497] May demonstrated this in relation to majority-decision by noting the hypothetical tie-breaking potential of an individual's vote. Because 'a change of one vote breaks a tie', and hence determines the outcome, the process clearly responds positively to changes in preferences.[498] Thus, if a group decision is indifferent 'to *x*, and if the individual preferences remain the same except that a single individual changes in a way favorable to *x*, then the group decision becomes favorable to *x*'.[499]

While May presents this condition as one surrounding the *changing* of preferences,[500] it is argued here that it also as a deeper significance. As the tie-break proof demonstrates, each vote has a positive influence on the outcome. As the vote is the means by which the process responds to preferences, this means that each individual with a vote has a positive impact on the decision. The *decisive* impact of the individual's preference is only evident in the (hypothetical) scenario of a tied vote, but the *positive* impact that this reveals – the "pushing" of the decision towards the direction according with the individual's preference – is inherent in the process all of the time. This particular demonstration of the positive impact of each vote, in terms of the positive weight and potential for *decisiveness* given in the majoritarian process, will be of particular significance later when considering possible alternatives to

[497] May (fn445) 682 (emphasis removed).
[498] ibid. See also Sen (fn445) 68, and the proof at 72-73; Ackerman (fn445) 283.
[499] May (fn445) 682.
[500] See also Ackerman (fn445) 283. Presenting the condition in the tie-break context, he writes that majority rule positively responds 'to the considered judgments of any citizen when this will serve to break a tie'.

majority rule – particularly the argument showing that the lottery alternative is inadequate (see **Chapter 6, section 6.4**).

The immediate point is that the condition of positive responsiveness reflects another key aspect of the Godlet Conception – what was termed in the previous chapter, the "authoritative aspect". The power this quality gives to the individual accords with the view of the individual as a freely defining, authoritative moral legislator. On the Godlet conception, the individual is him or herself taken as *the* moral authority. It is, therefore, the individual's preferences – *their* preferred descriptions – that should influence the outcome as far as possible.

5.5.2.4. The Balance of Majority Rule: Stopping the Godlets Being Pulled Apart

As far as possible is an important rider here. As an authoritative – and *the* authoritative – moral legislator, it would logically seem that the sovereign individual ought to *determine* the outcome, in all circumstances. That is, they should be treated not only as always *counting towards* their favoured outcome, but as *always decisive* in establishing that outcome, regardless of how many others happen to agree or disagree with them. However, taking this line of logic would be to reflect only the individualistic authoritative aspect of the Godlet Conception, and ignore the normative equality aspect. This equality aspect must necessarily be taken as a constraint on a full-blown reflection of the Godlet's moral authority in the context of a collective.

This becomes clear once it is recognised that it is practically impossible to allow *all* individuals to determine the outcome as part of the same process while still achieving a

single, collective, outcome.[501] Overcoming this practical problem, however, and allowing some individuals and not others to be authoritative and always determine the outcome, would involve contradicting the fundamental idea that individuals are of *equal* normative force. As this is the other key part of the Godlet Conception, a stalemate appears to have been reached: both aspects of the Godlet Conception cannot be maximally satisfied by the decision-making process at the same time. Indeed, it is this very dilemma that we saw led to the debilitation of Leff. The problem is that if individuals really are authoritative, and equally so, then it is the case both that *everyone* can tell everyone else what to do – because they are self-legitimating authorities – but also that *no one* can tell anyone else what to do, because anyone they attempt to order will also be a self-legitimating authority, and thus nothing can legitimately be done.

The Godlet Conception thus might seem to be very quickly destructive of any possible workable political theory. However, in these circumstances, and making sure to take both aspects of the Godlet Conception equally seriously, the most that can be asked is that the individual's preference has *maximal* weight – maximum weight subject to an equal weight being given to others. The account of positive responsiveness above achieves this. It is therefore a suitable compromise, satisfying each aspect of the Godlet Conception of the individual *to the maximum degree possible* while remaining compatible with the other. Such a balance allows all parts of the Godlet Conception to be respected, by preventing logical extremes taking over.

Thus, on the basis of these two qualities combined – the equality of positive responsiveness that it ensures – it is submitted that simple majority rule is justified on the sceptical approach

[501] In formal social choice terms, the process would fail to satisfy the condition of decisiveness; that it must, in all circumstances, specify 'a unique decision' (May [fn445] 681) such that it will always 'give a definite result' (683).

taken and offers a practical way out of Leff's debilitation that is *consistent with* the logic which led him to it.[502] It is a possibility Leff did not appear to realise. He allowed extreme versions of both aspects of the conception to take over and pull in different directions, thus pulling the Godlet apart. This thesis keeps the Godlet together.

5.6. Institutionalising Majority Rule: In Theory and Practice

Having so far defended the principle of majority rule as the primary political decision-making method – and source of legitimate political authority – for society, attention will now be turned to the issue of how to institutionalise that principle. This leads quickly to the issue of how the majoritarian ideal should be realised, and of its appropriate scope. This section discusses these questions both as a matter of theory – applying the reasoning deployed so far – and practice.

[502] May's theorem, and consequently defences of majority rule which refer to it, has been strongly criticised on the grounds that it applies only in the binary context – where there are two options at stake. It has been argued that such a basis for majority rule renders it irrelevant to much political decision-making, which does not easily reduce to binary choices. See, for example Risse (fn435) 51 (arguing that May's theorem is ' 'too narrow' as an argument for majority rule'). So popular is this criticism that Beitz described the theory's lack of applicability to 'the general case where there are more than two alternatives' has having been 'the chief embarrassment of social choice theory' (Beitz [fn466] 58). This has been levelled at Waldron's defence of majority rule, which, as above, relies heavily on such social choice analyses of the rule (See Risse [fn435] 54). However, it is responded that the two key qualities relied on – political equality and positive responsiveness – remain untouched by moving outside a binary context. Whether there are two, three, or more options, the aggregative rule from which equality is established can still operate on the basis of one person one vote. The condition of positive responsiveness still applies as seen by imagining a three way (rather than a two-way tie as expressed above). Imagine D_1, D_2, and D_3 all have one vote each. A shift of one vote from D_1 to D_2 (for example) leaves D_1 with zero votes, D_3 with one vote, and D_2 with two votes. On the simple majority rule that the option with the most votes is taken as the outcome, D_2 will win, demonstrating the decisive power of a change of vote, and the positive impact that each vote has in precisely the same way as in the two option context set out above. The case for majority rule, relying on the two qualities discussed in this chapter, therefore remains the same even outside the binary context.

5.6.1. Placing Majority Rule: Direct and Representative Democracy

For Pennock, the 'practical question[]' of how to institutionalist the procedure 'arise[s] as soon as one attempts to apply the majoritarian position'.[503] After raising the question he reduces it to two distinct possibilities: 'Is it the majority of the electorate or the majority of the elected representatives that should rule?'[504] As will be suggested below, this way of putting the question of placement is too simple, relying on a false dichotomy between direct and representative rule, which ought to be rejected. However, the question itself is one which is frequently raised – most often to dismiss the direct democratic possibility straight off – and so does need specific attention. The approach taken by others starting from similar majoritarian premises will inform this discussion.

The above argument – utilising elements of Waldron's argument from respect – has presented the case in the language of *direct* participation in decision-making, in which *individuals themselves* vote on policy issues. This is evident in the praising of the key qualities of simple majoritarianism on the basis that they reflect the normative equality and authority of *individuals* as autonomous moral evaluators, with no distinctions drawn between specific groups. It thus used the language of a direct democratic process making no distinction between lawmakers and other members of a community.

This is also the language in which Waldron presents his own argument. As he explains in the 'preliminaries' to his argument for majority-decision in *Law and Disagreement*, however, Waldron's reason for doing this is purely a matter of expository convenience.[505] For while his topic in that work and elsewhere is legislation by representative assemblies, it is, as he

[503] Pennock (fn446) 793.
[504] ibid.
[505] Waldron, *Law and Disagreement* (fn4) 109.

sees it, 'easier to explain' his points surrounding the respectful nature of majority-decision 'in terms of majority-decision in a direct democracy, rather than majority-decision in a representative legislature'.[506] As he also notes, for this argument from respect owed to rights-bearers to work in the context of his work on representative legislatures, Waldron requires the assumption that respect for an individual constituent can be equated with respect for an individual representative:

> 'I assume that in the latter context a representative's claim to respect is in large measure a function of his constituents' claims to respect; ignoring or slighting or discounting his views, is a way of ignoring, slighting, or discounting *them*'.[507]

Thus, while presented in direct terms, Waldron's majoritarianism is very much envisioned as a representative system of law-making.

Waldron's treatment of the issue of representation is very brief. Indeed, as he frankly admits in a footnote, 'one of the glaring defects of this book [*Law and Disagreement*] is that it does not include an adequate discussion of representation'.[508] The lack of attention shown to the idea of representation has indeed been criticised by others, focussing on the unsatisfactory conception of representation assumed in his argument linking respect for the individual with respect for the legislator. For example, Kyritsis objects that Waldron's assumption that respect for legislators is tantamount to respect for their constituents – equating 'democratically elected legislatures with the people conceived of as a self-governed

[506] ibid.
[507] ibid.
[508] ibid 110, n60.

collective' – is unsatisfactory in that it does not fit the dominant conception of representation as evident in the current practice of representative democracy.[509]

Whether or not correct, this issue – internal to a model of representative democracy – will not be commented upon further here. This is because, in line with the purpose of this thesis, it is the normative questions about how power *should* be distributed and conceived, rather than how it currently is, that are most pertinent. Thus, Waldron's fundamental assumption of representative democracy itself – rather than the accuracy of a particular conception within it – is more in point here. It will be argued that this assumption is unsatisfactory.

5.6.2. The Ideal: Direct Democracy

While Waldron uses the language of direct decision-making – as though individuals themselves participate equally by voting on collective issues – only as a useful expository device, before falling back onto an apparently purely representative system, here, the language of direct democracy is to be taken as more than an explanatory tool. This thesis contends that the fact that the argument is at its clearest in the language of direct democracy itself shows that its core logic leads to that ideal. The language of direct democracy works so well in expressing the logic because *this is precisely where the logic leads*.

Precisely why this is the case will be explained in this section, which constructs a principled argument for direct democracy as the ideal system from the sceptical perspective. Treatment of the issue of direct democracy can only be relatively brief, and in the scope of this chapter will be restricted to the decision-making process itself, rather than a full-scale vision for an active and participatory majoritarian society and culture.[510] However, that Waldron-style

[509] D Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26(4) Oxford Journal of Legal Studies 733, 735.

[510] More extensive treatments, moving beyond the decisive moment of the decision-making process, can be found in BR Barber, *Strong Democracy: Participatory Politics for a New Age*

rider aside, what follows will go substantially further than his brief treatment of the issue and, it is hoped, provide a more satisfactory justification for the system envisioned in this thesis. Some more specific, necessarily tentative, suggestions about what this might look like in practice will be made in the sections which follow.

In summary, the argument is that the very principles used to defend majoritarianism itself – political equality, and a maximal conception of positive responsiveness (which are in turn based on normative equality flowing from the view of the individual as an authoritative moral legislator), logically entail a system of direct decision-making. That argument required that the views of each individual as to the desirability or acceptability of a policy be counted equally. Furthermore, as already argued, that view must be counted at the greatest possible weight consistent with equal weight being given to others. That second condition led to a maximally decisive interpretation of the positive responsiveness requirement of a decision-making procedure. As a means of making the authoritative individual maximally decisive in collective decisions in this way, a situation in which individuals *themselves* use majority rule to vote at the decisive stage on the policies to be adopted seems the most obvious. It is the logical reflection of the individual's status as an authoritative, decisive, moral legislator. Put simply, what better way to treat the views of the individual as maximally decisive than for that individual themselves to finally decide on the policy to be pursued?

5.6.2.1. The True Colours of Representative Democracy: An Apologia for Elitism

Furthermore, the normative equality aspect of the argument for majority rule would, logically, rule out the alternative to a direct system: giving this immediate decision-making

(Twentieth Anniversary Edition, University of California Press 2003). See also I Budge, *The New Challenge of Direct Democracy* (Polity Press 1996).

power to others. Doing so would clearly be a violation of normative and political equality because particular individuals, or a particular group, are given more decisive power than others. This applies also, prima facie, to a system of representation, given that, as Beetham points out, it 'involves the surrender of control over decisions to others', with any influence retained exercised only indirectly.[511] This is a 'condition of inequality, whereby only a few are entitled to take part in decision-making and the vast majority are excluded'.[512] Thus, despite its reputation in modern times as pleasingly "democratic", representation has a prima facie elitist character, due to the inequality in decisional influence at its heart.

Indeed, it is telling that, as recounted by Bevir, strong conceptions of representative democracy – such as the classic Diceyan model of parliamentary sovereignty – were developed and maintained to alleviate 'anxieties about popular participation'.[513] Historically, this anxiety was tied to the extension of the franchise to the lower classes.[514] This led Mill to his plural vote system[515] and Dicey to emphasise an account of the UK constitution in which 'popular participation was restrained by parliamentary sovereignty, the rule of law and informal constitutional conventions'.[516] Such elitist accounts have long been at the centre of democratic theory and practice. They formed the core of the Westminster system of governance, since exported throughout the Commonwealth. Indeed, Burke's famous account of British democracy, and apparently the British *constitution* itself, in his 'Speech to the Electors of Bristol', is dripping in the elitist sentiment: 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices

[511] D Beetham, 'Liberal Democracy and the Limits of Democratization' (1992) 40(1) Political Studies 40, 46.
[512] ibid. See also Kyritsis (fn509) 750 ('legislative decision-making also involves an analogously aristocratic element' [to judicial review].
[513] M Bevir, 'The Westminser Model, Governance and Judicial Reform' (2008) 61(4) Parliamentary Affairs 559, 561.
[514] ibid.
[515] See **Chapter 6, section 6.2.**
[516] Bevir (fn513) 561.

it to your opinion', he claimed, with frequent references to the duty of MPs to serve the 'real good' of the community.[517] The desire to control, or temper, the participation of ordinary people similarly underpinned the Madisonian argument for representative democracy. Thus, one finds Madison suggesting that the 'wisdom' and 'love of justice' of the 'chosen body of citizens' – representatives – means that they 'may best discern the true interest of their country' and pursue it.[518]

This elitism could, to some extent, be remedied by taking something like what Kyritsis describes as the "proxy" approach to representation, whereby the representative's role is to act on the views of their constituents, rather than according to their own convictions[519] – the very conception vehemently rejected by Burke, above. However, this would be an improvement – less of a violation of normative equality – precisely because it would be tantamount to an individual expressing their own views and them being taken as decisive, as opposed to the representative substituting their own. Thus, it is clearly, as a matter of principle, still second best to a direct system which allows the individual to do precisely this in the first place, removing the need for the proxy representative entirely.

5.6.2.2. Distinguishing Popular Defences of the Ideal of Direct Democracy

The above basis for the ideal of direct democracy can be distinguished from others often found in defence of direct democratic approaches within political theory. A common

[517] E Burke, *The Works of the Right Honourable Edmund Burke*, vol 1 (Henry G Bohn 1854) 446–448.
[518] J Madison, A Hamilton and J Jay, *The Federalist Papers* (C Rossiter ed, Penguin Books 1961) 82. Popular elitist arguments seeking to justify an unequal distribution of power among a community on the basis of normative authoritarianism are considered and responded to later in **Chapter 6, section 6.2**). Those elitist arguments can be used to justify both a Millian-style system of plural voting within a representative or direct (or combined) system, or the system of representation itself to the extent that it relies on the idea of normative authority or superiority of the representatives. *Practical* justifications for representation that do not rely on such normatively elitist premises are discussed later in this section (see **section 5.6.3**).
[519] See Kyritsis (fn509) 742.

argument, as noted by Budge, takes the interest-based approach through to its own logical consequence. If the individual is the 'best and ultimately sole judge of his/her interests', and the point of public policy is to advance the interests of all equally, 'then this makes a strong case...for every citizen to participate in the making of public choices'.[520] The idea is that 'no one else will be in as good a position to express his/her interests'.[521] This is essentially the same interest-based argument as seen above in relation to a popular argument for political equality. As there, the argument here is not necessarily incompatible with the claim that individuals' expressed interests should be taken as decisive. But it does take a different focus. The claim here is that individuals, as Godlets, are *morally* decisive, *whatever conception of the good they purport to rely on*. It is therefore not necessarily an interest-based claim and does not entail a vision in which the aim of politics is to advance the interests of all equally. It is to reflect the *authority* of all equally.

Another defence praises direct decision-making as conducive to the moral growth and self-development of the individual – 'the educative and improving effects of political participation'.[522] The idea is that '[w]e should desire more opportunities for making our own choices...because we become better persons by doing so'.[523] For example, it improves 'one's self-knowledge and maturity';[524] increases 'moral sensitivity and our potential for practical judgement'; and, in thinking about and making the decision, builds 'capacity to weigh up arguments and balance interests'.[525] Again, the approach here is not *incompatible* with this line of argument. Indeed, if made out, this might add extra weight as an *additional* reason to

[520] Budge (fn510) 9.
[521] ibid.
[522] ibid 10.
[523] ibid.
[524] ibid 8.
[525] ibid 10. A seminal example of this approach can be found in C Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970).

favour direct participation. However, here the basic justification stems from the decisional power it gives to the individual as a reflection of their status as moral legislator. It is therefore not at its core an outcome-based approach like this.

For Beetham, the ultimate justification for democracy is its respect for personal autonomy; he argues that shaping 'the course or conditions of one's life through sharing control over collective decisions is a necessary counterpart for exercising such control at the personal or individual level'.[526] It is about control over one's own life – as evident in his shorthand of 'self-determination' to describe this account.[527] This shares some similarities with the approach advocated here in that it too sets aside a purely interest-based approach. As Beetham points out, decision-making involves more than just interests: 'collective, like individual, decision-making involves the articulation of values, principles or ideals' also.[528] An interest-based approach does not seem to account for these value-based decisions, and their importance. This embracing of non-interest-based considerations is similar to the approach taken here, focussed as it is on moral authority and moral visions.

5.6.2.3. Individual and Collective Visions: The Scope of Majority Rule

However, Beetham's account also involves an ambiguity. His commending of democracy through the claim that involvement in collective decision-making is valuable in giving the individual more control over their own lives at a "personal level" could be read narrowly in terms of impact on the circumstances or practical aspects of one's *own* life. This limited reading – limiting the scope of the justificatory principle to issues which are likely to impact upon one's own life – would seem to be the most natural implication of the reference to the

[526] Beetham (fn511) 45.
[527] ibid.
[528] ibid.

"personal level". However, his recognition that decision-making involves also ideals, values and principles and his distinguishing of this from interest-based considerations, leaves room for a broader view. It could suggest a more general moral autonomy. On this interpretation, the justification is about more than just control over the conditions of one's individual life, but also over one's evaluations more generally, including the priorities and values of society more generally. The narrow reading fits Beetham's linking of political and *personal* autonomy, while the latter and broader one would avoid collapsing his approach into the interest-based one he criticises – if decision-making autonomy based entirely on giving one personal control over one's *own life*, it is hard to see how it would differ significantly from the traditional interest-based focus.

Whatever Beetham's intention, however, the broader approach just suggested is explicitly the one taken here: individuals are autonomous not only in controlling their own lives, and deciding their own priorities, but also the conception of the good for society. Their authority on the latter is not to be respected because it is instrumental to the former – the justification is not that control over the priorities of the collective is valuable in ensuring that their own life can run as they desire – but simply *because* it allows them control over the values of the collective. On the view put forward here, the individual's moral authority and definitional autonomy extends to judgements about how society should be, and what moral outlook and conception of the good it should reflect. After all, these are no less matters of linguistically-constructed morality.

This is a claim about the scope of majority rule. Dworkin's work on "internal" and "external" preferences provides a useful way of expressing this difference. An external preference involves more than just a 'preference for the assignment of one set of goods or opportunities

for him' or herself;[529] it also includes preferences for the 'assignment of goods and opportunities to others', based on one's views about the ideal community.[530] So, for example, one's moral disapproval of 'homosexuality, or contraception, or pornography' are external preferences when applied to public policy because they do not simply state a preference for what the individual themselves does or does not indulge in.[531] It also states a preference for a state of affairs where 'no one else does so either', based on the judgement that 'a community that permits rather than prohibits these acts is inherently a worse community'.[532] It is a preference concerning the moral outlook of public society, and, more generally a view as to what the 'ideal community' would look like, and the direction it would take.[533]

On the view of the individual as a morally authoritative Godlet, one is authoritative in *both* their internal *and* external preferences, because they are both based in the individual's moral premises – their preferred descriptions and evaluations. These premises are constructed by the individual through language in the way set out in **Chapter 2** and the latter part of **Chapter 4**. There is no distinction drawn between the two, because they are both the products of linguistic moral constructs. The Godlet's status as a moral legislator thus applies to both personal and public morality. As a result of this outlook, one's direct involvement in collective decision-making is valuable because it gives morally autonomous and authoritative individuals authoritative political power to develop a society which reflects their moral outlook, as a matter of both personal and public morality.[534]

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[529] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 275.
[530] ibid.
[531] ibid 275–276.
[532] ibid 276.
[533] ibid 274.
[534] Dworkin himself objects to the use of external preferences in public policy making as a violation of his liberal conception of equality. Because it violates his condition of equal concern and respect, he militates against it via his "rights as trumps" approach, designed to protect against the harms of an inappropriate reliance on external preferences in policymaking. His argument against the use of

5.6.3. Putting the Ideal into Practice: Practical Constraints and Representation

5.6.3.1. The Modern Dismissal of Direct Democracy

Practical concerns surrounding the feasibility of a system of direct decision-making, particularly given the large scale of political communities in modern times, are often used to quickly dismiss the very idea of direct democracy. For example, after raising the question of who should rule in a majoritarian system – representatives or people themselves[535]– Pennock quickly dismisses the latter on this basis. He writes that '[s]ince the former [rule by the majority of the electorate] would be impracticable for any major state, it is perhaps safe to assume that it is not what is meant' by democratic majoritarians.[536] Within constitutionalist scholarship, Goldoni notes this general tendency to see representative democracy as the only realistic system of democratic decision-making. On this view '[e]lections remain a pivotal moment in political life, because there are no other reasonable alternatives to voting to deciding future plans'.[537] As a more extreme example, Mill, after outlining the value of participation, dismisses the ideal of direct democracy entirely in just one sentence:

> '...since all cannot, in a community exceeding a single small town, participate personally in any but some very minor portions of public business, it follows that the ideal type of a perfect government must be representative'.[538]

This nod to practicality might also be behind Waldron's firmly representative focus noted above. While Waldron offers no explicit justification for his representative focus, in spite of

external preferences will be responded to when dealing with criticisms of majoritarianism in the next chapter (**section 6.3**).

[535] See above, **section 5.6.1.**

[536] Pennock (fn446) 793.

[537] M Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2013) 10(4) International Journal of Constitutional Law 926, 940.

[538] JS Mill, *Considerations on Representative Government* (2nd edn, Parker, Son, and Bourn 1861) 69.

his argument being expressed in direct terms, there are a handful of throwaway comments that might reveal his thoughts here. Waldron, on a few occasions, writes of the need to reduce 'the decision-making procedure to a human scale'.[539] However, the crucial sentence comes in the footnote to this claim. Here, Waldron suggests, in response to an unrelated point, that *'representation does reduce deliberation and voting to a (politically) manageable scale*; but it is...supposed to do so as a *way* of respecting citizens in their millions'.[540]

These examples fit the description of modern scholarship on democracy offered by Budge. Budge points out that '[f]or practically the whole of the modern period...the possibility of direct democracy has been raised in theoretical discussion' only for it to be immediately dismissed via practical objections.[541] A large part of this objection revolves around the 'barriers to participation deriving from the limits on the time and energy people have to spend on it'.[542] As the critic in Dahl's dialogue on the matter bluntly puts it '[t]he world's work has to be done'. [543] Because of this, 'you can't really expect citizens to spend all their time, or even most of their time, in assemblies', legislating directly.[544] Indeed, as Beetham also recognises, 'the work of legislation requires full-time attention if the issues are to be fully debated and understood'.[545] The sheer number of issues on which decisions are required in complex modern societies only exacerbates this.

Criticisms such as these often lead just as quickly to the idea of representation as a solution. The representative system is presented as a means of ensuring an attractive and effective division of political labour, 'where citizens limit their activity largely to voting and

[539] Waldron, *Law and Disagreement* (fn4) 110.
[540] ibid 110, n60 (emphasis added).
[541] Budge (fn510) 25.
[542] ibid 13.
[543] Dahl (fn445) 228.
[544] ibid.
[545] Beetham (fn511) 47.

representatives make detailed decisions for them'.[546] Waldron's brief treatment of the issue, noted earlier, and the others mentioned directly above, are also examples of this tendency to move straight to a representative system on the basis of practicality. Bellamy's similarly brief treatment provides another. His move from his foundation of political equality, conceived of as the idea that 'rule of the people be by the people according to some mechanism that gives them all an equal say', to the idea that citizens should have 'an equal vote in common elections where political parties compete for the people's vote and electoral and legislative decisions are made by majority rule'[547] is justified on the basis that representation allows decisions to be made via a form of public reason, responsive to the views of citizens in some way, where people 'practically cannot take decisions but only choose decision-makers to act on our behalf'.[548]

Indeed, as a historical matter, practicality can be identified as a key factor leading to the transition of democracy as found in the Greek city-states – with greater direct involvement of citizens (albeit with a more restrictive definition of "citizen" than that found in modern states) – to the representative systems of modern nation states. As Dahl notes, by the 19th century 'representation was widely accepted by democrats and republicans as a solution that...transformed democracy from a doctrine suitable only for small and rapidly vanishing city-states to one applicable to the large nation-states of the modern age'.[549]

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[546] Budge (fn510) 13.

[547] Bellamy (fn445) 219.

[548] ibid 231 (footnote omitted). See also James Mill (the Scottish political theorist), quoted in G Sabine, *A History of Political Theory* (3rd edn, Holt, Rinehart, and Winston 1961) 695 (presenting representation as a system in which 'the solution of all difficulties, both speculative and practical, will perhaps be found'). Also Beetham (fn511) 48 ('representation involves a significant limitation of citizens' autonomy, but one that is justifiable by considerations of time consistent with political equality').

[549] Dahl (fn445) 29 (for a thorough historical account of the shift from the city-state style of democracy to the representative democracy of modern nation states see Ch 15 of this work). See also B Manin, *Principles of Representative Government* (Cambridge University Press 1997) chs 1 & 2. While noting that practicality was not the entire, or even key, consideration of those supporting a representative

5.6.3.2. Holding onto the Ideal: A Practical Argument for Direct Democracy

An in-depth investigation into the practicality of direct decision-making is more than can be attempted within the confines of this thesis. It may well be that, in a complex modern society, the sheer number of issues that need to be dealt with collectively would make it infeasible for there to be a system of direct decision-making on every single policy, or even on a majority of those issues, and less feasible still to have a direct hand in working out the details of these policies in action.

However, the issue of practicality – such as it may be – does not change that the arguments presented in this chapter point to direct participation as the ideal. The principled justification for that ideal still stands. It is thus contended that practical considerations, to the extent that they do apply, should not move us immediately abandon that ideal entirely. The principled case requires us to keep the ideal in our sights, otherwise it is not really an *ideal* at all. The arguments noted above, seeing most dismiss the idea of direct democracy entirely thus do not take the ideal sufficiently seriously, in the view of this thesis. Rather, we must look for a system which allows the ideal to be achieved *as far as possible.* As noted in the last section, representation can itself be seen as such a compromise, but it is not obvious that this is where it should end. It is also a *wholly unsatisfactory* compromise on the principles defended in this thesis.

Fortunately, the orthodox tossing of direct democracy aside entirely also relies on a false dichotomy. Those who jump into the practical justification of representative democracy, treat the issue as a zero-sum game in which there is a stark choice between a purely direct,

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system, and so provides a more complex picture than Dahl, Manin concludes that it 'is likely to have counted for something in the establishment of purely representative systems', and the 'fact remains that the sheer size of modern states had the effect of making it materially impracticable for the assembled people to play a part in government' (9).

and thoroughly impractical system on the one end, or a purely representative system dictated by practical constraints, on the other. This dichotomy should be rejected. While these two systems are often 'thought of as representing opposite versions of the democratic vision', the choice does not have to be so stark.[550] In fact, practice demonstrates that '[m]any nations have found ways of combining elements of both direct and representative democracy in their political institutions'.[551]

If we are to hold onto the principled ideal and take note of the case that the representative system is an unsatisfactory concession this possibility of a combined approach should be taken seriously. Once it is, a positive way forward towards the ideal of a sceptically-grounded majoritarianism can be seen. Rather than discarding the democratic principle established, this approach would allow a system to move towards the ideal, in terms of responsiveness to individual citizens in collective decision-making, while also paying attention to practical constraints and limitations.

For example, the device of the citizen-initiated referendum – direct votes resulting 'from a petition of citizens rather than from the action of a government'[552] – carries the appeal of direct participation in terms of responsiveness, particularly if legally binding (as is the case for citizen-initiatives in Switzerland, for example).[553] Provisions for citizen-initiative are also provided in a number of US States.[554] The requirement of citizen initiation, as well as delivering more direct control over the agenda of policy making to individuals, would have the effect of limiting the amount of direct votes that citizens face, thereby lessening the

[550] L LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (Broadview Press 2003) 31.
[551] ibid.
[552] ibid 38.
[553] Budge (fn510) 95–100; LeDuc (fn550) 152–164; JF Aubert, 'Switzerland' in D Butler and A Ranney (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research 1978), and the sources cited therein.
[554] For discussion of arrangements in the US see Budge (fn510) 89–94.

likelihood of an overwhelming and ultimately debilitating system. In current practice there are varying rules on the amount of public support that is required to initiate popular votes but, as Budge notes, they are 'generally enough to ensure that the proposal has serious backing'.[555] Thus, this goes some way to dealing with one of the major practical concerns with direct arrangements noted above – time constraints and interference with everyday life.

Indeed, experience from Switzerland is that 'voters are called upon approximately four times a year to decide perhaps three or four issues' put to them – otherwise, the Swiss system functions 'much as they do in other representative democracies'.[556] Studies have suggested that in Switzerland it has long been the case that, relatively speaking, only a 'minority of laws provoke demands for a referendum'.[557] Studies of the US case have suggested that direct votes constitute only around 10 per cent of overall legislation in the States where popular initiatives are provided for.[558] The level of support required in those States, and in Switzerland, could give some indication as to what number acts as an effective safeguard against overwhelming popular legislation, but the immediate point is that in systems where direct initiatives are in place, the concern of an overwhelming plethora of public votes is not made out.

Within citizen-initiatives, the ‘abrogative referendum’, whereby citizens can force a vote on a law already adopted by the representative legislature[559] allows greater force to be given to direct politics, again where there is demand for it. It also carries the specific benefit of providing a means of combating the defect of representative democracy that, until the next election, citizens' ability to influence policy making is dependent upon the willingness of

[555] ibid 90.
[556] LeDuc (fn550) 32.
[557] Aubert (fn553) 49.
[558] Budge (fn510) 91.
[559] LeDuc (fn550) 38.

legislators to be responsive.[560] It further provides a means of alleviating the situation where broad manifesto polices which were consented to at the election are put into practice in a way of which citizens disapprove.[561] Abrogative referendums can be found in a handful of countries. For example, in Switzerland, ordinary law passed by the Federal Assembly can be put to a referendum by a petition of 50,000 citizens or eight cantons.[562] Article 75 of the Italian Constitution is another such example. It allows a vote to be held on rejecting a law, totally or partially, if requested by 500,000 electors or five Regional Councils.[563]

Space precludes a detailed examination of the operation of direct decision-making arrangements in practice, and criticisms of its use, but some brief comments can be made. In broad terms, reviewing the literature on the Swiss, US and Italian experiences, where these arrangements are well established parts of the constitutional landscape, Budge's assessment is largely positive. He notes that 'government responsiveness is enhanced', for example, while the 'actual decisions made have not been unsound or imprudent', nor have minorities been threatened[564] – a major concern surrounding participatory majoritarianism.[565]

Another concern about an increased use of popular legislation surrounding the danger of 'elite manipulation of public opinion' and the 'power of image and money to influence the

[560] See Budge (fn510) 16 (noting that there is, at best, 'only a tenuous connection between popular voting in representative elections and the 'governmental policies subsequently pursued').
[561] See Bellamy (fn445) 239.
[562] LeDuc (fn550) 153.
[563] The first of these, held in 1974, triggered a public vote on the abrogation of a law legalising divorce, passed three years earlier, see further M Setala, 'Referendums in Western Europe - A Wave of Direct Democracy?' (1999) 22(4) Scandinavian Political Studies 327, 332.
[564] Budge (fn510) 102. For a more recent analysis of the US experience, relying on extensive empirical evidence comparing the experiences of representative and direct law-making, see S Spadijer, 'A Hardcore Case Against (Strong) Judicial Review of Direct Democracy' (2012) 31 University of Queensland Law Journal 55 (concluding that there is 'no empirical evidence' [56] that citizen-initiatives cause harm to minority rights, and certainly no more than representative democracy) .
[565] LeDuc (fn550) 41. For a largely positive, if somewhat dated, assessment of the Swiss system, see Aubert (fn553) 39–66. See also LeDuc (fn550) 152–164.

popular vote',[566] may, to an extent, be borne out in practice. LeDuc, for example, suggests that in countries with citizen-initiatives, 'powerful and well-funded interest groups, rather than ordinary citizens, often stand behind particular initiatives'.[567] However, commenting on the Swiss experience, Barber also finds evidence to challenge the idea of elite domination. While Swiss initiatives have often 'favored tradition and opposed modernising legislation', the so-called "modernizing" legislation was 'being supported by the establishment and was defeated by a strong-willed and independently minded Swiss public that ignored pressures from big money and the media'.[568]

While experience is not clear cut, however, a direct logical response can also be offered to this concern. As Barber puts it, it seems 'foolish to think that a nation can be rescued from the manipulation of elites by reducing the potentially manipulable public's input'.[569] In fact, there is a case to be made that 'it is more rather than less experience of government that will insulate voters against manipulation and prejudice'.[570] Barber does not go into detail on the logic of this claim in the section in which it appears, instead pointing to examples from the Swiss experience of elite domination not being borne out just mentioned, but the educative, self-developing and empowering benefits of participation have been pressed by others.[571] Furthermore, it is argued here that a system which directly reflects the conception of individuals as morally autonomous, decisive, moral legislators, of equal force to others seems more conducive to a culture in which the views of elites are treated with sceptical suspicion and criticism, than one which turns its back on that system. A culture which denigrates that system, by limiting the participation of some people, appears to send a

[566] Barber (fn510) 282.
[567] LeDuc (fn550) 46.
[568] Barber (fn510) 283 (footnote omitted).
[569] ibid 282.
[570] ibid.
[571] See e.g. Pateman (fn525).

message that some people's preferences ought to be taken more seriously. That is an elitist message. Thus, limiting participation curtails a powerful resource in the battle against elite domination; ordinary people, confident in their views, and empowered because of it. Thus, Barber's view that part of the answer to the concern of elite domination of the political process is more, not less, direct participation is supported here. It is logically more conducive to a culture in which the problem is less likely to materialise.

5.6.3.3. Democratic Copout or a Practical Idealism?

The above argument is one of balance. Those who reject direct democracy outright because of practical concerns are too hasty, misguided in their binary view of the possibilities. They are also not giving the ideal defended here the value it deserves, *as an ideal*. However, in recognition of the scale of the task of building a full-blown direct democracy, and taking account of some of the practical hurdles noted by those who dismiss it, the approach initially advocated here is what can be called a combined approach.

Representation can be seen as a response, but it is both deficient in terms of its consistency with the underlying principles relied on here, and in terms of actually delivering what lesser level of responsiveness it promises. The approach set out above, combining both direct and representative elements, as for example Switzerland does, is presented as a broad indication of a system more consistent with the underpinnings of the democratic argument made in this thesis, taking systems which currently exist, and thus are proven to operate, as a guide. We can thus hold onto the ideal, placing it at the centre of a democratic system, and continue the task of moving towards it.

Budge would argue that this treatment does not go far enough, however. For him, modern technology means that the extent to which there can be mass direct involvement in

democratic debate and decision-making is much greater than often presented by critics.[572] In fact, he goes as far as to conclude that, in light of the possibilities of technology –such as electronic voting – the 'argument against the practical feasibility of direct democracy is totally invalid'.[573] His thesis is therefore that in modern times a system in which the 'adult citizens as a whole debate and vote on the most important political decisions', and determine the action to be taken, is indeed feasible.[574]

Budge's vision involves a number of elements; a central role for topical debate programmes on television, sampling of citizen interventions in debates, and the use of party politics to organise and provide cues in campaigns, for example.[575] While perhaps intuitively appealing in moving closer towards the ideal of widespread direct decision-making, in a way which is apparently not as constrained by practicality as often assumed, this intricate argument involving a balance of these different elements, and specific arrangements, cannot be given the attention it would require in this thesis. Certainly not the treatment it would require to test Budge's rather strong claim that the practical case against direct democracy is *entirely* invalid.

With this in mind, rather than a copout, it is, it is submitted, preferable to proceed in the cautious way this section does – to find a system which is still more towards the ideal, but which, with reference to actual communities which utilise it, is *shown* to be feasible. Investigation as to whether one can go further, and detailed recommendations as to what this would look like, must be left for future work.[576]

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[572] Budge (fn510) 24–33. See also LeDuc (fn550) 186.
[573] Budge (fn510) 28.
[574] ibid 35.
[575] Barber also takes a more radical and wholesale approach, again stressing the possibilities of modern technology (Barber [fn510]).
[576] It might be thought paradoxical that this thesis appears to endorse the *imposition* of a system of direct democracy upon citizens. Why not the people choose for themselves whether they want a

5.7. Conclusion

The overarching purpose of this chapter is to begin properly the sceptical contribution to constitutional theory, building on the groundwork laid down in the previous chapters. To this end, it has developed an account of the basis of legitimate political authority for collective decision-making, normatively attractive to the sceptical position as grounded in the principles developed so far. In doing so, a number of assumptions which have entered this work – inherent in taking this task on in this chapter – were drawn and out and explained. This is in the interests of clarity, which becomes particularly important given the nature the method relied on in this thesis: to apply the logic and tenets of scepticism with as few external assumptions as possible.

After a summary and explanation of these assumptions, this chapter argued that the dead-end that Leff came up against, is illusory. The reason why forms the core of this chapter. A positive and practical way forward was offered, argued on the basis of the very principles at the heart of Leff's negative account, and at the heart of this thesis. It was argued that the simple majoritarian approach to political authority – focussed on a process in which votes are distributed and weighted equally, with the most votes determining the outcome – is attractive as taking the paradox that individuals are decisive, authoritative morally autonomous legislators, but of no greater authority than others, seriously. It reflects both aspects of the conception of the individual at the heart of this paradox – the Godlet Conception elaborated and defended in the previous chapter. Leff did not explain his own

direct or representative system? The reply is that the paradox is only *apparent*; the argument here does not impose a full-blown direct democratic responsibility on citizens. Rather it gives them the power to trigger such a process, *if they want to*. Otherwise, subject to this safeguard, the democratic process can operate largely as before – that is, in largely representative form.

account using this conception, but it was suggested that it can be taken as a useful description of the logic of his position – and a useful diagnosis of his negative conclusions. The fruitfulness of such a conception *was* explicitly dismissed by Leff, however. The argument here challenges that dismissal. Emphasising both aspects of the Godlet Conception equally, without letting the logic of one pull the other apart, as Leff did, allows a practical way forward, allowing decisions to be made, while also remaining compatible with the consequences of scepticism, and the principles drawn from it.

Majoritarianism reflects both aspects of the Godlet Conception – the moral authority of the individual, and their normative equality with other linguistically-armed moral legislators. It does so through two inherent qualities of the majoritarian process. This was demonstrated with reference to social choice analyses of majority-decision. The moral authority of individuals is reflected in the *positive responsiveness* of the procedure which gives each individual maximal decisional weight consistent with equal weight being given to others. This latter aspect of majoritarianism – *that decisional-weight is distributed equally* – reflects the normative equality of individuals. Together, therefore, simple majoritarianism offers a way of making decisions consistent with the sceptical conception of the individual, containing the same principles which led Leff to his despair.

The key to the argument here is that majoritarianism reflects both aspects of the Godlet Conception – the "authoritative aspect", and "normative equality" aspect – to the maximum extent possible with equal respect for the other. It is therefore put forward as a sceptically justified basis of legitimate political authority for a sceptic's constitution. This grounding for the majoritarian principle was differentiated from approaches often found in democratic theory – in particular an interest-based approach to political equality and democratic authority. An approach based in *normative* authority, showing the moral *evaluations* of

individuals maximal respect, rather than their interests, follows more logically from the sceptical perspective itself as a perspective on the nature of normative statements. This normative focus is also reflected in the Godlet Conception itself. It will have further consequences in the arguments of the following chapters.

Having made the case for the majoritarian approach, attention turned to the more specific issue of where, and particularly in whose hands, to place it. It was argued that the same conception of the individual which made the majoritarian procedure attractive – and the principles which form that conception – suggest a direct system of decision-making as the ideal. Alternatives – such as placing decisional power in the hands of representatives, as is commonly assumed in constitutionalist debate – were seen to be prima facie unsatisfactory; they are violations of the principle of normative equality and the idea that individuals themselves are authoritative. Some relatively brief thoughts on how to put this ideal into practice were offered. An approach combining representative and direct democracy was recommended as meaningfully holding onto the ideal of direct democracy, while remaining practical.

The suggestions offered to this effect, such as making arrangements for citizen-initiated referendums both to both propose and reject laws, while more towards the ideal than pure and elitist representative systems, might not go far enough. There may be a case to be made, as some have, that practical considerations notwithstanding, it is possible to move towards a more wholesale version of direct democracy, particularly in light of modern technology. It was not possible to give this the attention it would require however, given the wide-ranging, complex and speculative nature of this investigation. The treatment given and the suggestions made, however, already go much further than commonly found in the constitutionalist literature, the assumptions of which were challenged. With this in mind, the

suggestions made present a more attractive vision, more consistent with the principles of scepticism, but which, on the issue of practicality, carry the advantage of being grounded in evidenced practice. Whether it is possible to go further, and what a more ideal sceptical system would look like, is an avenue for further research.

In conclusion, then, this chapter has made the core argument that a simple majoritarian approach to collective political authority, with opportunities to exercise the decisional power it gives to the individual directly as far as possible, forms a normatively attractive foundation of a sceptical constitution. Whatever the practicalities of the system built, core political authority lies with direct majoritarianism as the system giving each individual maximal decisional weight, in line with the Godlet conception. Common objections to this argument will be considered in the next chapter. The work done in this, and those building to it, forms the groundwork for the responses offered, and the work which follows.

Chapter 6

Objections to Majority Rule

6.1. Introduction

The previous chapter set out and justified a vision of the fundamental basis of legitimate political authority, on the basis of the moral scepticism taken in this thesis, and the consequent approach defended in **Chapter 4**. While, to some extent, the majoritarian approach to political decision-making was defended while setting it out, this chapter concerns itself with responding to a number of further problematic criticisms. These were left to be dealt with in their own chapter so that they can be given sufficient attention, without disturbing the flow of the positive argument for majoritarianism. The criticisms responded to in detail here have been chosen on a couple of grounds.

The first – strongly objecting to the idea of political equality in the form of equal decisional weight – is one of the most longstanding criticisms of democracy. The "ignorance of the masses" objection has remained popular since Plato, and in the midst of Brexit and Trump, sees no sign of waning. The elitist criticism must therefore be dealt with carefully. This objection will be examined in detail in **section 6.2**. Unlike the responses from prominent democrats such as Waldron – whose account of majority rule bears similarities to that offered here – the response offered in this thesis is explicitly grounded in the rejection of objective moral truth. While there is an apparent concern to strive to avoid this kind of

response – with Estlund dismissing it out of hand as 'too exotic',[577] and Waldron quickly granting a number of problematic concessions to the realist-instrumentalist project – it will be argued here that it serves as a more convincing and decisive rejection of the elitist objection.

The second criticism objects not to the idea of political equality itself, but the supposedly crude and narrow conception of democracy it grounds on the majoritarian approach. The criticism that the account of democracy set out in the previous chapter fails to fulfil the proper value of equality, as argued most prominently by Dworkin, will be responded to in **section 6.3**. It will be contended that the narrower conception of equality as *normative* equality – on the basis of which the argument for majority rule proceeds – more persuasively follows from the sceptical perspective than the more substantive Dworkinian account of "equal concern and respect" read as "treatment as an equal". The consequent outcome-based constraints on the democratic process that Dworkin demands in his conception of democracy thus cannot be justified on the grounds he advances. However, that said, this does not necessarily render the legitimate majoritarian process *entirely* blind as to outcome; it may be that outcome-based limits can nonetheless be justified. The approach here merely requires, symmetrically to Dworkin's approach, that any substantive requirements of democratic legitimacy must follow from the fundamental conception of normative equality relied on.

The final section turns to a criticism concerning the logical consequences of taking normative equality sufficiently seriously. This is that the argument for majority rule relied on could just as easily justify an alternative approach to political decision-making, based in

[577] D Estlund, 'Making Truth Safe for Democracy' in D Copp, J Hampton and J Roemer (eds), *The Idea of Democracy* (Cambridge University Press 1993) 80.

the principle of a responsive lottery (**section 6.4**). Rather than aggregating votes, the idea is that the majoritarian could just as easily justify this, perhaps counter-intuitive approach. If this is correct, and no decisive argument can be made in favour of the majoritarian approach as opposed to a random selection, then the case for majority rule put earlier would be, at best, incomplete, and at worst misguided. The response offered shows the conception of positive responsiveness at the core of the lottery approach to be inadequate, on the basis of the principles established in previous chapters. Specifically, it fails to respect the authoritative/decisive aspect of the Godlet Conception to the maximum extent possible. This forms a decisive argument in favour of the maximally decisive responsiveness found in majority rule, and thus for majoritarianism itself.

6.2. The Elitist Challenge: Of Simpletons and Experts

6.2.1. The Ignorance of the Masses: Past and Present

The first criticism to be considered strongly challenges the value of political equality at the heart of majoritarianism. It fundamentally objects to the value of according each individual equal decisional weight in collective decision-making on the grounds that 'some have superior wisdom to others'.[578] Given this greater wisdom, and the fact that 'the decisions involved affect every person's interests', the criticism goes, 'those who have the most wisdom ought to have…at least more political power than the others'.[579] This expertise-based argument objects that the system of majority rule, premised on political equality in

[578] Christiano (fn447) 112.
[579] ibid.

the sense of equal weight, is ‘an intrinsically unjust or undesirable scheme for collective decision-making’.[580]

This elitist-style criticism – which Christiano identifies as one of the main objections to democracy[581] – has a long history. Indeed, as Estlund notes, it is ‘[o]ne of the longest-standing objections to democracy’.[582] This ‘ignorance of the masses’ idea was once levelled at 'the *demos* of ancient Athens', for example,[583] and the principle that decision-making power belongs to those most capable of using it wisely or justly infamously formed a key part of Plato's work.[584] As a more contemporary matter, this kind of objection continues to make an appearance in political and constitutional theory to this day,[585] particularly among those who take an outcome-based, instrumentalist approach to the issue of collective decision-making; it often forms a key part of the argument for the constitutionalisation and judicial enforcement of rights as a constraint on majoritarian decision-making for example.[586]

It has also come to the fore of public discourse more generally in the form of critical responses to recent, controversial, political events such as Brexit, or the election of Trump.

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[580] ibid 117.
[581] ibid.
[582] Estlund (fn577) 71.
[583] ibid.
[584] Plato, *The Republic* (GRF Ferrari ed, T Griffith tr, Cambridge University Press 2000).
[585] The elitist line of thought behind this criticism has a history, and is still evident today, in other areas too - the arts for example. As an example, see the British educationalist and former Secretary General of the Arts Council of Great Britain, Roy Shaw's scoffing at 'the mass culture business', and invoking Plato to put forward the idea that the public's standard of 'what is good' should not 'blind' us; 'people deserve the best and need it' (R Shaw, ‘Democracy and Excellence’ (1988) 22(3) The Journal of Aesthetic Education 5, 8]. What others call a "democratic culture" - one reflecting the views and tastes of the public - he regards as 'pandering to the lowest, or at best, the least demanding tastes', for the 'majority' simply do not have sufficient 'knowledge and understanding of the arts - and much else' (7).
[586] See, for example, Alexander (fn495); A Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) 22 Law and Philosophy 451; R Arneson, ‘Democratic Rights at National and Workplace Levels’ in D Copp, J Hampton and J Roemer (eds), *The Idea of Democracy* (Cambridge University Press 1993) 135.

Examples of such responses are not hard to find. The response of prominent British intellectual, Richard Dawkins, to the 2016 Brexit vote, is a particularly colourful one. Lamenting the outcome, and indeed the very process, Dawkins pointed out that '[t]here are stupid, ignorant people in every country', arguing that it is simply 'unfair to thrust on to unqualified simpletons the responsibility to take historic decisions of great complexity and sophistication'.[587] Given the history, popularity, and recent invigoration of this objection, it is one which must be considered carefully by any defence of majoritarianism that relies on the idea of equality of decision-making weight.

As Christiano notes, the '*locus classicus*' of this argument in democratic theory is Mill's *Considerations on Representative Government.*[588] There, Mill argued that while the democratic egalitarian is right that everyone whose interests are at stake in a decision 'should be legally entitled...to have his consent asked, and his opinion counted at its worth', it is crucial that it be counted *'not at more* than its worth'.[589] For while:

> '[e]very one has a right to feel insulted by being made a nobody, and stamped as of no account at all…[n]o one but a fool…feels offended by the acknowledgement that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his'.[590]

As summarised by Arneson, this is 'the doctrine that no one has a right to an equal share of political power when other persons can be reliably identified and installed in power who are

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[587] R Dawkins, 'David Cameron's Reckless Folly' [2016] *Prospect* <https://www.prospectmagazine.co.uk/politics/david-camerons-reckless-folly> accessed 1 April 2017. In similarly forceful fashion, see the following comment-piece in American magazine *Foreign Policy,* whose unapologetically elitist title speaks for itself: J Traub, 'It's Time for the Elites to Rise Up Against the Ignorant Masses' [2016] *Foreign Policy* <http://foreignpolicy.com/2016/06/28/its-time-for-the-elites-to-rise-up-against-ignorant-masses-trump-2016-brexit/> accessed 1 April 2017.
[588] Christiano (fn447) 117, n26.
[589] Mill (fn538) 166 (emphasis added).
[590] ibid 173–174.

more competent to exercise political power'.[591] Mill famously used this principle to argue for a system of plural, or graduated voting in which those who are superior in wisdom – the experts – are given more of a say than those who are inferior in this capacity, and so less worthy of power.[592] More recently, scholars such as Arneson have built on this to defend 'judicial supremacy [as] morally acceptable despite its conflict with democratic rights', pointing out that '[j]udicial supremacy is just plural votes by other means'.[593]

The core of this longstanding objection to approaches to decision-making along the lines of that supported in the previous chapter, then, is that '[p]olitical power rightly belongs to those people who are good for it', *not* to everyone in equal measure. And not everyone *is* equally "good for it".[594]

6.2.2. The Democratic Response

A prominent response from democrats favouring political equality to the elitist points to the controversial nature of claims to greater competence. However, this response often focusses on the problem of putting the elitist premise *into practice* in an acceptable way. For example, Waldron, after setting out his case for majority decision on the basis that it respects individuals in according 'equal weight or potential decisiveness to individual votes',[595] seems to *endorse* the elitist premise in principle. Quoting Mill, above, Waldron accepts the possibility that '[f]airness does not require that the view of a wise and intelligent person have the same weight – the same potential for decisiveness – as the view of a person who is

[591] Arneson, 'Democratic Rights at National and Workplace Levels' (fn6) 135.
[592] Mill's advocacy of plural voting is the core argument presented throughout Chapter VIII of his *Considerations on Representative Government,* but see especially 172-182.
[593] Arneson, 'Democratic Rights at National and Workplace Levels' (fn6) 135.
[594] R Arneson, 'Democracy Is Not Intrinsically Just' in K Dowding, RE Goodin and C Pateman (eds), *Justice and Democracy: Essays for Brian Barry* (Cambridge University Press 2004) 40.
[595] Waldron, *Law and Disagreement* (fn4) 114.

ignorant and unreasoning'.[596] This leads him to accept that 'a conception of equal respect which is responsive to proven or acknowledged differences in reason, wisdom, and experience may justify some sort of plural voting scheme, rather than the equal weight implicit in plain majority-decision'.[597] With this in mind, he adds the rider to his democratic case that he is *'not* saying…that either fairness or equal respect *requires* majority-decision'.[598]

However, while conceding the weight of the Millian argument in theory – its plausibility as a general idea – the differential responsiveness principle to which it leads is not something Waldron pursues further. Waldron objects to its use in practice because he is dubious as to '[w]hether it is possible in the circumstances of politics to *justify* (or agree upon) criteria of wisdom etc. for the purposes of these differentiations'.[599] The problem comes, as it often does for Waldron, from disagreement over what "wisdom" involves, along with the idea that we must respect individuals' beliefs on this matter. One may measure "wisdom" in terms of how often one has 'come up with just decisions in the past', for example, but if 'people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not without failing in respect for persons'[600] in the sense of 'respecting the fact of their differences of opinion about justice and the common good'.[601] Thus Waldron's response to the authoritarian criticism is that "wisdom" is a controversial matter in the circumstances of politics and designing a system of decision-making on the basis they

[596] ibid 115.
[597] ibid (footnote omitted).
[598] ibid (footnote omitted).
[599] ibid.
[600] ibid.
[601] ibid 111.

propose would necessarily privilege one controversial view over others and 'accordingly fail to respect the others'.[602]

A similar dismissal of the elitist objection is offered by Estlund, also pointing to controversy over identifying those with the superior normative wisdom desired – knowledge of 'what society ought to do, or what is in the common interest of the community'.[603] This problem – put simply as that of 'Who will know the knowers?'[604] – is again a problem with putting the elitist approach into practice. It does not challenge the idea of normative expertise itself (which, as below, Estlund is at pains to hold onto, lest he fall into an apparently dubious moral scepticism), or the principle that greater expertise *could* ground a legitimate principle of unequal decisional-weight. As with Waldron, the problem is with disagreement; '[n]o knower is knowable enough to be accepted by all reasonable citizens'.[605] This controversy among reasonable citizens undermines the moral legitimacy of authoritarian decision-making; 'no individual or elite can defend, in a morally sufficient manner, their claim to epistemic authority', because 'any putative knower could be doubted by some reasonable people'.[606]

Both Estlund and Waldron's treatment of (moral)[607] disagreement as a problem with the authoritarian decision-making approach rely on a fundamental normative premise. For

[602] ibid 116.
[603] Estlund (fn577) 84–85.
[604] ibid 71.
[605] Estlund (fn577) 71.
[606] ibid 95. For another account the problem of identifying moral experts (even assuming they exist) in ethical theory, see M Cholbi, 'Moral Expertise and the Credentials Problem' (2007) 10(4) Ethical Theory and Moral Practice 323.
[607] From his focus on the problem of disagreement over the desired substantive outcomes of political decision-making, and the justice of those outcomes in particular, it is seems clear that Waldron is focussed on moral wisdom and competence in his anti-elitist reply. Likewise, Estlund declares that he is concerned only with 'knowledge about such things as what society ought to do, or what is in the common interest of the community', and that it is disagreement over the 'goals of politics' that is decisive on his approach (Estlund [fn577] 84–85). Claims to *moral* competence are not the sole focus of some elitist cases, however. Expertise on other matters - empirical, economic,

Waldron it is the idea that we must give equal respect to individuals, which means respecting equally their different beliefs by not privileging some over others. For Estlund it is the contractualist premise that the reasons given for a distribution of political power must be 'acceptable to all reasonable people' if it is to be justified;[608] in other words, that it is 'wrong to act in ways that affect people except on the basis of principles they could not reasonably reject'.[609]

6.2.2.1. The (Realist) Authoritarian's Reply

These premises concerning the importance of respecting normative disagreement, and the importance of political acceptability, leave the democratic response open to a straightforward answer. This is that disagreement does not mean that there are no right, or better, answers to be had, nor that we cannot tell who is more likely to reach them. Put bluntly, people may well disagree over competence as much as they disagree directly over what the right answers are. But some will be wrong to so disagree.

This response is in essence the same as that put forward in defence of instrumentalist approaches to constitutionalism more generally against this kind of disagreement-based objection.[610] There also, the reply to the claim that taking an outcome-based approach to constitutional design is problematically question-begging in the context of disagreement

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scientific etc - are sometimes taken as key, and so these authors' focus on moral disagreement, and the present author's focus on the moral realist/anti-realist issue in this discussion may be questioned. Political decision-making, it might be replied, engages non-moral elements too, and even putting issues of moral disagreement and defensibility to one side, expertise in these other areas may itself justify the elitist's attack on strict equality in the decision-making process. This possible criticism of the moral focus taken will be discussed further and responded to below (**section 6.2.4**).

[608] ibid 89.

[609] Arneson, 'Democracy Is Not Intrinsically Just' (fn14) 51.

[610] It is also of the same nature as the response we initially came across in **Chapter 5** regarding Waldron's "rights-based" argument for participatory equality (see **section 5.5.2.2**).

about what the outcomes should be,[611] is often along the lines set out in plain terms by Fabre; that 'if one allows for the possibility that someone may be wrong' on these issues, then 'why not argue that in so far as he [or she] is wrong', their views 'should not prevail?'[612] While there will undoubtedly be those who will 'not be convinced' by the conceptions and standards used, 'one has to bite the bullet, and stand, in the face of others' disagreeing with us, for what is just'.[613]

This kind of approach leads Arneson to argue that Estlund's preoccupation with disagreement among "reasonable" people collapses rather quickly, when one applies the *correct* standard of "reasonableness". He points out that if one takes a 'reasonable person' to be one who 'makes no cognitive errors and deliberates with perfect rationality', then it will be the case that 'reasonable people will agree in selecting the conceptions of justice and rights that are best'.[614] There may be other conceptions of justice, 'but these can be set aside' on the basis that they only 'attract the allegiance of less than fully reasonable persons'.[615] The notion of competence 'can then be calibrated in terms of the best conceptions of justice'.[616] Disagreement is not problematic, for this 'notion of competence will not be controversial among reasonable people';[617] it could only be disputed by the unreasonable –those who are

[611] See, for example, Waldron, *Law and Disagreement* (fn4) 249–254.
[612] C Fabre, 'The Dignity of Rights' (2000) 20 Oxford Journal of Legal Studies 271, 273.
[613] ibid 282. For other examples of this response see Alexander (fn495) esp. 281 ('respect cannot be demanded for erroneous moral judgments in the form of acceding to them', for this 'may entail allowing those whose judgments they are to impose immoral constraints...on other people'); Raz (fn492) 47 (replying that controversy over epistemology - of paths to reaching the best outcomes - is 'irrelevant'. The fact that 'sound epistemology is controversial does not mean that we cannot know what it requires'. Rather, it merely means that 'avoiding controversy is not a goal to be pursued'). For a detailed, critical consideration of these responses, and the instrumentalist approach to constitutional authority more generally from the sceptical perspective, see Murray, 'Philosophy and Constitutional Theory' (fn3) 154–157.
[614] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 51.
[615] ibid.
[616] ibid.
[617] ibid.

making some 'mistake of reasoning', for example – and the idea is that *this* kind of controversy is not really problematic at all.[618] Given that 'the political rulers' will have the instrumental task of 'designing and administering laws and policies that will maximize fulfilment of human rights', it is quite clear that '[o]nly the best is good enough'.[619] This strong interpretative gambit is an indirect way of putting the blunt point above that disagreement should not get in the way of getting the matters concerned "right" – there is too much at stake for that, focussing in particular in the importance of maximising rights protection. Estlund's theory is then strongly reinterpreted with this aim in mind to establish the necessary conception of "reasonableness".

A similar strategy has been used to respond to arguments like Waldron's which rely on the premise of equal respect. The response is that it shows 'no *wrongful* disrespect...to notice' that some are 'imperfectly rational' and prone to make 'mistakes' which would have the effect of 'wrongfully harming others' or oneself.[620] Rather, '*appropriate* respect for an agent's rational agency capacity is shown by recognizing it for what it is'.[621] Once again, 'variation in capacity matters', and the notion of respect 'should not be interpreted as requiring us to pretend' otherwise.[622] Thus, as with the definition of "reasonable" put to Estlund and his contractualist approach, the *correct* conception of "respect" for persons as agents 'requires treating them according to the moral principles that fully rational persons would choose' which, once again, is to say 'the principles best supported by moral reasons'.[623]

[618] ibid.
[619] ibid.
[620] ibid 52 (emphasis added).
[621] ibid (emphasis added).
[622] ibid.
[623] ibid.

Arneson recognises that this response might be seen as not much of a response at all by those concerned by disagreement. It might be said to involve 'an illicit sleight of hand' because there is still the original problem raised, that it is precisely over the issue of *what* the "principles best supported by moral reasons" – the correct or most justified principles of justice – *are* that there is widespread disagreement.[624] In particular, he recognises Waldron's point – made as a more general criticism of instrumentalist approaches to decision-making authority – that such an approach '"seems to face the difficulty that it presupposes our possession of the truth about rights in designing an authoritative procedure whose point is to settle that very issue"'.[625] While initially acknowledging these as 'sensible concerns' however, Arneson maintains that they can be easily satisfied, for there are 'sensible ways to address them'.[626] This "sensible" way forward is, quite simply, to stand up, and to act, for what *is* correct. If one happens to 'have the power to implement' what is 'correct', then one 'should do so, despite the fact that [it] will not attract the unanimous assent of those affected'.[627]

It might be replied that this again merely avoids the problem pointed to by those like Waldron, that the disagreement they identify is such that *all* parties to a dispute will believe that *they* are acting on the correct standards. The problem is that it seems open to those in opposition to each claim for themselves such epistemic authority; if one asserts that they are acting on the "correct" or "true" view of justice, then, if 'he is at all self-aware,' he will know that 'he will be followed, one by one, by his ideological rivals, each making a similar announcement in similarly self-assured tones'.[628] Such are the "circumstances of politics". It

[624] ibid 53.
[625] ibid (footnote omitted), quoting; Waldron, *Law and Disagreement* (fn4) 253.
[626] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 54 (footnote omitted).
[627] ibid.
[628] Waldron, *Law and Disagreement* (fn4) 3.

might therefore be asked how "sensible" it really is to insist that one simply "implement the correct assessment" in such circumstances. Indeed, this takes one back to the very point Waldron frequently makes in his work on political decision-making: that '[s]ince we are to assume a context of moral disagreement, a principle such as "Let the right decision be made" cannot form part of an adequate principle of authority'.[629]

However, this problem of symmetry in the authority one claims for one's own moral assessments is not a problem at all on the view of instrumentalists like Arneson. The reason why is central to the argument that will be made in what follows, so is worth quoting in detail. On this view:

> 'just as people *think* they are acting justly, whether they *are or not*, yet there is such a thing *as acting justly*, so also people will *think* their preferred standards of competence and criteria for eligibility for political office are correct, yet there is such a thing as there *being correct* standards of political competence and correct inferences from these standards to judgments as to what form of political governance in given actual circumstances *is* just'.[630]

The point is that the asymmetry of moral claims, or of claims to moral competence – in other words, disagreement – along with symmetry as to their *claimed* status is not problematic for Arneson and others who argue for the significance of superior moral competence, because all of this is perfectly compatible with there *being, in fact,* divergence between what people *think* is just, and what actually *is* just. This in turn means that it is perfectly compatible with there being people who, *in fact,* have possession, or are more likely to have possession, of these independently correct, best, standards of justice and competence thereof. An indication

[629] J Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 18, 19–20.
[630] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 54 (emphases added).

of who this is – or is likely to be – and who it is not – or likely not to be – can be assessed as long as one is armed with 'an independent standard for assessing the political outcomes produced by the democratic process'.[631] Crucially, if one 'agrees that we can have knowledge about justice', then one agrees that it is possible to arm ourselves with such a standard.[632]

This amounts to a more general questioning of the relevance of disagreement. Waldron, Arneson argues, writes as though all disagreement were reasonable; he focuses on disagreement among 'reasonable, well-informed, competent judges'.[633] Yet, 'alongside reasonable disagreement...there is also disagreement that is manifestly and blatantly unreasonable and disagreement that...would not persist if all parties reasoned correctly and exercised practical reasoning excellently'.[634]

Given the importance of the matters at stake, and accepting the possibility of accessing the "moral truth" of the matter, unreasonable disagreement ought not to be respected. Controversy over the standards of justice, or the standards of competence to achieve it, and begging the question against some people and their differing conceptions, is not, or *should* not (in light of the importance of the outcomes at stake), be an issue as long as it is possible that some standards are more in line with the requirements of justice than others. The opposite would mean allowing "truth" or "justice" to be held to ransom by the less "reasonable" or "rational". The idea that we must prioritise respect for these groups – the less, or even the 'not reasonable, competent, well-informed judges' – is, on this view, the

[631] ibid 53.
[632] ibid.
[633] R Arneson, 'The Supposed Right to a Democratic Say' in T Christiano and J Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) 206.
[634] ibid 207.

idea that we must allow 'serious violations of people's moral rights the nature and existence of which are beyond the pale of reasonable disagreement'.[635]

6.2.2.2. Waldron, Estlund, and the Curse of Realism

It will be noted that the above response relies firmly on the idea that there *are* "correct" standards; that there *is* such a thing as acting "justly", independent of what people happen to *think.* For example, the words emphasised in the quote from Arneson above invoke this distinction between parties to a disagreement *thinking* that they have "justice" or "rightness" on their side, and what these standards *actually*, *independently* require. Disagreement thus affects neither the possibility, nor the importance, of pursuing the latter. Thus, this approach takes a realist-foundationalist approach to morality. It presumes that there is such a thing as "moral knowledge" – that "morality", "justice", "rightness" etc are qualities it is possible to *know* more about, such that it makes sense to say that some conceptions are more or less in line with the demands of these notions; that, as Arenson puts it in his response, some more or less accurately 'conform to its requirements'.[636]

In making such distinctions between the purported and the "real" knowers, between thinking one has "justice" or "rightness" on their side, and one *actually* so having, the argument directly mirrors the realist project noted in **Chapter 2.** The promise is that some claims concerning "justice" or "rightness" can be distinguished as 'descriptions of what is really going on', with others dismissed as descriptions of 'what only appears to be going on' in their minds.[637] Significantly, these are presuppositions and ideas which Waldron and Estlund

[635] ibid 206.
[636] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 49.
[637] Rorty, *Truth and Progress* (fn63) 1. See further, **Chapter 2, section 2.3.1**.

either seem to accept, or at least are reluctant to explicitly challenge. This acceptance or equivocation puts their anti-elitist arguments in some difficult waters.

Waldron is often (although, as I have argued elsewhere, not always consistently[638]) keen to stress that he is *not* challenging premises concerning 'the singularity of truth' in his arguments.[639] His argument from respect, we are told, has nothing to do with 'how we treat the truth about justice itself' which, he stresses, appears only – 'if at all – in the form of somebody's controversial belief,' but rather with 'how we treat each other's *beliefs* about justice in circumstances where none of them is self-certifying'.[640] His point is that while it is 'maybe' the case that the moral realists 'are right' concerning the objectivity of values, this idea is useless in politics as long as they 'fail to disclose themselves to us, in our consciences or from the skies, in ways that leave no room for further disagreement'.[641] Indeed Waldron at times, in addition to his apparent acceptance of the idea of moral truth in theory, also himself stresses the fundamental importance of getting matters of rights and justice "right" in practice.[642]

Given this apparent acceptance of the core realist premise of those who maintain an elitist, competence-based approach to decisional weight, the argument identified above is easily

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[638] See the holistic analysis set out in Murray, 'Philosophy and Constitutional Theory' (fn3).
[639] Waldron, *Law and Disagreement* (fn4) 111. (footnote omitted),
[640] ibid.
[641] ibid 111, n62. See also Ch 8 (presenting this argument for the irrelevance of moral realism to the issue of decision-making in constitutional theory in more detail); 244 (explaining his point as 'even if there is an objective right answer...still people disagree implacably about what that right answer is'). For a detailed criticism of Waldron's irrelevance case, and the implications for the coherence of his thought more generally, see Murray, 'Philosophy and Constitutional Theory' (fn3) esp. 136-150.
[642] See, for example, Waldron, *Law and Disagreement* (fn4) 252 (praising the idea behind the instrumentalist, outcome-based approach to the issue of decision-making authority on the basis that it 'takes very seriously' the dangers of reaching 'the wrong answer' on the matters at stake in the decision-making process - the violation of rights); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1373 ('Because rights are important, it is likewise important that we get them right', and should therefore 'take outcome-related' arguments in the constitutionalist debate 'very seriously indeed').

put to Waldron. That Waldron himself sometimes goes as far as *praising* the other key normative premise of this approach – that we *should* work towards the truths purported to exist in order to avoid the dangers of getting matters wrong, and that this should be taken as of *serious* importance – makes the case even easier, and for him, particularly problematic. For it can then be suggested that the prioritising of morally correct and just outcomes in the reply to Waldron's disagreement-based argument is the logical result of the importance Waldron *himself* attaches to the substantive quality of decisions on rights. The case against his fundamental concern for disagreement seems especially plausible, strong even, *on his own terms.* Thus, Waldron himself can be seen as providing the tools for the dismantling of his own position in favour of the ideal of equality of decision-making power in the democratic process.[643]

Something similar can be said of Estlund. In the piece in which the anti-elitist argument considered above appears, Estlund, while not going as far as Waldron in praising the idea that it is important to reach or progress towards the "right answers" or "truth of the matter" concerning issues of fundamental importance, comes across as agnostic on the fundamental philosophical premise of the existence of such truths. This fundamental tenet of the position he calls 'Normative Epistemic Authoritarianism' – that '[n]ormative political claims (at least often) are true or false'[644] – is one that he repeatedly refuses to challenge. Here, this refusal is not necessarily on the grounds that he finds moral realism convincing or plausible – 'the objection...is not to political noncognitivism as a philosophical position' – but that it is an

[643] Of course, this could be seen as a matter of balance, raising the question: what weight should respecting disagreement be given relative to reaching the truth of the matter? Questions of balance like this are themselves open to disagreement, so the above reply may not necessarily be a knockdown argument against Waldron, but the point is that he is certainly left open to it, and it is one which puts him in some difficulty given his concessions.

[644] Estlund (fn577) 72.

'exotic and eternally controversial view'.[645] For this reason, rejecting the idea of moral truth is 'not a robust case against authoritarianism'.[646] It is simply 'too exotic to be generally persuasive', and ought not to be pursued.[647]

His own argument (set out above) is, in contrast, apparently preferable as a means to undermining the authoritarian objection to democratic equality, because it 'depend[s] on less deep and exotic preferences'.[648] However, this refusal to challenge the fundamental realist presuppositions behind the elitist responses above leaves Estlund's case open to the same responses as Waldron's. His confidence in the robustness of his own objection to authoritarianism which leads him to leave these presuppositions untouched, somewhat ironically, leads him to fail to appreciate fully the dangers that this very refusal poses to the robustness of his case. As with Waldron, then, Estlund's (lack of) stance on the philosophical issue gives the authoritarian the tools to undermine his own case against them, following a line of logic that can be seen as persuasive, or at the very least plausible, *on his own terms:* If there are right answers, and we can access them, then we should do so, disagreement notwithstanding (this is the realist authoritarian reply noted above, in **section 6.2.2.1**).

This is only exacerbated by comments which can be found in Estlund's later work in which he leaves his philosophical agnosticism behind and openly *accepts* the existence of moral and political truths. Early in his *Democratic Authority,* he openly states that he is 'supposing that some things are unjust, some right, some vicious, and so on, regardless of what anyone thinks about them'.[649] Furthermore, Estlund recognises that the 'discovery' of these 'truths

[645] ibid 74.
[646] ibid.
[647] ibid 80.
[648] ibid 74.
[649] D Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008) 5.

about the high stakes matters that are present in politics' is an important part of 'the best account' of political authority.[650] This 'truth-seeking dimension' is something 'we cannot do without'.[651] However his anti-elitist case remains the same: 'morally constrained' by his contractualist-style premise. The point is still that political power must be 'justifiable to those subject to it in ways they can accept'.[652] The argument remains the same, and so does the realist response put above, now armed with Estlund's embracing of both moral realism, and the realist instrumentalist approach.

For both Waldron and Estlund, then, the spectre of realism haunts. Their sometimes agnostic, and sometimes welcoming stance on the moral realist and instrumentalist premises leaves their defence of the principle of equality of decision-making power which underlies the defence of the majoritarian process open to a straightforward and, *on their own terms,* plausible response from the elitist.

6.2.3. A Sceptical Response to the Elitist

For the moral sceptic, however – one who *does* get struck into the apparently 'deep and exotic business'[653] of the meta-ethical controversy of questioning the objective status of moral beliefs – the elitist response, and their approach generally, is open to a more fundamental criticism than pointing to disagreement. The approach set out and defended in **Chapter 2** has the consequence that the very *idea* of a moral competence approach is rendered misguided. From this viewpoint, the approach is left meaningless. This is because it requires the assumption that there is something to be competent *about*. Yet it is the idea of the existence of a higher order "moral truth" independent of an individual's linguistic

[650] ibid 5–6.
[651] ibid 6.
[652] ibid 39.
[653] Estlund (fn577) 74.

beliefs that the sceptic discards. This also leaves the goal of the elitist approach – often expressed as *moral truth* or *morally superior outcomes* – a non-starter.

Arneson's Mill-inspired approach to decision-making, for example, positing the principle of differential decisional weight, is supported on instrumental grounds as a means to the end of increasing the likelihood that our 'epistemic access to moral truth will improve'.[654] Moral competence is relevant for the instrumentalist for the reason that groups who are superior in this sense have 'superior knowledge of the truths that legislators must know in order to identify the laws and public policies the establishment of which would best promote human rights fulfilment' such that we can 'know' that the outcomes 'will be morally better' if they were given the entire say, or at least more say than others.[655] To adapt an analogy relied on by Arneson to explain his instrumentalist approach, those with superior moral competence can be likened to the holders of 'maps', the purpose of which is to 'enable us to attain genuine [as opposed to mere purported] treasure'.[656] But when the idea of moral truth falls, then so does the idea that this can be a goal of decision-making, and also the idea that there is such a thing as moral expertise which can serve as the means to this goal. The maps point to a destination which does not exist; they set us out on the road to nowhere.

If the goal is taken in the non-objective sense of "truth according to particular groups or individuals", however, it falls foul of the Godlet Conception of the individual with its key component of normative equality at the heart of the defence of majority rule. It would amount to the unwarranted privileging of moral views in the way rejected in the argument for majority rule. Furthermore, there would be no question of resorting to the kinds of

[654] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 43.
[655] Arneson, 'Elitism' (fn103) 160.
[656] Arneson, 'Democracy Is Not Intrinsically Just' (fn594) 43–44.

responses seen above to Waldron and Estlund – that objective truth is being held to ransom by a misplaced respect for disagreement.

On these grounds, the elitist objection to the commending of a political process governed by the principle of equal weight in decision-making is rejected. While this may be "exotic" to some, it is thus contended that the sceptical perspective provides a firm ground on which to reject the elitist objection to majority rule.

6.2.4. The (Ir)Relevance of Moral Realism and Expertise: An Account of Political Decision-Making

6.2.4.1. Non-Moral Expertise

However, it might be responded that the above argument – dismissing the elitist approach on morally sceptical grounds – fails to appreciate the relevance of *other, non-moral* forms of expertise to political decision-making. The idea would be that, whatever one's views on the possibility of moral expertise, and even accepting the sceptical argument that the idea of such expertise is misguided (and therefore not possible), the elitist argument could still hold by pointing to the greater competence of some in *non-moral* areas; on empirical or scientific matters for example. Morality aside, epistemic superiority in these areas would nonetheless justify a greater amount of power in the political decision-making process on the ground that this would lead to better, more effective outcomes. The morally sceptical argument put forward in this thesis would thus be too narrow to adequately deal with an elitist objection to political equality.

Such an argument might be put in defence of Mill, for example. His claim that 'the wiser or better man...has a claim to superior weight'[657] can plausibly be read as intending "wisdom" to include both moral *and* non-moral matters. After all, Mill maintained that the opinion of a 'higher moral *or intellectual* being...is worth more than that of the inferior',[658] and in the course of his argument one can find more general references to 'mental superiority'[659], or 'superiority of mental qualities' as justifying greater decisional weight.[660] These more general references show that Mill was concerned not only with superior knowledge of *morality* – superior *moral* competence – but also with other areas of knowledge that affect one's 'capacity for the management of joint interests'.[661] Indeed, Mill's ideal is that one's right to any vote at all be made contingent on sufficient knowledge of other matters; 'the conformation of the earth, its natural and political divisions, the elements of general history, and of the history and institutions of their own country', for example.[662] While he does not pursue this line because of the lack of any practical and reliable means of ascertaining whether such knowledge has been acquired,[663] the point is that his support for it in theory shows that his argument against strict equality of political decision-making power does not rely solely on claims concerning moral competence.

This might be used to ground an argument that, as noted by Dahl in his deconstruction of elitism, political 'guardians should be drawn from…[those] who are presumed to possess specialized empirical knowledge', or to otherwise *know* more, as a general matter.[664] Justified on this ground, the criticism from moral scepticism – rejecting the idea of *moral*

[657] Mill (fn538) 172.
[658] ibid.
[659] ibid 175.
[660] ibid 182.
[661] ibid 173.
[662] ibid 168.
[663] ibid; Arneson, 'Democratic Rights at National and Workplace Levels' (fn586) 133.
[664] Dahl (fn445) 67.

knowledge and expertise – would fall short. There would be no need to resort to claims of moral expertise, and the value of normative equality would not be offended. To take a contemporary example, perhaps free reign and an equal say should *not* be given to those who reject the scientifically-established "truth" about the risks of unchecked climate change; their morals do not come into it.

6.2.4.2. Means and Ends: The Inseparability of Morality and Politics

Given this thesis' scope – leaving the idea of objective qualities, and therefore expertise, in non-moral pursuits formally untouched – this response might be seen as an unanswerable criticism of the attachment to political equality here. However, even granting the possibility of expertise in these other non-moral areas (empirical matters, science, and the like)[665] this response collapses once it is noted that views on these areas form, at best, but one part of political decision-making.

Knowledge of empirical, scientific, economic or other matters does not itself dictate an outcome of political decision-making. Knowledge does not apply itself. It does not itself point in any direction. Political decision-making requires putting this knowledge to use, and this in turn requires a normative premise; a view on the goal of decision-making. To use Mill's language, what *are* the "joint interests" that are to be pursued? What *is* the "common good" that is to be aimed for? Without such a view on the ends to be pursued, there simply can be no considered decision at all. As Dahl puts a similar point, this 'completely undermines' the idea that policy decisions 'are purely instrumental and could be made

[665] For present purposes, I write on the conventional basis that there can be "correct" or "incorrect" views about factual matters. Or at least I leave this formally unchallenged. Furthermore, as already explained earlier (see **Chapter 1, Introduction, p8**), the arguments put in this thesis – including the anti-elitist case – depend on moral scepticism alone. This section can be seen as supporting that point.

wisely on purely empirical, scientific, or technical considerations'.[666] Thus, as the ardent elitist Arneson himself recognises, 'no argument to the conclusion that a particular public policy ought to be established can be developed without appeal to moral premises'.[667] Moral views are always necessary, at least implicitly, in political decision-making.

The intermingling of moral and non-moral views in political decision-making can further be seen by noting the further evaluative judgements that inevitably come into play, *even where a common goal is assumed.* Such further moral judgements come into play when apparently merely considering the means to established ends and putting these into practice. An 'epistemologic assumption that the means are *value neutral'* is, as Urbinati suggests, questionable.[668] Consider the aim of full employment. Those who accept it will soon be faced with the issue of how to pursue it. Is the issue of whether to pursue this aim 'by encouraging the growth of military industry instead of that of the food industry', for example, really value free?[669] This seems implausible, given the moral implications of both of those industries: should we be encouraging an industry leading to what may be seen as the immoral practice of warfare? Should we not instead be putting our efforts towards *ethical* employment, especially when we see the struggles faced by people unable to afford food?[670] Perhaps government should rather increase employment by expanding state welfare schemes? But how is the funding for this to be balanced against other worthwhile aims in society? Should high-earners be taxed more, or are they entitled to the spoils of their talents (a fertile practical battleground for the Rawls-Nozick dispute on distributive justice, perhaps)?

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[666] Dahl (fn445) 68.
[667] Arneson, 'Elitism' (fn103) 174.
[668] N Urbinati, 'The Rule of the Many: Fundamental Issues in Democratic Theory by Christiano, Thomas (Book Review)' (1999) 109(2) Ethics 431, 432–433.
[669] ibid 433.
[670] P Butler and P Duncan, 'People with "nowhere Else to Turn" Fuel Rise in Food Bank Use - Study' *The Guardian* (24 April 2018) <https://www.theguardian.com/society/2018/apr/24/food-bank-use-trussell-trust-universal-credit-figures> accessed 2 March 2019.

Further examples are not hard to think of. If one feels it is morally valuable to offer assistance to homeless people without shelter, there are many ways to operate an assistance scheme: one could provide shelter to all those who can prove they need it (until the supply runs out) perhaps; one could instead set up a system of priority, and this could be done on a number of possible grounds (who most *deserves* our help, who most *needs* our help?).[671] Then there is the question of how to balance costs in all of this. These are matters on which people differ, on *moral* grounds.

To return to the apparently straightforward climate change example, above: once we accept the expert's evidence, what balance is to be given to the value of protecting the environment as against the economic and social costs? For example, raising taxes on fossil fuels, or pollution taxes in "clean air zones", might be seen, on balance, as an effective way of discouraging their use, and protecting the environment, with benefits for future generations. But is the possible disadvantage to poorer sections of society, already struggling to make ends meet, an acceptable price to pay?[672] If we want more trade as a boost to our economy, perhaps to alleviate a harmful economic slump, or maybe in order to afford expensive but valuable responses to climate change, does it matter if the trading partner is an anti-democratic nation using their newfound funds to wage war on sections of their own populations, or to fund anti-egalitarian state polices? How are the risks, such as they may

[671] Example and considerations adapted from Waldron, 'A Rights-Based Critique' (fn629) 25.

[672] See S Petherick, 'Bath Clean Air Zone Is "Blatant Tax on the Poor", Businessman Argues in Petition' *Somerset Live* (8 November 2018) <https://www.somersetlive.co.uk/news/somerset-news/bath-clean-air-zone-petition-2192215> accessed 2 March 2019. For similar concerns, see D Holland, 'Drivers Could Face New Charge for High Polluting Vehicles - but It Won't Be Enough to Tackle Emissions Crisis' *Chronicle Live* (8 January 2019) <https://www.chroniclelive.co.uk/news/north-east-news/drivers-face-new-charge-high-15648601> accessed 2 March 2019.

be, of genetically modified crops to be balanced with the benefits for food-availability, and even world hunger, or the risks of nuclear power against its benefits?[673]

The speed with which these further, value-laden questions arise out of the issue of establishing means to ends gives weight to Dahl's observation that policy decisions inevitably 'require judgments about the relative desirability of trade-offs between different values: equality versus liberty, high wages versus international competitiveness…short-run gains versus long-run gains, and so on'.[674] In short, moral views, and moral values are *always* implicated in political decision-making.

As a result of this observation that all political decisions require value judgments – a moral element – it follows that giving decisional power to experts in non-moral areas, on the basis of their superior knowledge in such areas, will nonetheless have the result of privileging their moral and evaluative premises. The significance of this, it is contended, is that unless the elitist claims both non-moral *and* moral expertise for their preferred decision-makers, this privileging will be unjustified. An unwarranted superiority will be granted to the moral premises of some individuals over others. This will violate the principle of normative equality, earlier established on sceptical grounds. In other words, given that political decision-making unavoidably involves relying on moral and evaluative premises, a justified argument for greater political power to be given to some on the basis of competence in political decision-making must involve a claim of superior moral competence. Superior wisdom in other areas, taken alone, cannot justify the result the elitist contends for.

[673] The problem is particularly evident when it comes to decisions about whether, and how best, to manage perceived risk – even where the risk, and effective means of managing it are based in scientific evidence. For an account of the complexities of managing risk, and the issues of balancing risk with opportunities, or differing forms of risk and benefits, see CR Sunstein, 'Beyond the Precautionary Principle' (2003) 151 University of Pennsylvania Law Review 1003, esp. 1023-1028.
[674] Dahl (fn445) 75.

Thus, the suggestion made, for example, by Beitz, that the principle of treating all views as '"at least as good" as anyone else's' does not follow from any claim that no conception of the good should be treated as 'preferable or more worthy of pursuit than any other' is unconvincing.[675] His argument is that an opinion can be treated as 'better...for reasons unconnected to the superiority [of one's] conception of the good'; one may simply be 'better informed or have better political judgment', for example.[676] But as was just argued, being better informed alone is not enough; political judgment necessarily includes the normative, moral element and so the privileging of some views over others necessarily privilege one's conception of the good. Avoiding this result *does* require treating views as of equal value.[677]

Furthermore, if the elitist must claim moral expertise, then, as Arneson also recognises, it is open to reject their argument by resisting the idea that there is 'such a thing as technical expertise in the identification of evaluative and moral truths.'[678] As it happens, Arneson sets this response aside rather quickly by asking '[w]hat justifies the claim that there is no such thing as moral expertise?'[679] But an answer to this has already been offered above. As

[675] Beitz (fn466) 61–62.
[676] ibid 62.
[677] It might be thought that there are other ways to achieve an appropriate balance between moral and non-moral expertise. For example, it is already standard practice for a democratically accountable government to take expert evidence on particular matters and use this to guide their conduct in achieving the political goals approved by electors, for which they are then accountable at the next election. In theory, governments will thus not be putting the issue of the effectiveness of a particular drug, for example, to the public vote, but they would be democratically responsible for how they use this information, balancing costs and other values. However, while governments might operationalise this distinction in their policy-making role, it dissolves as soon as democratic accountability is brought back into the picture: the process of accountability does not distinguish between citizens' disapproval of government's views on empirical matters and its views on how to put such knowledge to valuable use – it reflects their approval or disapproval of whole policies, or even whole manifestos.
[678] Arneson, 'Elitism' (fn103) 174.
[679] ibid.

Arneson admits, then, in light of moral scepticism a fatal flaw in the political elitist approach emerges.

From the moral sceptic perspective, and from the stance of normative equality it grounds, then, the elitist objection to political equality is thoroughly misguided, and should be firmly put to one side. The moral realist defence of the violation of political equality, that it is possible to be more in line with the requirements of morality – "Justice", "the Good" or whatever – notwithstanding disagreement is rendered incoherent and meaningless once the idea of such standards existing independent of the descriptions of particular individuals is rejected.

6.3. Majority Rule: A Crude, Narrow Conception of Democracy?

As was set out in the previous chapter, political equality (combined with the quality of positive responsiveness) was central to the case for majoritarianism. This kind of argument has been criticised as leading to a misguided, narrow conception of democracy. For example, Dworkin disparages the majoritarian principle as a 'crude statistical democracy'.[680] It rests on a 'misunderstand[ing] of what democracy is'.[681] The problem is the underlying conception of equality at play. For Dworkin, majoritarians fail to recognise that 'majority decision is legitimate only if it is a majority within a community of equals', and what it means to be "equal" is 'not only that everyone must be allowed to participate in politics as an equal, through the vote', for example, but that 'political decisions must treat everyone with equal concern and respect'.[682]

[680] R Dworkin, *A Bill of Rights For Britain* (Chatto & Windus 1990) 36.
[681] ibid 32.
[682] ibid 35.

This demand that everyone must be treated with "equal concern and respect" appears throughout much of Dworkin's work, and can be traced as far back as *Taking Rights Seriously*, where he identified it as the core of his 'liberal conception of equality'.[683] Dworkin carefully differentiates two possible concretisations of this abstract principle: 'equal treatment' and 'treatment as an equal'.[684] Equal treatment requires 'the same distribution of goods or opportunities as anyone else has or is given'.[685] Treatment as an equal, in contrast, requires 'equal concern and respect in the political decision about how these goods and opportunities are to be distributed'.[686] Thus, the right to treatment as an equal is '…the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else'.[687]

In this language, an equal distribution of 'voting power', as encapsulated in the one person one vote principle, and which forms a key part of the argument for majoritarianism put in the last chapter, is an example of "equal treatment".[688] And for Dworkin to emphasise this right is not to fully respect the requirement of equal concern and respect, which Dworkin puts at the basis of a proper "understanding" of democracy. This grounds Dworkin's familiar outcome-based approach to democracy – that the 'best form of democracy is whatever form is most likely to produce the substantive decisions and results that treat all members of the community with equal concern'.[689] This is what he also sometimes refers to as the 'dependent interpretation' of democracy, holding that 'democracy is essentially a set of

[683] Dworkin, *Taking Rights Seriously* (fn529) 273.
[684] ibid.
[685] ibid.
[686] ibid.
[687] ibid 227.
[688] ibid 273.
[689] R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 186.

devices for producing results of the right sort'.[690] By this he means the sort that respects this "thicker" sense of equality in the sense of treatment as an equal.

Understanding how this works in practice requires recalling Dworkin's distinction between "external" and "personal" preferences, we first encountered in **Chapter 5.**[691] For Dworkin, putting democracy into practice requires insulating individuals from majoritarian decisions which may be tainted by inappropriate external preferences treating particular groups or particular ways of living with disdain – or certainly of lesser concern. This is the basis behind Dworkin's "rights as trumps" argument, and, in the absence of a workable way of excluding external preferences from political discourse debate itself, for an enforceable scheme of rights and liberties protected from the interference of political decision-making – a central thesis of *Taking Rights Seriously.* With democratic legitimacy being determined by such an outcome-based test – what is most likely to produce the best outcomes as assessed by the more substantive view of equality, constrained by rights – it is seen as an error to base the justification of democracy on the condition of equal decisional weight in the way this thesis does. A similar criticism is put by Beitz against the conception of majoritarianism based on the supposed fairness of treating 'each person's preference equally'.[692] He argues that, in order to work, the move from equally respecting the status of persons to majority decision has to 'reflect an implausibly narrow understanding of the more basic principle [equality], from which substantive concerns regarding the content of political outcomes…have been excluded'.[693] Like Dworkin, these concerns include 'the chances that the procedure will produce substantively acceptable decisions'.[694]

[690] ibid.
[691] See **section 5.6.2.3** on the "scope" of majority rule.
[692] Beitz (fn466) 59.
[693] ibid 64.
[694] ibid 60.

So, for both Beitz and Dworkin, the justification for majority rule put forward in the previous chapter – based as it is on the equal treatment of preferences in the political process – is unconvincing, relying as it does on an impoverished view of equality which is left blind to the quality of democratic decision-making and the substance of its outcomes. They would therefore reject it. The concrete consequences of this abstract argument for political and constitutional theory is that it sets the limits and scope of majority rule. A majoritarian process that undermines the fundamental premise of equal concern and respect – treatment *as* an equal – is not democratic. As noted above, this ties in to Dworkin's idea of "rights as trumps"[695] – the individual 'must be guaranteed fundamental...rights [that] no combination of other citizens can take away'.[696] Which is to say, the outcome must be a *rights-respecting* outcome if it is to be endowed with democratic legitimacy. Beitz is led to consider a similar possibility and its institutional, constitutional consequences. 'We might', he considers, 'adopt countermajoritarian devices such as bills of rights or requirements for "special majorities" in order to constrain the social choice mechanism' to protect against results 'that could be severely damaging to people's interests'.[697]

6.3.1. Political Equality as Plausibly Narrow

Waldron's response to such a criticism of his own move from equal respect to majority rule is to, in typical fashion, point to the circumstances of disagreement surrounding outcomes. In these circumstances a substantive notion of respect such as that taken by Beitz and Dworkin 'is unusable in society's name'.[698] Taking an outcome-based approach, will 'necessarily privilege one controversial view about what respect entails and accordingly fail

[695] See R Dworkin, 'Rights as Trumps' in J Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 153–167.
[696] Dworkin, *A Bill of Rights For Britain* (fn680) 35.
[697] Beitz (fn466) 65.
[698] Waldron, *Law and Disagreement* (fn4) 116.

to respect the others'.[699] Thus, he concludes, in circumstances of disagreement, 'all one *can* work with is the "implausibly narrow understanding" of equal respect'.[700] This leads back to his argument, similar to that put in the previous chapter, that majority rule is the only procedure consistent with this kind of equal respect.[701]

It will be noted that Waldron's response here is basically the same as that which he makes against elitist challenges to his reliance on the principle of equal decisional weight (considered above**, section 6.2.2**). It is therefore subject to the same difficulties that followed from the objectivist/instrumentalist reply to that response; that in light of the importance of the matters involved, it is simply wrong to allow independently correct outcomes to be held to ransom by those who, potentially unreasonably, or incorrectly, disagree. Waldron's sometime concessions to the realist premise land him in difficult waters once again.

6.3.1.1. The Sceptical Conception of Equality

The response offered by this thesis differs, and follows directly from its sceptical foundations and their logical consequences. It is simply that the conception of equality relied on by Dworkin, or Beitz, does not follow as clearly and persuasively from this underlying philosophy. The substantive account of equality they rely on is based in a fundamental interest-based approach. This is clear from Beitz's concern to take account of what he sees as an intuitive aspect of fairness that 'it matters how the particular issues set forth for electoral choice bear on individual interests'.[702] Dworkin's concern for interests is evident

[699] ibid.
[700] ibid.
[701] ibid.
[702] Beitz (fn466) 65.

in the example he gives to justify his claim that 'the right to treatment as an equal, and the right to equal treatment, derivative' at best:[703]

> 'If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug'.[704]

How, precisely, this shows that treatment as an equal is more fundamental than equal treatment is not clear, and so some reconstruction is necessary. The obvious significance that he attaches to the different positions of the children in terms of health, and the relative harm/good that would be done by giving the drug to one child over the other, suggests that he is focussing on concern for the *interests* of those involved. Here, the interest in life itself is the interest of concern. Flipping a coin does not treat them "as equals" because it does not consider their differing interests in the drug, on the basis of their need in terms of staying alive. However, rather than showing that treatment as an equal is fundamental, and a superior conception to equal treatment, it is contended that this shows only that Dworkin is assuming a certain prescriptive standard of treatment – a substantive interest-based standard. This does nothing to show that such treatment as an equal is more fundamental than what Dworkin calls equal treatment – being distributed an equal chance of getting the drug, in this example. Again, it shows merely that he takes the equal interests of individuals in particular "goods" (here, life) to be the appropriate factor in his standard of treatment. And with that, his conception of equality is revealed as clearly a substantive one; putting equal concern for the substantive interests of others at its heart.[705]

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[703] Dworkin, *Taking Rights Seriously* (fn529) 227.

[704] ibid.

[705] See also ibid 227–228 (explaining the right to equal concern and respect in the context of university admissions policy: the applicant 'has a right that his interests be treated as fully and

Taking the argument to this more fundamental level clarifies the key point of departure between the conception of equal respect taken here, and that taken by the outcome-based criticism. The issue is with precisely *what* is being treated as "equal", and the conception of equal respect that follows. As noted in the previous chapter, the political equality approach taken here is based in the equality of *normative force* between individuals. This distinguished the defence provided from the commonly-put interest-based defence of democracy. The outcome-based approach of Beitz or Dworkin is based in the equality of *interests* of individuals, and they essentially take issue with the fact that the majoritarian approach advocated here is not.

The conception of equality supported from the sceptical outlook has significant consequences for the "personal"/ "external" preference distinction at the core of Dworkin's substantive approach to democracy. As already noted, Dworkin argues that external preferences ought to be protected against in political decision-making because its violates the principle of equal concern and respect: it allows one's preferences to be affected, not on the basis of competition with others, 'but precisely because their conception of a proper or desirable form of life is despised by others'.[706] On this view, to judge another's way of life or conception of the good, and allowing it to influence governmental decisions as to what goods and opportunities are available to them, is to treat them with contempt. It is to rely on an idea that 'certain forms of life are more valuable than others', and is for this reason a violation of equal respect to be defended against.[707] As noted briefly in **Chapter 5**, however, the value of *normative* equality does not recognise the idea that a substantively judgemental preference is, taken alone, enough to amount to a violation of equality in *this sense.* It thus

sympathetically as the interests of any others when the law school decides whether to count race as a pertinent criterion for admission').

[706] ibid 276.

[707] ibid 274.

rejects the distinction drawn between the legitimacy of personal and external preferences which grounds Dworkin's argument, and indeed his own conception of democratic legitimacy.[708]

However, as also seen, this focus on normativity over interests is a direct consequence of the sceptical approach taken, focussed as it is on the issue of the groundability of normative assertions, and noting the linguistic construction of morality. The argument from sceptical premises to *normative* equality was set out in **Chapter 4.** On this basis, rather than "implausibly narrow" or impoverished, the conception of equality relied on here is defended as more fitting to the sceptical approach, than the interest-based approach. Given the method of this thesis – developing an account of constitutional theory *from* the sceptical outlook – this is decisive. The conception of equality which may or may not follow from the interest-based approach is dismissed as ill-fitting to the sceptical approach taken in this thesis. The criticisms above, on the basis of which the view of democracy taken here is rejected can therefore be dismissed as misguided. They depend on a view of equality not suited to the sceptical outlook.

[708] On a second line of thought, the issue with allowing external preferences to influence public policy making is that it results in the "double counting" of views. Dworkin gives the hypothetical example of a decision to build a swimming pool or a theatre. Many citizens, who do not swim themselves, prefer the pool because they 'admire athletes' or 'approve of sports'. If those external preferences are counted, then this would 'reinforce the personal preferences of swimmers'. This results in 'double counting' because a swimmer 'will have the benefit of not only his own preference , but also of the preference of someone else' (ibid 235). Initially, this seems more problematic on the conception of normative equality taken here; if Dworkin is right, some preferences, and therefore the people who hold them, will be given greater force than others, effectively counted more than once. However, this is a misleading description. As Coleman points out, double counting requires that something is counted twice, but in the situation put by Dworkin 'this does not occur. No single individual receives two votes; no individual preference is counted twice'. That some preferences have the additional weight of others behind them does not change that '[a]ll preferences of all persons are counted - each as one' (JL Coleman, 'Taking Rights Seriously (Book Review)' [1978] 66(4) California Law Review 885, 916).

6.3.2. Political Equality and Substance: Does the Majoritarian Have Nothing Left to Say?

Having defended the conception of equality central to the argument for majority rule put here – focussed on normative equality – as more fitting to the moral sceptical approach, a further observation can be made regarding its relationship to the outcomes of political decision-making. Dworkin and Beitz's criticisms above also rely on the idea that the underlying approach of political equality renders the majoritarian process blind as to the importance of substantive outcomes, whereas their own approach – based on what they see as the more fundamental value of equality – is appropriately sensitive in their accounts of democratic legitimacy. They thus put their fundamental conceptions of equality to work in setting outcome-based limits on the legitimacy of majority rule, and chastise the conception taken here for being incapable of doing so.

However, while it is clear that the defence of majority rule taken here rules out *these* arguments for limiting the substance of democratic decision-making, it is not necessarily the case that it rules out outcome-based considerations *per se*. In fact, the same logic used by Dworkin to posit limits on the majoritarian process to protect the fundamental idea of equality from which it must derive its legitimacy could also apply to the approach based on normative equality. The possibility that the logic of political equality, with its underlying premise of normative equality, might ground potential limits on the *outcomes* of the decision-making process, and possibly a strong system of rights, is considered in detail in the following chapters on the topic of entrenchment and the limits of majority rule (see especially, **Chapter 8**). The case there is that there is a persuasive line of logic in which rights-based limits on the majority rule can be justified where this is instrumental to the legitimating conditions of majority rule itself. The very principles behind majority rule may also ground its limits, for if the defence of majority rule is that it achieves or reflects the

value of normative equality, then where particular outcomes also reflect this value, they too would have political legitimacy. Outcomes which contravene the value of normative equality no longer respect this value, and so conflict with the basis of their supposed legitimacy. This being so, it is open to defend against those outcomes and thus limit the open-endedness of the democratic process.

While the detail of this case is left for those chapters, it is worth flagging its plausibility here because this possibility may give us further reason to question the criticisms of majority rule as crude or narrow. If this logic is made out, it is misguided to state that majoritarianism grounded in political equality is necessarily blind or indifferent to the outcomes of the procedures it sets up as legitimate.

6.3.2.1. An Instrumental Approach to Equality

The above logic can be seen as following the same structure as Dworkin's own moves from his conception of equality to a concern for substantive outcomes. These moves, as Dworkin explains, treats the right to equal concern and respect as the legitimating source of other rights. Other rights – including a right to equal treatment – are 'derivative'.[709] This means that 'individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights'.[710] This logic leads to the conclusion that protecting rights from intrusion – including against the majoritarian process reflecting the value of equal treatment – 'does not conflict with any supposed right to equality' – rather, 'on the contrary', it 'follows from a conception of equality conceded to be more fundamental'.[711] This is the fundamental logic on which Dworkin is led to his

[709] Dworkin, *Taking Rights Seriously* (fn529) 227.
[710] ibid 273–274.
[711] ibid 274.

outcome-based approach to democracy: democratic legitimacy is *dependent* on the more fundamental conception of equality – equal concern and respect – and so must maintain this respect. Political equality, in sense taken here – requiring an equal distribution of decisional-weight – is justified only as parasitic on this more fundamental conception.[712] It is therefore limited by it. However, while the fundamental conception of equality that this thesis has been led to on sceptical grounds is different, it is argued that the above logic could still hold. Dworkin's claim that the majoritarian must be blind to substance fails to recognise this.

With the underlying value of normative equality being fundamental to the conception of the individual and the value of majority rule, it could, on the logic just put, set limits to majority rule. Just as the right to equal treatment would be legitimate if derived from the more fundamental right to treatment as an equal, it would seem logical for a right to treatment as an equal to be legitimately derived from the right to equal treatment. The symmetrical logic is that if legitimating power comes from the more fundamental value of equality, then other values which can be derived from it, take on such legitimacy in precisely the way recounted by Dworkin. We might say, therefore, flipping Dworkin's conclusion, that "individual rights to distinct liberties must be recognised only when the fundamental right to *normative equality* requires it". Indeed, the right to political equality – equal decisional weight – was itself derived from this right.

What concrete consequences this might have, or what these further rights derived from the basis of democratic legitimacy outlined here might look like, is discussed in the latter part of **Chapter 8**. The immediate point is that is not necessarily the case that the differing view of equality taken here leads to a narrow lack of concern for substance and outcomes. In fact, the logic of Dworkin's claim that the fundamental value of equality sets the remit of

[712] ibid 273.

legitimate process and outcome, can show as much. The differing view as to precisely what the more fundamental conception of equality *is* does not affect his logic, it merely flips it the other way around. Depending on how far this approach can go in grounding more substantive rights, it may therefore be the case that Dworkin overestimates the differences that flow from the differing views of equality. However, exploring the merits of this claim – tentative at this stage – must be left for the chapters which follow.

6.4. The Responsive Lottery: A Fitting Alternative?

While the previous criticism centred on rejecting the conception of political equality relied on in the argument for majority rule, the next criticism considered proceeds from this conception. In fact, this criticism concerns the logical consequences of taking this conception seriously, contending that the argument for majority rule relied on could just as easily justify the use of what can be described as the "responsive lottery" approach to political decision-making.[713] As Saunders puts it, 'none of the common arguments for majority rule provide a decisive general justification for preferring it to lottery voting',[714] and indeed it may actually be 'preferable in certain circumstances'.[715]

On the responsive lottery approach to collective decision-making, each individual votes as before, on the basis of one person one vote, but, rather than counting the votes in order to determine which is to be taken as the outcome, a random selection takes place from the pool of votes. Ackerman's explanation of the core idea of this approach might be helpful in visualising precisely what this involves (although no doubt there are other, perhaps more

[713] This label is Ackerman's (see Ackerman (fn445) 285. His treatment of the issue is considered in detail below.
[714] Saunders (fn446) 169.
[715] ibid 177.

practical, ways of doing this). Instead of aggregating votes, as in the majoritarian approach, each individual's preference is written down on a piece of paper, and 'placed in a large black box'.[716] After all individuals have placed their votes into the box 'a single paper is selected at random' from it, and whatever option is written on the paper will be taken as the outcome.[717]

The lottery principle is nothing new, dating back to Athenian democracy. Here, many positions of power were filled through the method of sortition – a random allocation based on the drawing of lots – rather than on the basis of a majority vote, as is the case with modern representative democracy.[718] It has in modern times become something of a niche theory however – modern political practice has largely confined the lottery 'to the periphery of social choice' literature,[719] perhaps owing to an intuitive reaction that we should be taking important political decisions a little more seriously than drawing lots. As such it might be wondered why it is given serious attention at all here, and not merely confined to the peculiarities of history.

However, this thesis is concerned with theory, and the issue which makes this alternative worthy of attention is the claim that the logic used to ground majoritarianism here could *just as easily* ground the lottery principle. If one is concerned, as this thesis is, with pursuing the consequences of the logic relied on, it should therefore be taken seriously, just as the ideal

[716] Ackerman (fn445) 286.
[717] ibid. See also Saunders (fn446).
[718] Manin (fn549) 8. See also AHJ Greenidge, *A Handbook of Greek Constitutional History* (Macmillan & Co 1896) 138–139.
[719] Ackerman (fn445) 286. Although for discussion of the growing popularity of the idea of the democratic lottery see G Delannoi, O Dowlen and P Stone, *The Lottery as a Democratic Institution* (Policy Institute, University of Dublin, Trinity College Dublin 2013). As an example, see Barber (fn510) 291 (on the 'beneficent democratic influence' of the method of selection by lot) . This of course differs slightly from what is being considered here in that it is concerned with the selection of positions of power - of the decision-*makers* - rather than the selection of the *outcome* of the decision itself, but the principle cuts across the majoritarian approach generally.

of direct democracy – similarly put down by many to the peculiar ways of doing things in ancient times – was taken seriously in the last chapter as following from its grounding logic. The question to be considered here, then, is whether this method *is* just as justified as that of simple majoritarianism, or whether a decisive distinction can be made in this thesis.

6.4.1. The Case for the Lottery: Political Equality and Responsiveness

According to Saunders, no such decisive difference can be found between majoritarianism and the lottery alternative on the logic underlying the case for majority rule. For present purposes the key argument is that the lottery satisfies both of the attractive qualities of majority rule: political equality, and positive responsiveness to the preferences of individuals. If political equality means that '[e]ach group member must have an equal (chance of) influence over the group's decisions', then, Saunders points out, the lottery method easily satisfies it.[720]

Each voter has 'an equal chance of being decisive', because all individual votes form the group from which an option is drawn at random.[721] Drawing it at random gives each vote 'an equal chance of being picked' (as long as each vote is counted for one and one only).[722] It therefore seems entirely compatible with the principle that each individual should be treated as equal in their preferences, and therefore, in the way argued of the majoritarian procedure in the previous chapter, an attractive reflection of the idea of normative equality.

The method also achieves a degree of responsiveness to the preferences of individuals 'since extra votes in favor of one option always increases its chances of winning'.[723] Increasing the number of votes for a particular option present in the pool makes it, as a matter of

[720] Saunders (fn446) 149.
[721] ibid 151.
[722] ibid (footnote omitted).
[723] ibid 168.

mathematical probability, more likely to be chosen. However, while unproblematic from the stance of a strict view of political equality, and therefore sharing the same appeal as far as that quality is concerned, the comparability of this quality of responsiveness is more problematic. The conception of responsiveness reflected in the lottery approach differs significantly from that found in majoritarianism. This difference is decisive on the case put here.

6.4.1.1. Distinguishing Two Conceptions of Responsiveness

The crucial difference is acknowledged, to some extent, by Saunders himself. Saunders recognises that lottery voting is 'positively responsive in a weaker sense' than that noted by May, and other social choice theorists regarding majority rule.[724] Recall May's explanation of the positive responsiveness at the core of majority-decision: where a group decision is indifferent, 'and if the individual preferences remain the same except that a single individual changes in a way favorable to *x*, then the group decision becomes favorable to *x*'.[725] On May's analysis of majority decision, each vote has weight to the extent that it would, in certain conditions, be guaranteed to break a tie and *determine* the outcome. While it would only be *guaranteed* decisiveness in a tie-break situation (group indifference), the example shows the positive weight that the vote always has. Thus, as explained earlier, each vote in the majority procedure can be accurately described as *pushing* the outcome towards that preferred in the vote (see **Chapter 5, section 5.5.2.3** for more on this point). For these reasons, the conception of positive responsiveness found in majority-decision will be termed here "determinative", "maximal" responsiveness.

[724] ibid.
[725] May (fn445) 682.

In contrast, the conception of responsiveness found in the lottery approach can be described as “minimal”, “probabilistic” responsiveness. The difference to May's condition of positive responsiveness is that this does not, as does each vote in the majority procedure, *push* the outcome towards that preferred in the vote, it merely increases the *probability* that the procedure results in that outcome. This can be seen by considering again the tie-break example: where there are an equal number of votes for more than one option, a change of one vote will *not* be decisive. It merely increases the chances that the favoured option will be taken, but there is still the chance that it will not be. Even all things being equal, a change of vote does not have the *guaranteed decisiveness* that a change of vote in the majority process in the circumstances of a tie would have. This hypothetical reveals the lack of weight the vote has in the lottery procedure. It has no *weight* at all, but only probabilistic power.

Clarifying in this way the different conceptions of responsiveness reflected by the two competitors – majority rule and lottery voting – allows us to more clearly assess which, if any, is preferable, or more justified.

6.4.1.2. The Argument for Minimal Responsiveness

Having set up the key distinctions at play here, the remit of the key question on whether majoritarianism and the lottery can be distinguished on the principles and logic set out in the previous chapter can now be clearly stated. If the lottery is to be shown as preferable – or *just as* preferable – as the majoritarianism supported in the previous chapter, then the minimal, probabilistic conception of responsiveness must first be shown to be preferable, or just as logical, from its underlying premises.

Saunders’ argument is, it is suggested, unfortunately lacking on this issue. He begins by pointing out that there is no ‘explicit justification’ in May's argument as to why we should

be restricted to 'determinate social decision rules', or a ‘deterministic procedure’ which he notes would exclude lottery voting necessarily.[726] Saunders then moves quickly to the claim that the weaker account of responsiveness seen in lottery voting – the probabilistic rather than determinative interpretation – still ‘captures the main intuitive appeal’ of May’s condition.[727]

The first point, concerning the lack of justification for restricting social choice to deterministic rules, is a strange one to make against May himself given that he did not, and never intended to, offer justification for *any* of the conditions he outlined. May was merely analysing the characteristics of simple majoritarianism – an expository rather than normative task. Saunders can of course point to a lack of explicit justification by those who do appeal to this characteristic in an *argument for* majority rule. But that does not apply here – such an argument will be offered below.

Before setting that argument out, however, a fatal flaw in Saunders’ own argument must be noted: it is practically non-existent. Somewhat ironically, his second claim concerning the capturing of the “intuitive appeal” of May’s conditions through the less demanding conception of responsiveness is itself given no explicit justification, or even explanation. What, precisely, *is* the "intuitive appeal" of both May's condition, and this weaker interpretation? What precisely makes them comparable? Without this detail the equivalence argument is incomplete and question-begging.

[726] Saunders (fn446) 168.
[727] ibid.

Ackerman's attempt to justify the weaker sense of responsiveness is more promising. For Ackerman, probabilistic, minimal responsiveness is sufficient because it satisfies his condition of 'minimal decisiveness'.[728] This condition holds that:

> 'the polity cannot appeal to some completely unresponsive procedure when it remains possible to resolve a political disagreement by consulting the opinion of [a citizen] whose judgment has not yet been solicited on the matter'.[729]

Minimal decisiveness is achieved because, through the lottery, either the individual's preference will be selected at random, in which case the individual '*will* be decisive', or some other citizen's will be.[730] Crucially, in neither case will the individual be overruled by a procedure that is completely unresponsive to the judgement of *any* citizen because only citizens' preferences are available in the pool of selection.

The issue then becomes one of whether *this* condition of minimal decisiveness, which grounds the justification of the minimal responsiveness conception, is itself justified, and importantly for present purposes, *how* it is justified. Having passed through his dialogic approach, applying the Liberal principles grounding his work, Ackerman regards this minimal decisiveness conception as justified. Basically put, the justification is that, in Ackerman's envisioned society, the Democrat does not insist that his views *always* govern – that a 'citizen should always get his way'[731] – because that would violate the idea that everyone's conceptions of the good are equal.[732] It would therefore, he argues, involve a

[728] Ackerman (fn445) 287.
[729] ibid 282.
[730] ibid 287.
[731] ibid 281.
[732] See the dialogue at ibid 62–64.

misunderstanding of this Neutrality constraint on the quest for justice.[733] It is at this crucial point, however, that the approach here differs.

6.4.2. A Decisive Rejection of the Minimally Responsive Lottery

The key difference concerns what the individual does and does not demand for their views on Ackerman's account of the ideal citizen of his Liberal State, and this thesis's account of the individual as Godlet. On the conception of the individual as a Godlet – as a self-defining, authoritative, moral legislator – they *would, logically*, demand that they always get their way. The logic in **Chapter 4, section 4.4.1.1,** linking moral scepticism to the Godlet Conception, shows this. Having repudiated the idea of an authority beyond individuals as language-bearing describers, they themselves become the authority regarding the linguistic construct of morality. As authoritative moral legislators, it is not enough that their preferred outcome simply be made more likely by their holding of the preference (as on Saunders' approach). Nor is it enough that the procedure responds to *any* member of the community, with there being an equal chance that it is the individual moral legislator's (as Ackerman puts). Put bluntly, Godlets *determine* outcomes, because their normative utterances determine, constitute, what *is* morally right and wrong, and therefore what *ought* to be done, or not done. Logically, Godlets *would* make the demand that their views determine the outcome. It is only because of the value of normative equality – also integral to the Godlet conception – that they do not follow through on these demands.

As revealed by the tie-break hypothetical above, the conception of responsiveness that best reflects the idea that Godlets *are decisive* is what was termed the maximal, determinative conception: all other things being equal, the individual's preference will *determine* the

[733] For Ackerman's 'Neutrality' constraint, see ibid 10–12.

outcome. Without their preference, no outcome will be reached. With it, *their* desired outcome will be taken. This reveals the maximal weight given to the preferences of the individual. Even where there is no tie to be broken, the hypothetical shows the maximal weight their vote has – it actively pushes the outcome in their direction. The probabilistic conception of the lottery does not reflect this. All other things being equal, the individual's preference will not necessarily determine the outcome (although it might, by chance, turn out that way). Without their preference, an outcome will still be reached (another preference will simply be chosen from the pool). With it, their desired outcome is merely, mathematically more likely to be taken. It therefore falls short of according with the *authoritative* element of the Godlet conception.

There is, of course, the problem that *all* individuals who can describe can use the logic above – that *they* should determine the outcome – and so all Godlets can insist that their views govern. To deny this would be to contravene the idea of normative equality by treating the views of some as more determinative than others. However, this is reflected by attaching the deterministic conception of responsiveness to each and every vote; the equality of the aggregative process. Taking both the authoritative and equality aspects of the Godlet conception equally seriously, then, this conception of responsiveness is the closest we can get to ensuring each individual is decisive – *maximally* decisive, as constrained by the equality constraint also derived from the sceptical perspective. This, it is contended, reveals that the weaker approach to responsiveness taken by the lottery method is inadequate – it does not achieve the maximal, decisive, responsiveness required by the authoritative aspect of the Godlet conception, as constrained by the normative equality element.

On these grounds, and contrary to Saunders' objection to the argument for majority rule, a decisive justification for preferring majoritarianism to lottery voting, or sortition *can* be

found. The lottery method reflects a version of responsiveness that is, on the principles and logic developed in this thesis, inadequate when compared to the maximally determinative responsive at the core of simple majority rule.[734]

The argument developed in the previous chapter can thus provide a decisive, sceptically grounded, case for majoritarianism. Majoritarian democracy remains the system of collective decision which accords best with the sceptical outlook.

6.5. Conclusion

This chapter has furthered the defence of the majoritarian approach to democracy and legitimate political decision-making set out in the previous chapter. To do so it has examined in detail and rejected three problematic criticisms. Two of these – the longstanding elitist objection, and the Dworkin-style version of substantive democracy – focus their criticism on the political equality at the centre of the majoritarian account.

The elitist strongly objects to this quality generally, whereas the Dworkinian critique, at its core, objects to the specific account used as inadequate. A morally sceptical response to both

[734] Waldron's own response to the random selection alternative – examined through the lens of coin-tossing – is a little bare. Waldron notes that majority-decision differs in 'giving positive decisional weight to the fact that a given individual member of the group holds a certain view' (Waldron, *Law and Disagreement* [fn4] 113). Tossing a coin may give *some* weight to that fact when setting out the options to be decided between, but, he points out, majority-decision 'goes further and says that in the case of each individual, the fact that that individual favours option X is a reason for the group to pursue option X' (ibid). This line of argument sees Waldron relying on a conception of positive responsiveness in which each individual view is taken as *maximally* decisive, as he goes on to make clear: '[n]ot only may each person's view be minimally decisive, but the method accords maximum decisiveness to each' (ibid 114). The problem is that Waldron offers no argument for this conception of responsiveness itself, other than the rather bare, and circular, claim that "fairness" or "respect" requires it (see 109). As has been drawn out in this section, *this* is the very issue being disputed by critics. In contrast, this thesis has above set out the reasons why the maximally decisive conception of positive responsiveness is preferable.

of these criticisms was set out. It was contended that the elitist approach, in light of moral scepticism, is rendered a meaningless non-starter, and incapable of adequately justifying its rejection of normative equality. Unlike the attempted responses of Waldron and Estlund, the reply here was, as with the value of normative equality itself and the Godlet Conception of which it is a part, *grounded explicitly in moral scepticism*. Doing so avoids some problematic counter-responses put to both Waldron and Estlund.

It is readily admitted that this reply relies on a premise which is – as Estlund repeatedly points out – 'exotic' or 'eternally controversial',[735] but this is not, it is contended, problematic. Contrary to Estlund's suggestions otherwise, the controversial nature of the sceptical, anti-realist premise relied on, such as it may be, does not *itself* count as a reason for rejecting the argument which follows. If it is rejected, this must be on the basis that the arguments relying on the sceptical premise are unpersuasive – that they do not persuasively follow, or are inconsistent, for example – or that the arguments for this premise itself – those presented in **Chapter 2** – are found to be unpersuasive.

The account of normative equality to which the moral scepticism advanced here leads, and the consequent conception of political equality, was established as more in line with the sceptical approach than the thicker conception at the heart of Dworkin's rejection of majoritarianism as crudely narrow, and inadequately tuned to issues of outcome. Furthermore, it was suggested that the view of majoritarianism as necessarily blind to outcome in its account of legitimacy was misguided. Flipping Dworkin's logic, it was seen that a concern for outcome can plausibly follow from the value of equality relied on. Just as democracy itself is instrumental to the value of normative equality, other values could similarly be justified where they themselves further this account of equality. This possibility

[735] Estlund (fn577) 74.

was sketched only briefly, however, and the conclusion on that matter is tentative at this stage. The possibility of grounding a persuasive case for limiting majority rule in the same values which ground its legitimacy, and the concrete consequences of this, are considered in the following two chapters on the topic of entrenchment.

The third criticism was premised on positively taking the view of political equality relied on. It instead was concerned with the logical consequences of doing so, contending that the majoritarian is unable to offer a decisive reason to take their account of legitimate decision-making over a lottery-based alternative. It was argued that what distinguishes the lottery approach from majoritarianism is the weaker, minimal conception of positive responsiveness it achieves. Once this is recognised, it becomes clear that it is inadequate given the grounds offered in defence of majority rule. This conception of responsiveness does not adequately reflect the Godlet Conception of the individual as an authoritative moral legislator. Rather, taking this aspect of the Godlet Conception seriously requires a decisive, as opposed to a merely probabilistic, approach to responsiveness. Read in light of the parallel principle of normative equality – also grounded in the sceptical approach – this requires an approach which treats the views of each individual as *maximally* decisive, with each vote having *positive weight*. Majoritarianism, in contrast to the responsive lottery, achieves this.

Chapter 7

A Sceptical Take on Entrenchment I: The General Democratic Case Against Entrenchment

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7.1. Introduction

Having so far constructed a path from the moral sceptic perspective to majority rule as the core principle of legitimate collective decision-making (**Chapters 2 – 6**), the final pair of chapters turn to a topic at the heart of constitutional theory – the core issue of entrenchment within a constitutional system. The core question raised concerns the legitimacy – and desirability – of placing some aspects of the constitutional and legal order, or particular principles and standards, outside the ordinary law-making process set out in **Chapter 5** and defended in **Chapter 6**, either by making them more difficult to change, or even putting them beyond (legal) change altogether. The topic raises fundamental issues concerning whether there are, or should be, limits to the primary law-making authority and to the legitimacy of majority rule itself. How these questions are answered not only has far-reaching implications for democratic and constitutional theory – it also has clear practical consequences for those operating in, and living under, a constitutional system.

It is thus hardly surprising that the issue of entrenchment has long been central to constitutional theory and debate. In fact, for some, the entrenchment issue has a determining impact on whether a set of arrangements within a legal order amounts to a "constitution" at all. For example, this is a key factor contributing to Ridley's infamous declaration that the 'embarrassing' arrangements of the UK are not worthy of the name "constitution", with two of his 'essential characteristics' of "constitution" requiring that it 'is a form of law superior to other laws', and that it is 'entrenched' so that amendment can 'only be achieved by special procedures', if at all.[736] In similar definitional fashion, Alexander introduces "constitutions" as 'laws that are more entrenched than ordinary laws'.[737]

For others, however, the very idea of entrenchment strikes an uncomfortable discord with democratic principle; as Holmes notes, the idea that entrenched constitutionalism – seeking to 'tie the community's hands' by removing 'certain decisions from the democratic process' – is 'essentially undemocratic' is widely held.[738] On this line of thinking – examined in detail in this first of the two chapters on the topic – if entrenchment is necessary to the existence of a "constitution", then constitutionalism is itself illegitimate as unavoidably anti-democratic.

Whichever side of the debate one comes down on, the matter is of central importance – practically and symbolically; as one commentator notes, it goes to 'the heart of what it means to be a people who have joined together...to define itself as a collective'.[739] For these reasons, entrenchment, legal change and the underlying issues concerning political sovereignty and

[736] Ridley (fn49) 342–343.
[737] Alexander (fn50).
[738] S Holmes, 'Precommitment and the Paradox of Democracy' in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press 1988) 196.
[739] R Albert, 'Nonconstitutional Amendments' (2009) 22(1) Canadian Journal of Law and Jurisprudence 5, 32.

its limits must be addressed by any adequate constitutional theory. It also seems the next logical step, after setting out an account of the legitimate basis of collective decision-making, to set out a view on the potential limits to that rule, if indeed there are any limits at all. That is the purpose of these final two substantive chapters. Taken together they form a detailed account of the issue from the majoritarianism defended so far. This task is significantly exploratory in nature, applying the sceptically-grounded approach to the fundamental issues which arise in this debate. This task, in turn, requires drawing together various strands of the theory developed so far. As such this is perhaps a fitting way to end this thesis's broader investigation.

This first chapter focuses on the concept and nature of entrenchment itself. It begins by introducing and extrapolating the concept in **section 7.2**, disentangling the issues raised from related debates – namely the debate over the judicial review of legislative enactments that often dominates constitutional scholarship. This puts the thesis in a position to consider issues surrounding the democratic legitimacy of the concept itself. This first chapter's main contribution to the thesis is that it sets out a prima facie democratic case against entrenchment generally.

It is argued that the very concept involves a violation of the political equality valued by the case for majoritarian democracy elaborated in **Chapter 5**. The case presented is thus a heavily principled one, relying on the core of the case for the legitimacy of the majoritarian process set out in that earlier chapter. The prima facie conclusion is that entrenchment is, generally speaking, democratically dubious and to be opposed. This conclusion perhaps might come as no surprise, given that the concept of entrenchment, by definition, involves a move away from the simple majoritarian process. The basis on which this initial conclusion is reached, however, is worth elaborating in some detail given the issues this logic raises,

and the further lines of inquiry its raises in what follows. In particular, it will be key to the arguments made in the next chapter, considering precisely how far the prima facie anti-democratic case extend, and what it may commit the principled democrat to. As will be shown in both of these chapters – but especially that second one – the matter is far from as straightforward as the orthodox prima facie case might suggest.

The principled case against entrenchment is detailed in **section 7.3.** This case – focussed on political equality between decision-makers – will be distinguished from the popular and longstanding "intergenerational" objection to entrenchment (**section 7.3.2**). It will be shown that the collectivist focus of such critiques does not follow well from the account of the legitimacy of majoritarianism, based as it was in the idea that each *individual* is a normatively sovereign moral authority. Instead, it is contended, the intergenerational issue reduces to a concern with the impact entrenchment has on the political equality of individuals *within* a future generation. This more on point concern is set out in **section 7.3.3**.

An instant qualification to the prima facie case will be made in the context of using an ideally direct majoritarian decision-making process to constrain representative institutions – placing a referendum requirement on amending or repealing legislation for example (**section 7.4**). Rather than a violation of democracy, this can be seen as furthering the ideal form of political responsiveness. The issue of cross-institutional entrenchment is also necessary to consider given the combined approach to decision-making sketched in **Chapter 5**, including elements of both representative and direct democracy. Where the two clash, it is the direct that wins out.

The chapter then considers what impact the democratic provenance of an entrenchment provision might have for the prima facie case: does it stand where the entrenchment is actively voted for through an ideally majoritarian process? (**section 7.4**). This enquiry gives

rise to some intriguing lines of logic, the consequences of which will be fully realised in the next chapter when we turn to the topic of entrenching the required principles of democratic legitimacy themselves.

The present chapter will finish with a consideration of two possible objections to the general prima facie case put: that it is straightforwardly self-defeating (**section 7.6.1**), or that entrenchment can be justified as a sensible act of self-binding in order to protect against future defects of rationality – the popular "precommitment" defence of entrenchment (**section 7.6.2**). Both will be rejected, leaving the prima facie case against entrenchment, appropriately qualified, intact.

7.2. The Concept of Entrenchment

Before examining the issue of entrenchment and its effects from the sceptical and democratic perspective developed in this thesis, the concept itself and the precise issues at play must first be clarified. That is the purpose of this section, taking a close look at the core of the concept, carefully delineating the focus of the inquiry, and disentangling the issues raised from peripheral debates which often find their way into existing treatments of entrenchment.

7.2.1. A Typology of Entrenchment

While entrenchment can come in a variety of forms, of differing strength, as widely understood they share the common quality and rationale of placing the repeal or amendment of particular provisions outside of the ordinary law-making process. Thus, entrenched provisions are 'more difficult to amend than ordinary legislation, or even unamendable in a

strict sense'.[740] A number of specific devices are commonly used for this purpose, and so have been grouped under the umbrella term of "entrenchment" in constitutional theory.

7.2.1.1. Restrictions of Form

The first entrenchment technique commonly identified is to impose a requirement of 'form'; a need to use 'a particular form of words' to amend or repeal a previous enactment.[741] This is generally seen as an entrenchment technique because it does, in a sense, involve *some* move away from the ordinary legislative process. In the context of legislation passed through a legislative assembly, the technique has the effect that particular provisions are shielded from the 'normal rules of implied repeal'.[742]

However, the consequences of this "shielding" can be seen as rather weak. Thus, Fenwick labels requirements of form 'the weakest form of entrenchment available'.[743] In theory, such restrictions require only that the intention of the decision-making body to amend or repeal be expressed clearly, without 'restricting their ability to change it'.[744] Furthermore, the change, if so desired, can still be achieved through the ordinary majority rule which governs other legislation, carrying the legitimating qualities of the majoritarian principle – political equality and positive responsiveness. As such, this device, in theory, ought to be of little concern to the democrat.

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[740] J Elster, 'Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment' (2003) 81 Texas Law Review 1751, 1757–1758. See also A Marmor, *Law in the Age of Pluralism* (Oxford University Press 2007) 98 (provisions that are 'made difficult to change by ordinary democratic processes').

[741] H Fenwick, G Phillipson and A Williams, *Text, Cases and Materials on Public Law and Human Rights* (4th edn, Routledge 2017) 165.

[742] H Fenwick, *Civil Liberties and Human Rights* (Routledge-Cavendish 2007) 153.

[743] ibid.

[744] J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 195 (footnote omitted).

In the sections which follow, then – questioning the acceptability of entrenchment from a majoritarian viewpoint – this form of entrenchment will take a back seat. It does not raise the issues discussed in the sections to follow. Probably the best-known example of such a requirement can be found in s33 of the Canadian Charter of Rights and Freedoms – the famous "notwithstanding" clause – providing that 'Parliament or the legislature of a province may expressly declare' that a provision, or full Act, 'shall operate notwithstanding' the rights provisions set out in previous sections.[745]

7.2.1.2. Restrictions of Manner

A stronger form of entrenchment which does raise some significant issues for majoritarian democrat is a requirement of manner. This restriction refers to 'the way in which [legislation] should be passed' if it is to have effect.[746] The entrenched provision can thus only be amended or repealed 'through an extraordinary process'.[747] This most often takes the form of supermajority requirements – probably the most common means by which constitutions are entrenched.[748] As will be set out in the next section, this form of entrenchment is more troubling from the perspective of democratic procedure.

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[745] Canadian Charter of Rights and Freedoms 1982, s33(1). Whether this particular instance of the requirement of form delivers on its promises in practice, amounting to no real restriction on the democratic decision-makers and thereby resolving democratic concerns over entrenchment (such as those to be discussed later in this chapter) is a matter of some controversy. For present purposes, however, it is noted that, *in theory* such requirements are relatively unproblematic, in leaving the legal "final word" to the democratic body through the legitimating process of simple majority rule. For the concern that the non-use of the Section 33 override clause at the Federal level may show the Canadian system to have "collapsed" into an anti-democratic judicial supremacy over the entrenched rights see M Tushnet, 'New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries' (2003) 38 Wake Forest Law Review 813. For a strongly negative assessment, see Allan, 'An Unashamed Majoritarian' (fn192).

[746] Fenwick, Phillipson and Williams (fn741) 165.

[747] A Chander, 'Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights' (1991) 101(2) Yale Law Journal 457, 462.

[748] A particularly famous example is found in Article V of the US Constitution (providing that amendments to the Constitution require a 2/3 majority of each House of Congress and approval of at least 3/4 of state legislatures). In the context of a system where representative majoritarianism

7.2.1.3. Restrictions of Content – "Absolute" Entrenchment

The most extreme example of entrenchment techniques can be described as restrictions of 'content or substance',[749] 'full'[750] or 'absolute entrenchment':[751] 'no method of repealing [or amending] the legislation is provided'.[752] The provision entrenched is rendered (legally) 'permanent and immutable, inaccessible even to extraordinary constitutional processes'.[753]

A well-known example can be found in the German Basic Law, providing that amendments to the Articles declaring Germany to be 'a democratic and social federal state' (Article 20), '[h]uman dignity' to be an 'inviolable' principle, and the consequent recognition of 'inviolable and inalienable human rights as the basis of every community' and 'peace' and 'justice' (Article 1) are 'inadmissible'.[754] As the most extreme form of entrenchment, this raises particularly acutely the democratic concerns levelled at the concept to be discussed later.

7.2.2. Isolating the Concept of Entrenchment

In constitutionalist literature, discussion of entrenchment often comes hand in hand with the contentious issue of *judicial review* of legislative action for conformity with the entrenched limits. In turn, this often forms a key part of objections to entrenchment. For example, Waldron's argument against entrenched Bills of Rights focuses primarily on the shift of

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is the ordinary rule, a referendum requirement can be seen as a supermajority-based restriction, as requiring approval among the electorate directly. This forms a somewhat anomalous example of entrenchment in the UK constitution in s1(1) of the Northern Ireland Act 1998 (declaring that Northern Ireland 'shall not cease to be' part of the United Kingdom 'without the consent of a majority of the people of Northern Ireland' voting in a referendum). The issues raised by qualified majority requirements, and also by such referendum-based restrictions on representative politics are discussed further below in **section 7.3.3 and 7.4**, respectively).

[749] Fenwick, Phillipson and Williams (fn741) 165.

[750] Fenwick (fn742) 153.

[751] Chander (fn747) 462.

[752] Fenwick (fn742) 153.

[753] Chander (fn747) 462.

[754] Basic Law for the Federal Republic of Germany Art. 79(3) (English translation available from the Bundestag website: <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 1 July 2018).

power towards the judiciary this is thought to entail. Part of his response to the precommitment defence of entrenchment (below, **section 7.6.2**), for instance, points out that entrenchment is not a causal mechanism that directly reflects the judgements of the entrenchers, but passes the *judgement of when a constraint is violated* to another group of individuals. In doing so the reality moves away from the idea that precommitment is just another means by which a collective rules themselves:

> 'constitutional constraints do not operate mechanically, but work instead by vesting a power of decision in some person or body of persons (a court), whose job it is to determine *as a matter of judgment* whether conduct that is contemplated (say, by the legislature) at t_2 violates a constraint adopted at t_1'.[755]

This response to the precommitment justification for entrenchment is reflective of Waldron's concern with entrenchment *as* an increase in judicial power. Indeed, Waldron does make clear that his target in his interventions on the subject is 'a Bill of Rights *together with an American-style mechanism of judicial review of legislation*'.[756]

These parts of his case, and this approach, however, merge what are in theory two separable issues: entrenchment concerns the *legitimacy* of placing limits on the ordinary democratic process, whereas judicial review raises the issues of how, and by whom, those limits may or may not be *enforced*. As Posner and Vermuele put it, 'judicial review is a particular enforcement mechanism that might or might not be thought desirable and that must be justified, if at all, by separate argument'.[757] It is possible to imagine a system that, for example, has a 'constitution of entrenched rules' but which leaves the 'interpretation of those

[755] Waldron, *Law and Disagreement* (fn4) 262.
[756] ibid 257 (emphasis added).
[757] EA Posner and A Vermeule, 'Legislative Entrenchment: A Reappraisal' (2002) 111 Yale Law Journal 1665, 1670.

rules to democratic decision making'.[758] Christiano makes a similar observation in pointing out that entrenchment against 'democratic change is compatible with the democratic assembly being the ultimate interpreter' of the rights entrenched, concluding that entrenched Bills of Rights and the concern for 'democratic control' are thus not necessarily incompatible.[759]

Christiano uses this point as a critical response to Waldron's democratic case against entrenched Bills of Rights, but for present purposes the key point is that it shows how Waldron is often too quick to move from entrenchment to judicial review, and that the issues they raise may not be identical. As Alexander puts it, there is a distinction to be had 'between attacking constitutionally entrenched rules because they cannot be *overturned* by current majorities and attacking those rules because they are *interpreted* by nondemocratic bodies'.[760] The first is an attack 'on the very idea of constitutional entrenchment', the latter on a particular enforcement mechanism – the practice of judicial review.[761] Dealing with the two together means that the core issues raised by the concept of entrenchment itself are not properly, or at least clearly, addressed.

For this reason, while the issues raised by enforcement mechanisms – particularly the issue of disagreement – will be discussed in the next chapter when dealing with specific institutional consequences of the points made there, this initial chapter, dealing with the concept of entrenchment itself, will keep them separate.

[758] Alexander (fn50).
[759] T Christiano, 'Waldron on Law and Disagreement' (2000) 19 Law and Philosophy 513, 537.
[760] Alexander (fn50).
[761] ibid.

7.3. The Prima Facie Democratic Case Against Entrenchment

7.3.1. The Democratic Objection in the Abstract

We are now in a position to take a closer look at the issues raised by entrenchment itself. As Holmes states, the key objection raised against entrenchment in constitutional and political theory is the democratic one, based in the prima facie 'discord between majoritarian politics and constitutionally anchored restraints'.[762] Given that its very function is to '*remove* certain decisions from the democratic process', at least in its ordinary majoritarian form, and thereby 'to tie the community's hands', the widely held view that it is 'essentially antidemocratic' is perhaps unsurprising.[763] The longstanding democratic concern can be reduced to the question: 'how can we justify a system which thwarts the will of the majority?'[764] As Tribe puts it in relation to the US Constitution:

> 'In its most basic form, the question...is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement...deliberately structured so as to be difficult to change'.[765]

In his introduction to the precommitment idea of entrenchment, Holmes reports that the 'underlying problem has been posed in a variety of ways' throughout the years.[766] Again drawing on the US Constitution as the prime target, he asks:

> 'How can the "consent of the governed" be reconciled with the preempting of subsequent consent by a Constitutional Convention? Why should a constitutional framework, ratified two centuries ago, have such enormous power over our lives today? Why should

[762] Holmes (fn738) 196.
[763] ibid.
[764] ibid.
[765] L Tribe, *American Constitutional Law* (Foundation Press 1978) 9.
[766] Holmes (fn738) 195.

> a minority of our fellow citizens be empowered to prevent amendments to the Constitution? Is judicial review, when based on a superstitious fealty to the intent of the Framers compatible with popular sovereignty?'[767]

Although Holmes puts the above questions together as mere reformulations of the original problem of reconciling entrenchment with democracy, they raise a series of more specific, and slightly different problems, which it will be useful to clarify.

The last question concerning judicial review is, as already set out above, a different question to that being considered in this chapter in focussing on the *enforcement* of entrenched provisions by a court, rather than the *concept and act of entrenchment per se*. The other questions fall into two categories: the problem of intergenerational authority – why should a past majority bind a future one? And an "*intra*-generational problem" – why should a minority, at any one time, be able to block amendments sought by a majority? These different versions of the democratic concern give rise to different issues, and, as will be seen, involve differing interpretations of the fundamental principle of democracy. They will both now be discussed in more detail, from the perspective developed in this thesis.

7.3.2. The Democratic Objection to Entrenchment I: The Intergenerational Concern

Democratic concerns over the intergenerational effects of constrained constitutionalism have a long pedigree in political and constitutional theory, dating back 'at least to the eighteenth century'.[768] The classic statement of this democratic objection comes from one of the US Founding Fathers, Thomas Jefferson, who declared that each generation, like those preceding it, 'has a right to choose for itself the form of government it believes most

[767] ibid.
[768] ibid 207.

promotive of its own happiness'.[769] Around the same time, Thomas Paine wrote, in similar fashion, that '[e]very age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it'.[770]

This political view flows from a more fundamental normative premise that 'the earth belongs to the living and not to the dead',[771] or, somewhat more bluntly, 'the dead have no rights. They are nothing'.[772] Indeed, Jefferson colourfully continues, 'the particles of matter which composed their bodies, make part now of the bodies of other animals, vegetables, or minerals'.[773] Thus, 'by the law of nature, one generation is to another as one independent nation to another';[774] each generation is a sovereign authority endowed with a right to self-rule. As such, for both Paine and Jefferson, entrenchment devices – involving the past limiting future generations – are violations of democracy, and more fundamentally, 'open violations of justice'.[775]

The logic concerning the right of every generation to rule itself, led Jefferson to argue that referendums should be held for every generation to determine afresh its fundamental laws and thereby 'disenthrall the present from the past'.[776] He envisaged that at 'set periods, all laws and institutional arrangements must lapse'.[777] Jefferson linked this period to the lifespan of generations roughly calculated according to the life expectancy of its members. Relying on actuarial tables of the time, he calculated that 'of the adults at any one moment of time, a

[769] T Jefferson in M Peterson (ed), *Writings* (Library of America 1984) 1402.
[770] T Paine, 'The Rights of Man' in P Foner (ed), *The Life and Major Writings of Thomas Paine* (Citadel 1961) 251.
[771] T Jefferson in Peterson (fn769) 963.
[772] ibid 1402.
[773] ibid 1493. See also Paine (fn770) 251 ('It is the living, and not the dead, that are to be accommodated').
[774] T Jefferson in Peterson (fn769) 962.
[775] Holmes (fn738) 200.
[776] ibid 205.
[777] ibid.

majority will be dead in about nineteen years', at which point it can be said that 'a new majority' – a new generation – 'is come into place'.[778] Thus, '[e]very constitution...and every law, naturally expires at the end of 19 years',[779] at which point referendums are held to 'assure every generation its proper say'.[780]

That is the locus classicus of the intergenerational strand of the democratic objection to entrenchment, and the radical consequences drawn by its key proponent. However, the concern continues to the present day, particularly in relation to the US Constitution, with theorists still pressing these questions: 'What entitles one generation' to protect against change 'those values and practices it deems fundamental, but that a later generation may find unnecessary or affirmatively retrograde?', one commentator asks.[781] Similarly, Marmor asks,'[w]hy should the political leaders of one generation have the power to bind future generations to their conceptions of the good and the right?'[782] As Dorf notes, there is still a concern 'to answer the charge that constitutionalism merely handcuffs the future to serve the past'.[783] More recently, Jeff King has taken up something like the Jeffersonian generational authorship case in his defence of a democratic case for a written constitution – arguing that the UK should adopt a codified, entrenched constitution but with a sunset clause to ensure that it lasts, roughly, only one generation before it must be renewed. The idea is that this would grant the present generation democratic authorship of its governing system, thereby avoiding the problem concerning the "dead hand of the past".[784]

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[778] T Jefferson in Peterson (fn769) 1402.
[779] T Jefferson, *Jefferson: Political Writings* (J Appleby and T Ball eds, Cambridge University Press 1999) 596.
[780] Holmes (fn738) 205.
[781] MC Dorf, 'The Aspirational Constitution' (2009) 77(5–6) George Washington Law Review 1631, 1632.
[782] Marmor (fn740) 98.
[783] Dorf (fn781) 1634.
[784] King (fn51) (forthcoming).

The concern to answer this "dead hand of the past" formulation of the democratic objection to entrenchment has given rise to a number of tailored responses over the years. One such defence, traceable back to Madison, and pushed in more recent times by Holmes, reverses the objection and claims that entrenchment, in fact, 'does not enslave but rather *enfranchises* future' majorities.[785] In viewing the past 'as a dead weight', Holmes argues, Jefferson and Paine failed to appreciate the positive, empowering aspect of entrenched constitutionalism:[786] taking for granted certain standards, procedures and institutions 'fixed in the past' allows communities to achieve 'their present goals more effectively' than if they were 'constantly being sidetracked' by the need to establish these fundamentals.[787] Thus, by 'accepting a pre-established constitution...a people frees itself from considerable burdens'.[788] Entrenchment can then be seen as *facilitating* 'democratic self-rule': future generations are left free to debate and decide 'substantive policy questions' affecting their lives 'rather than having to constantly fight over [the] ground rules'.[789]

On this line, rather than raising the spectre of intergenerational domination, entrenchment is seen as a beneficial part of what Holmes describes as an 'intergenerational division of labor:'[790] the past decision-making body does the future generations a favour in disencumbering their successor partners - 'lighten[ing] their load', so to speak.[791] Habermas's response to the concern of intergenerational authority appeals to a similar idea of a partnership between the entrenchers and subsequent democratic bodies, interpreting them as engaged in a common enterprise. The problem dissolves when different generations come

[785] Holmes (fn738) 216 (emphasis added).
[786] ibid 222.
[787] ibid 216.
[788] ibid 222–223.
[789] Dorf (fn781) 1639.
[790] Holmes (fn738) 222.
[791] S Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press 1995) 159.

to see themselves as '"in the same boat" as their forebears'.[792] Constitutional history is interpreted 'as a learning process', in which all participants 'recognize the project as *the same* throughout history' and 'judge it from *the same* perspective'.[793] Thus, '[c]onstitutional framers can be *our* framers',[794] thereby resolving the 'allegedly paradoxical relation between democracy and the rule of law…in the dimension of historical time'.[795]

7.3.2.1. Putting the Intergenerational Concern in its Place

From the perspective of this thesis, these responses, and indeed the original intergenerational objection itself, rely on a misguided approach. As seen above, the core normative claim underlying the intergenerational approach is that legitimacy depends, to a decisive extent in the entrenchment context, on generational authorship. This concern has at its core the normative claim that one should 'live in compliance with a constitution that truly corresponds to the will of the contemporary…people'.[796] Or, as Jefferson would have it, the right of the living *generation* – as a *collective* – to the Earth, as a matter of natural justice. The conception of sovereignty at the heart of this objection is thus one of 'popular sovereignty'.[797] With frequent appeals to the problem of *generational* authorship, this concept clearly takes a collectivist shape. The conception of democratic legitimacy relied on is a collectivist appeal to the popular sovereignty of a conglomerate "People" – the one at the core of the famous "We the People" supposedly grounding the authority of the US Constitution, for example.[798] It is this collective "We the People" conception of legitimacy

[792] J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766, 775.
[793] ibid.
[794] F Michelman, 'Constitutional Authorship by the People' (1999) 74(5) Notre Dame Law Review 1605, 1628.
[795] Habermas (fn792) 768.
[796] Michelman (fn794) 1625.
[797] Habermas (fn792) 65.
[798] Preamble to the US Constitution.

which gives rise to the intergenerational objection: it is illegitimate, anti-democratic, for one People to bind another.

In contrast, the conception of democracy taken here does not take such a collectivist outlook, or rely on something like a Rousseau-style "General Will" as the basis of democratic legitimacy.[799] This difference stems from the specific route to democratic majoritarianism taken in this thesis – defending it as a process that gives each individual maximal decisional weight, a quality itself supported from the sceptically-grounded "Godlet" conception of individuals as authoritative moral legislators. The conception of democracy that follows from this is not a collectivist appeal to popular sovereignty – an authority gained from the infamous "Will of the People". Rather, it is one in which sovereign authority resides in each individual. In contrast to the collectivist normative premise identified above, concerning the right of each generation to rule itself, the core normative claim is that each *individual* has the right to live in compliance with a system that corresponds as closely as possible to *their* contemporary will. The majority process, through which it might be said that a "collective will" is constructed, follows from this individualist premise. This has the consequence that the contemporary democratic majoritarian process *is* to be favoured over the outputs of the past, but this is very much a side-effect of the individualist premise: the contemporary collective process has authority *because* it grants each present individual maximal decisional power compatible with such power being granted equally to all.

Thus, on this approach, the intergenerational concern gives way to a more fundamental *intra*-generational one surrounding the political inequality created *between* members of the future generation by the entrenching generation. Precisely how entrenchment impacts on the political equality between individuals of a collective will be detailed in the next section. The

[799] See Rousseau (fn396).

point to take from this section is that it is *this*, second, intra-generational issue of political equality that is of concern from the perspective taken in this thesis. To the extent that what others have taken as an intergenerational concern is a problem it is because it reduces to this more fundamental violation of political equality between individuals at a later point in time – between those individuals who happen to favour the status quo enacted by the previous generation, and those who wish to replace it. Entrenchment has the effect that the decision-making process is weighted against those who favour moving away from the previous generation's pronouncements.

Indeed, Habermas's response to the "paradox" of constitutional democracy – the authorship problem that 'the constitution was authored by historical founders, but we are ruled by it'[800] – merely *exacerbates* this more problematic political inequality. His solution depends on conceiving of the constitution as an ongoing collaborative enterprise, with the founding act merely part of a common project 'of constitution-making that continues across generations'.[801] However, this neglects the crucial issue of precisely *whose* idea of progress is to be taken as defining this common project, the *content* of Habermas's 'unifying bond' between generations.[802] As we saw in **Chapter 4**, in relation to Rorty's own ethnocentric attempt to ground our public normative outlook in what "we" believe, it is unworkable to leave such a "we", or an "our", undefined. So, the crucial question that must be asked of Habermas, is the same as that pressed on Rorty, and Rawls before him: Who *are* "we"? What *are* "our" values? What *are* the terms of "our" project?

[800] B Honig, 'Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"' (2001) 29(6) Political Theory 792, 794.
[801] Habermas (fn792) 768.
[802] ibid 775.

In societies full of disagreement, and in which our practices and institutions are open to a number of differing interpretations – a fact at least partially rooted in those disagreements – there is no singular "we" to which to refer on the level of belief and normative perspective. Thus, to take a stance on this, and to use it to justify limited constitutionalism, and the restriction of present individuals relying on the constraints "found" in the constitution (as interpreted) is to take sides in a matter of controversy. If the difficulties in changing a particular constitutional provision – because amendments are outright inadmissible, or require a 2/3 majority, for example – are justified on Habermas's interpretive strategy, the result would be that some members of the collective would be limited by those whose version of "we" is taken as authoritative. In this scenario, those whose views differ from this defined "we" are treated as of lesser weight (and in the case of inadmissible amendments, of no weight at all) as compared with those whose views accord with it. Those who have the power to define the "we" are in control. Groups and individuals are limiting others through the constitution under the guise of another vacuous "we believe".

More than that, however, Habermas's strategy allows the limiting, this violation of political equality, to take place covertly. The use of the collective "we" – "our" – leaves no room for those whose views are not part of its definition. Those who differ are effectively erased. "We" agree. "Our" values are *X*. Those who do not agree, or who hold to *Y*, are not "us". As a case in point, consider what Habermas writes concerning historical constitutional battles in the US, such as that over the New Deal:

> 'Once the interpretive battles have subsided, *all parties recognize that the reforms are achievements, although they were at first sharply contested. In retrospect they agree* that, with the inclusion of marginalized groups and with the empowerment of

> deprived classes, the hitherto poorly satisfied presuppositions for the legitimacy of existing democratic procedures are better realized'.[803]

Within this claim is a silencing – an erasing – of those who are not, as Honig puts it, swept up in 'the wave of progress'.[804] As Honig points out, it is not the case that all *do* agree in this way. What can Habermas say to these? The answer suggested here is that it seems as though he does not *want* to say *anything,* because he simply erases them from his picture. This is a wholesale exclusionary violation of political equality. The argument here, then, is that Habermas's solution, attempting to deal with the intergenerational aspect of the democratic concern, neglects what may be termed an *intra*-generational one, surrounding the political equality of members of the current generation, with problematic – even worrying – consequences.

Both Habermas's response, and the intergenerational formulation of the democratic objection to entrenchment he was responding to, are thus misguided; they miss what is, on the present approach, the real point of concern.

7.3.3. The Democratic Objection to Entrenchment II: Entrenchment as a Denial of Political Equality

It is to that specific concern which we now turn. The issue raised by this aspect of the democratic objection points out that entrenchment has the effect of treating particular views more, or less, favourably in the future decision-making processes. This carries with it the effect of treating those who hold or support those views similarly more, or less, favourably.

[803] ibid (emphasis added).
[804] Honig (fn800) 798.

Thus, entrenchment becomes an issue of political weight, with implications for political equality, which from the democratic perspective taken here are prima facie problematic.

7.3.3.1. Entrenchment and its Effect on Equal Weight

In his critique of the idea of entrenched constitutionalism, Marmor recognises and puts the issue well as part of what he describes as the 'problem of pluralism':[805]

> 'however abstract the rights and principles entrenched in a constitution, the entrenchment necessarily favors certain conceptions of the good and the just in ways that simply make it much more difficult for those who favor a different conception to change it. Constitutions necessarily favor a certain status quo, thus making certain social changes more difficult to achieve for some than for others. That is, at least relative to the baseline of a regular democratic process'.[806]

This effect can most obviously be seen in restrictions of content or substance – what can be called "absolute" entrenchment (see the definitions above, **section 7.2.1**). By establishing particular provisions – and the standards and conceptions within them, as immutable – the effect is that views which are incompatible with those entrenched simply *cannot* be taken as the outcome of the future decision-making process. From the start of that future process – and indeed before it even begins –those who favour alternative conceptions or standards to those entrenched in this way have their views discarded. The entrenched standards are, as far as the formal decision-making process is concerned, incontestable, and any alternatives are categorically rejected. It is thus rendered far more difficult – impossible, in fact, under

[805] Marmor (fn740) 97.
[806] ibid 101.

such regimes – for those who favour different conceptions or standards to those entrenched to achieve their desired result.

A similar, although less extreme, effect on the political weight of participants in the future democratic process can also be seen clearly in relation to restrictions of manner requiring supermajorities – for example, requirements of a 2/3 majority for amendment or repeal of a particular provision. Sadurski provides a particularly clear, and concise, account of the effect of such provisions through a hypothetical: If changes to a provision 'require a 66 per cent majority' in this way, and at some future point 'there is a 55 per cent majority support' for change or repeal, the effect is that each member of the 55 per cent majority's vote is given less weight in the decision-making process 'than each vote of the 45% minority'.[807] This hypothetical shows well that, as well as biasing the process in favour of the status quo (the existing entrenched provision) and the standards and values which form it, such supermajority requirements gives less force in the process to those who differ from the entrenched provisions than those who favour them. This happens as a mechanical, mathematical matter, inherent in the very requirement of supermajorities: the votes of those who favour a different position from that entrenched are given less weight within the process. Waldron, in similar fashion, refers to this as the "asymmetry" of supermajority requirements.[808]

7.3.3.2. Entrenchment and Political Equality

Putting it that way – in terms of mathematical weight and symmetry within the process – lays bare the violation of political equality that results from the stronger entrenchment techniques. With 2/3 majority, and other qualified majority requirements, this should hardly

[807] Sadurski (fn446) 67–68.
[808] Waldron, 'Freeman's Defense' (fn398) 40.

be surprising, given that it is a clear move away from the simple majoritarian process discussed in **Chapter 5**. That process, it was noted there, reflects directly the ideal of political equality via equal decisional weight accorded through the aggregative process at its heart. It is simply a mathematical fact that, as Sadurski notes, 'any decision-making procedure, other than a simple majority rule, creates an immediate inequality between proponents and opponents of a proposed decision'.[809] It follows that 'the further we go in departing from a simple majority rule, the more unequal their positions become'.[810]

Analysis such as the above, showing the inequality of weight involved in entrenchment, has not stopped some holding that (specifically in relation to supermajority requirements) entrenchment provisions are in fact *compatible* with political equality – 'equal rights of participation' – because individuals are in fact 'symmetrically situated' in the procedures.[811] Pennock, for example, uses this point to argue that a 60:40 majority requirement is compatible with a majority rule based on equality because it fulfils the requirement of treating all alike. This equality arises out of the lack of specificity in the supermajority requirement: the power to prevent certain action is given to *any* minority of 40 per cent, rather than a '*specified* 40 per cent', such that *anyone* has the potential to be in the majority or minority.[812]

This 'important distinction', between 'equality and special privilege' is, Pennock claims, 'ignored' by the simple majoritarian argument against qualified majorities.[813] However, this response can be quickly dismissed on logic already set out in **Chapter 5, section 5.5.2.2**. While it is the case that no inequality arises on the basis of the *identity* of individuals or

[809] Sadurski (fn446) 60.
[810] ibid.
[811] S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 Law and Philosophy 327, 350.
[812] Pennock (fn446) 792.
[813] ibid.

groups in the process – there are no specified individuals who are treated as of lesser weight – this is of no consequence for the point about political inequality. The problematic inequality arises out of the preference of individuals for or against the status quo as expressed in the entrenched provision. Those who prefer the status quo are given more weight in the process; it is easier for these individuals to achieve their preferred outcome than those who prefer any alternative. This is far from symmetrical. That the asymmetry attaches on the basis of substantive viewpoint rather than formal identity is not significant for the concern surrounding the difference of weight accorded in moves away from simple majoritarianism.

The effect of absolute entrenchment can also be put in these mathematical terms. Doing so again lays bare the violation of political equality at the heart of the concept of entrenchment. As noted above, in refusing to entertain the possibility of legal change, differing views are discarded from the process. With that, the voices of those who would differ are eliminated from the process. They are left with no chance, as a legal matter, to have their views on that issue taken as the collective outcome, or even submitted as a candidate for that status. In relation to the specific issue involved in the entrenchment, they are therefore powerless; *their decisional weight is reduced to zero on that matter*. Absolute entrenchment thus not only protects some provisions against change, it can be described as an extreme denial of equal weight in the decision-making process, and therefore an extreme infringement of political equality.

The problem with such an infringement of political equality from the perspective developed in this thesis is obvious; the value of simple majoritarianism as a collective decision-making principle lies in the fact that it gives each individual maximal decisional weight, compatible with giving the same to others. This directly reflects both the authoritative, decisive aspect

of the Godlet conception of the individual as supreme moral legislator, and normative equality – both of which it was argued flows from the grounds on which the sceptic rejects the idea of higher-order authorities. Entrenchment, in contrast, appears to be the institutional rejection of the idea that each individual is an authoritative moral legislator entitled to such maximal decisiveness.[814]

7.3.3.3. Is all Law-making a Violation of Political Equality? The Special Case of Entrenchment

At this point it might be replied that *all* law-making has the effect of undermining political equality in the sense of concern here. A denial of political equality is perhaps merely the price to be paid for a system in which individuals acting through the majoritarian process have any power to make collective decisions at all; 'majority rule would be meaningless without the ability to decide matters that have future consequences' of *some* kind, some point

[814] The prima facie case against entrenchment, based on political equality accords to some extent with the concern commonly put by political constitutionalists regarding the democratic credentials of a system of entrenched constitutionalism. The value of political equality underlying the right to equal participation leads political constitutionalists to rail in particular against the power-shift towards the courts that usually accompanies entrenchment. In fact, the spectre of judicial interpretation and enforcement often comes across as their *core* concern. For example, the entirety of Part III of Waldron's *Law and Disagreement* Is dedicated to an attack on constitutionalised Bills of Rights *with* judicial review. Likewise, for Bellamy, a key concern is that courts are 'less legitimate' than elected legislatures in interpreting and applying entrenched provisions on the ground that 'the process whereby these decisions are made must exemplify [the] commitment to the equal status of citizens' (R Bellamy, 'Legislative Comment: Political Constitutionalism and the Human Rights Act' [2011] 9 International Journal of Constitutional Law 86, 91). As already noted, to take this as the core concern against entrenchment conflates two issues: the *insulation of provisions* through entrenchment, and that of *who enforces* of such protections. These issues are kept separate in this discussion to get at the core of the case against entrenchment itself (for a discussion of the secondary issue of enforcement, see **Chapter 8, section 8.4.3**). Furthermore, it is submitted, if political constitutionalists are truly concerned with political equality in the sense of equal decisional weight, then, on the logic set out above, they *should* be concerned with entrenchment itself, even detached from issues of judicial enforcement. Entrenchment is, taken alone, a violation of political equality, regardless of whether or not a judiciary is given the task of enforcing it. The case against entrenchment is thus more fundamental than often presented by political constitutionalists.

out.[815] From public finance or foreign policy decisions of the highest order, to decisions as mundane as replacing smooth concrete paths in parks with gravel, such that future decisions to allow bicycles will be rendered costly due to the need to smooth the surfaces once more,[816] *all* decisions have an impact on future decision-making in some way.

Further, when one takes into account the 'political or logistical costs' of repealing or amending legislation, then it is clear that *all* legislation passed by one body has an effect on the ability of future participants who differ to get their way.[817] Legislation that has been enacted 'cannot be costlessly repealed or changed'.[818] Hence some argue that the effects of entrenchment are no more problematic than general law-making: Posner and Vermeule, for example, use this observation to deny that the idea of legislative entrenchment – a legislature binding future legislatures – is worthy of any special concern beyond that generated by ordinary law-making itself.[819] From this it might further be asked how far this criticism really goes: is the majoritarian willing to forgo the entire concept of law on the basis of their attachment to political equality?

However, this equivalence argument does not hold. That all law-making has *some* impact on the political equality of future participants in the democratic process does not justify the adding of *additional* impediments, further impacting upon their political weight. This is an extra violation of the sovereign power and political equality of the individual *over and above* the natural side-effect of legislation per se. This should hardly be surprising given entrenchment is, as outlined above, a device which, by definition, makes some laws *more*

[815] D Dana and S Koniak, 'Bargaining in the Shadow of Democracy' (1999) 148 University of Pennsylvania Law Review 473, 530.
[816] See Posner and Vermeule (fn757) 1687–1688.
[817] ibid 1686.
[818] ibid.
[819] ibid 1705.

difficult to amend than ordinary legislation, whose purpose it is 'to shield certain principles...from the *ordinary* democratic decision-making processes'.[820] Thus entrenchment can also be distinguished from ordinary law-making in the sense that the effects on political equality are, at most, merely an unfortunate, but unavoidable, side-effect of law-making, and more fundamentally the concept of law. Entrenchment, in contrast, has both the effect *and the purpose* of adding further, unnecessary legal impediments; thus, entrenchment evinces an *intention* to violate political equality.[821] Entrenchment is thus more problematic in terms of the *extent* of its violation of political equality, and also the *nature* of this violation.

7.4. Qualifying the Democratic Case: Entrenchment and the Constraint of Representative Power

Having set out the prima facie case general case against entrenchment – based in the principle of political equality at the core of the democratic majoritarian approach – this section concerns its applicability in the particular institutional context envisaged in this thesis. In particular, the democratic approach put forward in **Chapter 5**, taking the political sovereignty of citizens themselves seriously, and consequently envisaging a significant role for both representative and direct institutions, raises the issue of the relationship between these, and the possibility of inter-institutional entrenchment. The entrenchment issue is thus necessarily more complex than often presented.

[820] Marmor (fn740) 96 (emphasis added).

[821] A similar attitude is noted by Waldron, pointing out the air of 'self-assurance and mistrust' that comes with entrenchment (Waldron, *Law and Disagreement* [fn4] 221). The attitude noted in the text is similar, but, in the author's view more problematic: it is not merely a 'conviction that what she [or he] is putting forward really *is* a matter of fundamental right' (ibid). To an extent everyone putting forward a political proposal believes they have good cause to do so. Self-assurance is to be expected in normative argument. Rather, it is an attitude which goes one step further and holds that, as a result, *the political weight of others* must be reduced.

7.4.1. "Whose Entrenchment is it Anyway?"

A number of key contributions to the literature in constitutionalist debate approach the entrenchment issue in what can be described as a legislature-centric way: assuming that the issue of concern is the placing of limitations upon the ordinary law-making abilities of the *legislature*. This is enough to attract the charge of being "countermajoritarian". For instance, Waldron's democratic interventions assume – as they did in his defence of majority rule itself – the centrality of a representative legislature. This goes to his very definition of "entrenchment". Thus, he writes that '[w]hen a provision is entrenched in a constitutional document', the standard or principle laid down is 'compounded with an immunity against legislative change', or 'ordinary legislative revision'.[822] Likewise, the implicit attitude of disrespect and self-assurance that concerns Waldron is found among 'elected legislators'.[823] So while Waldron interprets this attitude as a slight on the democratic capacities and standing of 'one's fellow citizens' themselves,[824] his institutional focus is very much on elected politicians: constraining the ordinary lawmaking abilities of *elected representatives* is the source of the democratic issue he takes with entrenchment. Waldron's conflation of indirect and direct law-making authority was criticised in **Chapter 5** when discussing his defence of what was argued to be an incomplete and deficient conception of majoritarianism. In what follows, some of the consequences of these differing conceptions become clear.

[822] ibid 221-222 (emphases added).

[823] ibid 222. For another example, see James Allan's criticisms of entrenchment, objecting to the paternalism of placing rights beyond *legislative* revision. In his view, 'some form or other of [unlimited] parliamentary sovereignty would be the choice of those favouring democratic government' (Allan, 'Rights, Paternalism, Constitutions and Judges' (fn193) 37–38.). As with Waldron, the paternalism in the constraint of future legislators according to a particular conception of what is desirable or in the interests of society is viewed by Allan as a slight upon whole generations. There is 'no persuasive reason for thinking the rest of us are somehow deficient and less able to weight, rank, and legislate for rights than [the entrenchers]' (40).

[824] Waldron, *Law and Disagreement* (fn4) 222.

An immediate point to be made is that on the democratic approach taken here, the entrenchment issue is not this straightforward. It need not, and should not, be legislature-focussed; there are a number of nuances in the democratic case, and differing issues surrounding democratic authority and the limits thereon, that are missed when the relationship between direct and indirect authority is left untouched – that is, when the political equality and sovereignty of citizens themselves is put into the equation.

7.4.2. Entrenchment as a Constraint on Representative Power

The legislature-centred view of entrenchment and ordinary law-making would seem to put referendum requirements – a common form of manner-based limitations on elected law-making – in the same category as other manner-based, and democratically dubious supermajoritarian requirements. Some logic for viewing such requirements in the same way might be found in the argument from political equality set out in the first part of this chapter. On one way of thinking, referendum requirements are a violation of political equality in that they involve - as with other manner-based restrictions - a move away from the ordinary majoritarian law-making process in the legislature. Those who wish to alter this law, and the standards within it, are in a position where they must secure a vote, and achieve a majority among the entire electorate, rather than merely among other representatives. It is therefore more difficult for these representatives, and by extension their constituents, to achieve their desired outcome than others who prefer the status quo. This would paint referendums as a violation of political equality, and anti-democratic.

7.4.2.1. Direct Entrenchment as an Anti-Elitist Constraint: Furthering the Democratic Ideal

However, this objection, and the logic on which it is based, falls away once the democratic ideal supported in this thesis is recalled. Far from being a problematic violation of political equality, limitations on elected lawmakers via participatory referendum requirements can be seen as *facilitating* that value in its ideal form. As set out in **Chapter 5,** the grounds on which majoritarianism is supported as a decision-making method for society leads to a conception of democracy in which the *individual themselves* make the decisions; that is the ultimate expression of the view of each individual as authoritative moral legislators (see especially, **section 5.6**). Referendum-based limits on representative legislative power are conducive towards this ideal, for they provide another opportunity for individuals to make decisions directly, on a basis of political equality. Far from a form of entrenchment to be criticised on democratic grounds then, referendum requirements, as a matter of principle, have a certain *appeal* to them: they are, ultimately, another move towards the ideal form of political equality. What violation of that principle can be found in the limiting of democratically elected representatives' powers, such as it may be, is outweighed by this gain.[825]

[825] Gordon uses a similar point to defend legislative referendum requirements as compatible with the UK's parliamentary democracy. He reconciles the two on the basis that the underlying normative basis of parliamentary sovereignty - the basis of its authority - is its (albeit imperfect) responsiveness to the preferences of the electorate. Thus, while legislative referendum requirements may make it more difficult for *Parliament* to legislate, they are reflective of the *fundamental democratic principle* on which Parliament's authority is based in the first place. Gordon's point is more concerned with the legality of such requirements within the UK's system of parliamentary sovereignty, defended on the basis of his own "manner and form" theory of that doctrine, than with their normative *appeal,* however (see M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 267–277). This section concerns the latter.

This point is strengthened once it is also recalled that representative lawmaking is *inherently problematic* from an anti-authoritarian and equality-based perspective. By definition, it gives more power to some citizens (the representatives) over others (the electorate). This is exacerbated by the flaws and pathologies of representative politics (including electoral systems like First Past the Post) which mean that, as previously discussed,[826] it often fails to achieve even the non-ideal level of responsiveness to individuals' views it purports to offer. This strengthens the argument that the prima facie general democratic case against entrenchment would not apply in circumstances where representative politics is constrained by a directly responsive majoritarian process. Entrenchment via a referendum requirement,[827] both provides another opportunity to move towards the ideal form of political equality and power, while at the same time limiting a non-ideal, even problematic, democratic institution. In fact, these two qualities go hand in hand. Accordingly, this method of entrenchment avoids the prima facie case made against other forms of entrenchment set out above, and indeed there is a clear democratic case *for* entrenchment in this context. It serves to empower the individual in precisely the way valued by the majoritarian.

This point is, however, conditional upon acceptable arrangements for the triggering of the referendum in question. With this method of entrenchment, the question of who is in control of the process becomes key. Where legislatures entrench through referendum requirements *and* retain sole control over the initiation of that process, individuals are *disempowered* on the substantive issues at hand.[828] On these subjects, the power of individuals over collective

[826] See **Chapter 5, sections 5.6.2.1 and 5.6.3.2**.

[827] As is the case for constitutional amendments in a number of systems: Ireland, Switzerland, South Korea, Romania, Lichtenstein, the Philippines, and Ecuador, for example.

[828] As is the case with all referendum-based limitations in the UK, due to the nature of its parliamentary democracy. For example, s1 of the Northern Ireland Act 1998 does not provide for any direct means of starting the referendum process declared to the only way of altering the status of Northern Ireland as part of the UK. Without processes allowing people themselves to directly

decisions is limited to a power to lobby for an opportunity to influence the decision, in addition to losing what influence they might have had, in theory, through electoral politics. Rather than an advancement, this would amount to a wholesale violation of political equality. Thus, the device of citizen initiative discussed in **Chapter 5** is vital here.[829] Without it, entrenchment through referendum requirements *are* a violation of political equality.[830]

7.4.2.2. Is Direct Entrenchment Required? Distinguishing Fundamental and "Ordinary" Law-making

Some democrats have gone even further to argue not only that entrenchment via participatory processes is unproblematic from a democratic perspective, but that it is *mandated* on particular subjects. Thus, there are limits to the changes which representative legislatures can make *without* the involvement of direct democratic processes. This is the view taken by, for example, Allan Hutchinson and Joel Colón-Ríos on the basis of their theories of "strong democracy". In their view, 'important constitutional transformation[s]' must be made 'through an exercise of popular participation'.[831] 'In a democratic society, a constitution is the prize of all', and must therefore be within the control of citizens themselves.[832] For this purpose, the use of 'ordinary institutions' of representative government will not do; these are intended to operate only 'at the level of daily

trigger a vote, the use of referendums as an entrenchment device gives even greater power to representatives, to the detriment of sovereign individuals.

[829] **Section 5.6.3.2**.

[830] The present difficulties of putting a second Brexit referendum – or so-called "People's Vote" – onto the legislative agenda provide another example of the defects of the UK's approach to democracy. The ability to trigger a directly democratic referendum is in the gift of representative democracy. See further, H Siddique, 'People's Vote March "Too Big to Ignore", Organisers Warn MPs' *The Guardian* (24 March 2019) <https://www.theguardian.com/politics/2019/mar/24/peoples-vote-march-too-big-to-ignore-organisers-warn-mps> accessed 26 March 2019.

[831] AC Hutchinson and J Colón-Ríos, 'Democracy and Constitutional Change' (2011) 58(127) Theoria 43, 53.

[832] ibid 50.

governance'.[833] This strong democratic case leads to demands for entrenchment *over and above* less onerous manner-based requirements:

> 'If a legislature, *even if hampered by special procedural safeguards*, is granted the ample power to amend or revise the constitution without the active involvement of citizens, democratic legitimacy is adversely affected'.[834]

So perhaps not only is a direct majoritarian entrenchment – constraining representative law-makers – not an anti-democratic violation of political equality in its ideal form, but actually *mandated* on certain topics. On this view, the *absence* of this kind of entrenchment on fundamental constitutional issues would be anti-democratic.

However, central to this argument for mandatory limits upon representative politics is a distinction between, first, constitutional and ordinary lawmaking, and, second, between "important" or "fundamental" constitutional law-making.[835] It is only for the latter that greater participation and the limiting of representative law-making institutions is required.[836]

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[833] ibid 51.

[834] ibid (emphasis added).

[835] Colón-Ríos expresses this as a distinction between 'ordinary and fundamental constitutional change' in his own work (see J Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* [Routledge 2012] 127). For what amounts to "fundamental" constitutional change, see *Weak Constitutionalism,* Ch7. Colón-Ríos notes that this is largely a contextual matter, varying from country to country depending on the priorities and values within their specific political and juridical culture (140). One constant which he does identify as the core content of "fundamental constitutional change" is the collection of 'rights and institutions (whatever specific form they take) that are necessary for the exercise of constituent power' (141).

[836] For a similar argument in favour of requiring reference to extraordinary participatory politics where significant constitutional change is concerned see Ackerman's dualist theory of constitutionalism - reserving "higher lawmaking" for "The People" through processes over and above ordinary politics (B Ackerman, *We the People: Foundations* [Harvard University Press 1993]). Another, somewhat surprising example (given that he is cited as the seminal authority for the idea that UK law recognises no distinction between "constitutional" and "ordinary" law) can be found in the later work of Dicey. Dicey later came to see the referendum as a veto power, requiring it to be invoked to approve the amendment of 'statutes of the highest importance'. He included within this category, inter alia, the Act of Settlement, the Acts of Union, the various 19th Century Parliamentary Reform Acts (AV Dicey, 'The Referendum and Its Critics' [1910] 212 Quarterly Review

On the theory presented here, however, there is no such distinction. The argument is that individuals should have maximal power on *all* issues (subject to a potential democratic case for limitations to protect the basis of democratic legitimacy itself, considered in the next chapter), not merely constitutional or "significant" issues. The surrender of political autonomy that comes with representative politics is not problematic only where "constitutional issues" are concerned. The underlying moral and normative autonomy extends to everyday political and moral issues. The Godlet's normative authority is not exhausted at the level of fundamental laws.

It was recognised that, practically, this is difficult to achieve, and so the compromise of a representative system with significant direct elements, including citizen initiatives with positive and abrogative powers was recommended.[837] Given the primacy of these institutions to the system envisaged – the power of citizen initiative essentially forming the key to the democratic ideal in which each individual is given maximal and immediate decisional power – this might be seen as a limit to law-making. Indeed, this possibility is pursued in the next chapter**,** when discussing the argument for democratic limits to majority rule.

However, while this might form *some* basis for a distinction in democratic law-making authority based on the subject matter at hand, unlike the strong democrats' "weak constitutionalism", the consequence would not be to limit the legislature's authority to only "ordinary" change without reference to more participatory processes. This is because the principled case for such limits and the distinction it involves would apply not only to the legislature: its basis in the very principles which form the core of the democratic ideal means that it would also limit what *even a sovereign people acting directly* can legitimately

538, 554). For an insightful tracing of the development of this aspect of Dicey's thought, see further, R Weill, 'Dicey Was Not Diceyan' (2003) 62(2) The Cambridge Law Journal 474.

[837] This was the argument in **Chapter 5, section 5.6.3**.

legislate. In short, and anticipating the case made in the next chapter for the moment: *if* it is illegitimate for a body to violate the conditions of its legitimacy and the principles grounding its authority, *this applies whatever body is taking the action*. Thus, to the extent that there is any distinction which arises from the content of law-making that has any consequences for the limiting of democratic decision-making, it applies equally to representatives and citizens alike; there is no specific set of laws which requires citizen input to alter which could limit only the legislature and not the citizens themselves.[838]

7.5. Entrenchment and Democratic Provenance: A Qualification of the Prima Facie Case?

A further, thorny issue to consider is what effect, if any, an ideally democratically legitimate vote to entrench would have on the prima facie case against entrenchment: can a majority legitimately vote to entrench? Would this dissolve the democratic criticism? Would the majoritarian be obliged to accept the outcome?

7.5.1. "The Public Gets What the Public Wants": Entrenchment as Democratically Legitimate

While a trenchant critic of constitutionalised Bills of Rights and entrenchment, Waldron concedes that if a majority of citizens were to vote, through the democratic process, for an entrenched Bill of Rights, then that outcome should be respected. His 'arguments entail that if the people want a regime of constitutional rights, then that is what they should have:

[838] C/f Colón-Ríos (fn835) 141- 'only citizens can deprive themselves of their sovereignty (and in that very act deprive their constitutional regime of democratic legitimacy)'.

democracy requires *that*'.[839] Waldron recognises how far this logic of "what the public want, the public should get" line of logic goes, writing that, on this view, 'principles of democracy might give us a reason' to allow the people to 'experiment with dictatorship', if that is what they so desire.[840] Waldron quickly clarifies that in his view this concession does not render the democratic criticism of entrenchment redundant: an outcome can be democratically *legitimate* without being *democratic* in nature. We must not 'confuse the reason for carrying out a proposal with the character of the proposal itself'.[841] As an extreme example, while, as just noted, Waldron thinks that a vote for dictatorship gives us a reason to install such a regime, 'it would not follow that dictatorship is democratic'.[842] Rather, as '[e]veryone agrees' – he asserts – it is 'possible for a democracy to vote itself out of existence'.[843]

Waldron's position, then, is that a vote to end democracy or, less dramatically put, a vote for an entrenched Bill of Rights would be legitimate, but regrettable. Waldron would accept the decision, endorse its being put into effect out of respect for the democratic vote, but continue to criticise the outcome as undemocratic in nature and, presumably, continue to campaign against it. To some, this is a concession which amounts to 'a paradox in Waldron's argument'.[844] To Waldron, it is rather a logical *entailment*. Waldron seemingly feels *obliged* to accept the result as democratically legitimate, even where the result itself is democratically suspect – this is the inescapable logical consequence of a majoritarian democratic position based on the equal participation in decision-making as the "right of rights".

[839] Waldron, 'A Rights-Based Critique' (fn629) 46.
[840] ibid.
[841] ibid.
[842] ibid.
[843] ibid.
[844] Fenwick, Phillipson and Williams (fn741) 807.

The claim that Waldron's concession is a paradox presumably arises out of a supposed tension between criticising entrenchment as anti-democratic yet feeling obliged to accept it nonetheless and endorsing that action as the outcome to be put into effect, also on democratic grounds. However, the tension disappears once the distinction between the *reasons for accepting* a political action as legitimate, and one's views on the *nature of the action itself* is recognised. Once it is, it becomes clear that there are two distinct, seemingly compatible, positions at play: first, that in such circumstances the entrenchment decision would be democratically legitimate, and, second, that entrenchment is democratically undesirable and therefore *ought* to be, and to have been, voted against. These positions are on two different planes. One concerns what is legitimate and the other what is *desirable*; what one formally accepts as a valid decision to be respected by the collective until altered, and what one agrees or disagrees with on a personal level.

If one is concerned with legitimacy, and one ties legitimacy to majority rule, then there is no incompatibility here. As propositions on different planes, the statements "A is undemocratic, and therefore ought not to be the outcome" and "A has been endorsed through the democratic process and therefore ought to be taken as the legitimate outcome" are not incompatible. Rather than giving rise to a conflict, this is in fact a distinction which is central to democratic authority: we vote for our preferred candidate or policy, because we prefer it, but commit to abide by the result, even in the event that we do not get our own way, because it would be a *legitimate* result.[845]

[845] Richard Wollheim also identified this as a paradox in the theory of democracy more generally, invoking a metaphorical perfectly democratic voting machine to explain the point. In a situation where an individual 'expresses a preference for A and the machine [of democracy] expresses a choice for B, then the man, if he is to be a sound democrat, seems to be committed to the belief that A ought to be the case *and* to the belief that B ought to be the case' (R Wollheim, 'A Paradox in the Theory of Democracy' in P Laslett and WG Runciman (eds), *Essays in Philosophy, Politics and Society* [Barnes & Noble 1962] 78–79). Wollheim's own solution was to view the preference for

7.5.1.1. Is the Democrat Obliged to Accept a Majority Vote to Entrench?

However, while not revealing of a paradox in the democratic position – not a vicious one, at least – Waldron's assertion that it is an *entailment* of the democratic position that one must accept entrenchment as a legitimate result of the majoritarian process is a significant one which must be considered further. If this is the case, then it would seem that, despite the strong democratic case against entrenchment to which the democrat is led on majoritarian grounds, where entrenchment, on any subject, happens to be backed by an ideal democratic majority, the majoritarian democrat would be forced to begrudgingly accept it. At least temporarily.

There is a tenable line of argument from the democratic premise to support this position. A suggestion that the context of a democratically legitimate, majoritarian vote to entrench makes a significant difference to the conceptual case made above can be found in what Sager refers to as 'primal majoritarianism'.[846] It is, as he identifies, '[t]he traditional ground' for defending the US Constitution against the charge of being anti-democratic, the idea being that the 'Constitution is in fact safe for democracy' because both it, and its amendments 'are themselves the product of a majoritarian process'.[847] The logic of this case is put well by

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policy A as an expression of a 'direct principle' of the apparently conflicted democrat, and the view that policy B should be taken in the event of majority vote as the result of an 'oblique principle'. A "direct principle" is always compatible with the result of an "oblique principle", 'provided that the direct and oblique principles are not incompatible' (85). It is at this point that the argument made in the text takes effect: the direct principle (A is "right" and ought to be the outcome) and the oblique principle (B should be taken as the outcome because endorsed by the fair majoritarian process) are compatible because they address two different issues. One concerns what is right, or, more accurately, *preferable*, and the other is what is to be respected as the collective decision for the time being. That one respects a decision when the result of a majoritarian process does not thereby imply that one thinks it is right, unless one has a first principle which defines "right" as "whatever the majority says". That is not the case for the democrat operating on the basis of procedural fairness. Individual standards of rightness are not obliterated by a majority decision.

[846] LG Sager, 'The Incorrigible Constitution' (1990) 65 New York University Law Review 893, 900, n23.

[847] ibid.

Sadurski: 'if a majority decides to adopt a qualified majority procedure...at a foundational moment', then it can be claimed that this procedure has 'the legitimacy of the equality-respectful simple majoritarianism'.[848]

If so, then it would appear that the democrat would be obliged to accept entrenchment on the basis of their own first principles: If an ideally majoritarian process – which is to say, based on political equality, and made as directly as possible – comes up with entrenchment as its output, how can the democrat resist endowing that decision with the legitimacy and public authority they attach to other decisions resulting from that process? *If,* as the majoritarian democrat holds, the democratic process based on the principle of equal decisional weight *is* the key to legitimacy within a political collective, then a decision to entrench taken through that process must itself be endowed with legitimacy. It seems an offer of legitimacy the democrat cannot refuse. On this line, Waldron would be right to suggest that a begrudging acceptance of entrenchment as the legitimate outcome of a majority process is indeed an entailment of the democratic majoritarian's position.

7.5.2. "You Can't Always Get What You Want": Democratic Entrenchment as Illegitimate

For Sadurski, however, primal majoritarian logic such as this 'will not do'.[849] He offers two grounds for this rejection. The first is that there is something 'presumptively illegitimate about a simple majority deciding to entrench a qualified-majority procedure for certain subject matters'.[850] The ground for the presumptive illegitimacy of such primal majoritarianism is the point already noted throughout **section 7.3.3** above, also set out by

[848] Sadurski (fn446) 67.
[849] ibid.
[850] ibid.

Sadurski; that the members of a potential majority at T_2 would be treated as of less than equal weight to a minority in the decision-making process at that time.[851] Thus, so far this is just a repetition of the original ground on which entrenchment was rejected on the prima facie case; the outcome of the majoritarian decision to entrench, taken at T_1, is a procedure that is itself suspect on democratic grounds.

Taken alone this response would miss the issue being considered here. The troubling part of the primal majoritarian claim is that it draws on the fact that the committed democrat *also* holds that an outcome is democratically legitimate, and ought to be taken as the collective decision, *because* it was reached through the majoritarian procedure. If a decision to, say, elect a particular person President, or to leave the European Union is to be taken as the legitimate collective decision of society because the result of a direct majoritarian process, then why not a decision to entrench a provision, reached in the same way? Again, it can be asked that if a majoritarian procedure really *is* the key to legitimacy then why does it not render the decision to entrench legitimate? Taken alone, Sadurski's first response only shows that the outcome is not democratic in nature, with a substance that therefore should be criticised on democratic grounds, not that it is *illegitimate.* However, this is where Sadurski's second point becomes relevant:

> 'in addition [to the process set up being objectionable as a denial of equal weight] each majority member [at T_2] can plausibly refuse to see the nucleus of equal respect in the decision of the former 50 per cent plus one constituent majority at T-1 to entrench such an inequality for the future'.[852]

[851] ibid 67–68.
[852] ibid 68.

The point is that, in addition to the procedure set up in this hypothetical conflicting with the principle of political equality, it is difficult to see the *original* decision as adequately reflecting it because it is effectively a decision *to violate* that principle. Sadurski finishes off this point by arguing that even if the precommitment analogy works, 'we are still unable to say that the pre-committing decision taken under a simple majority rule endows all future decisions taken under a qualified majority rule with the value of equal respect for decision-takers'.[853] However, this appears to answer a claim slightly different to the primal majoritarian one; the claim is not necessarily that decisions taken under a qualified majority rule are rendered democratic by the original majoritarian procedure used to pass it, but that the *qualified procedure itself would be democratically legitimate*, and therefore to be accepted on democratic grounds.

But the logic building to that conclusion does, it is argued, lead to a more on point response to this specific point. If a decision to entrench sees the majoritarian procedure being put to anti (politically) egalitarian uses, then it can be seen as losing its legitimating power. This is because that power only ever came from the respect shown for the principle of political equality, and that respect, as Sadurski notes, is arguably *not* shown by a decision to put the process to inegalitarian ends. The respect shown by the process can be seen as, in a sense, cancelled out by the disrespect shown in its use at the time of entrenchment. It is therefore arguable that the rejection of entrenchment on political equality grounds stands, *even where the entrenchment is the result of a majoritarian procedure*. Another way of putting this point is that any argument that the previous procedure legitimates the otherwise illegitimate procedure can be thoroughly rejected because *both* decision-making processes conflict with the value on which majoritarianism's legitimacy is based.

[853] ibid.

However, it appears that Sadurski does not recognise just how far the logic he uses can easily go. It not only allows one to reject the primal majoritarian logic by which a decision to entrench might be rendered legitimate but would seem to lead one to the other extreme: something of an entrenched limit against entrenchment. His point is that a decision to entrench evinces a disrespect for the principle of political equality. Combined with the core majoritarian premise that it is respect for the principle of political equality which renders a decision democratically legitimate and authoritative – as he also puts[854] – it would seem to be an entailment that a decision to entrench rids the process of any legitimating quality. If so, then the decision to entrench would be rendered democratically *illegitimate*. Given that, on this view, democratic authority depends on legitimacy, such an illegitimate decision would not be worthy of democratic respect, and ought not to be accepted, in all senses. Sadurski's argument concerning the lack of respect for political equality involved in entrenchment thus leads easily to an argument against the democratic legitimacy of even the most ideally majoritarian decision to entrench. Rather than merely allowing one to dismiss claims that an acceptance of entrenchment is an entailment of the democratic position in this context, this logic would seem to itself posit a limit on the majoritarian process.

An alternative (and shorter) route to this conclusion from the position taken in this thesis would be to emphasise that the majoritarian procedure is but a means to the end of ensuring, as far as is possible and defensible, individual sovereignty in the normative realm. That is, the status of individuals as autonomous and authoritative moral legislators (on an equal basis to others). In cases where the majoritarian process does not serve that purpose, and indeed conflicts with it, the end is not satisfied, and the means become unjustified. In fact, as a *violation* of the desired ends, in this instance the means become counterproductive, even

[854] See e.g. ibid 44 ('[Majority rule] is thoroughly egalitarian in its rationale, and…it is this aspect of equality which is intrinsic to MR that can account for the legitimating power of MR)'.

harmful. Entrenchment is, on the conceptual case above, such an instance. It therefore would seem that the democratic process ought to be *rejected* in the context of a democratic attempt to entrench.

If one takes this line, then far from it being a logical entailment of the majoritarian democratic position that one must accept a democratically-endorsed instance of entrenchment as legitimate, it can be seen as an entailment that one must *reject* it. Thus, while Waldron would allow the democratic process to be used to undermine the future democratic process, merely criticising the nature of the system set up, this logic would rather commit one to the rejection of that system as a legitimate outcome at all. The only way to follow through on this wholesale opposition to entrenchment, and commitment to simple majoritarianism would, as some have noted in relation to the political constitutionalist opposition to entrenched Bills of Rights, seem to require 'an entrenched law forbidding the entrenchment of laws'.[855] The strong anti-entrenchment stance would thereby have come full-circle, apparently requiring the acceptance of *some* kind of limitation to ordinary majority rule, and a form of *entrenchment*, after all.

7.5.3. Non-Entrenchment as a Limit to Majority Rule? The Paradox of Democratic Entrenchment

The entrenchment of such an anti-entrenchment principle would, some have suggested, 'obviously be impossible on its own terms'.[856] If so the anti-entrenchment case, taken to its

[855] Fenwick, Phillipson and Williams (fn741) 807. In fact, returning to the definitional dispute surrounding "constitution" noted in the introduction to this chapter, it could even be concluded that a system which does *not* contain at least this form of entrenchment would be anti-democratic and unworthy of the name.
[856] ibid.

logical conclusion, would seem to put the committed majoritarian democrat in an impossible position, unable to follow through on the logical and principled consequences of their stance.

To this specific point, however, it can be quickly replied that the possibility of an immutable anti-entrenchment law is not as practically outlandish as it might seem. Indeed, on one view, such a rule has long formed the core of the UK constitution. The orthodox conception of Parliamentary sovereignty – as famously attributed to Dicey in his classic exposition of the UK constitution – holds that no Parliament can bind its successors. This is a logical entailment of the fact that Parliament, as an institution, is sovereign at all; that it has 'the right to make or unmake any law whatever'.[857] If each Parliament is to be sovereign, then it cannot be bound by its predecessors because, as Dicey put it '"[l]imited sovereignty"...is a contradiction in terms'.[858] Far from being a legal impossibility, then, there is a longstanding view that a version of the anti-entrenchment rule is a 'keystone of the law of the constitution' of the UK.[859]

Aside from legal impossibility, however, there is a more problematic issue of conceptual coherence. For example, Mildenberger argues that if entrenchment is seen as a negative, then it is 'patently unclear' why this ought not to apply to the entrenchment of an anti-entrenchment principle, whether that be legal, or purely moral in nature.[860] Prescriptions against entrenchment 'limit both individual and collective autonomy just as much' as other limits on the ordinary process.[861] Another way of putting this point is that if entrenchment *is* a denial of political equality – which on the logic of the prima facie case presented in this

[857] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915) 3.
[858] ibid.
[859] ibid 25.
[860] J Mildenberger, 'Waldron, Waluchow and the Merits of Constitutionalism' (2009) 29(1) Oxford Journal of Legal Studies 71, 88.
[861] ibid 87.

chapter it is – then the entrenchment of anti-entrenchment is no less a denial. It treats those who would favour entrenchment as less than equal in the process of decision-making, and infringes upon their decisiveness. If a denial of political equality undercuts the legitimacy of the process in the way the last section suggested it might, then the entrenchment of an anti-entrenchment principle itself undermines the legitimacy of the process.

At this point, then, we have come across an intriguing paradox in the majoritarian democrat's relationship with entrenchment: if the goal is to respect political equality, and political equality is respected by giving all participants equal decisional weight, then positing a limit against entrenchment as a legitimate outcome – as the consistent democrat is arguably led to – both achieves and compromises that goal. This is the first incarnation of a more general paradox that we will grapple with in detail in the next chapter: *Entrenchment can, where the principles of democracy are at stake, be seen simultaneously as a violation of, and expression of respect for, the fundamental value of political equality held to be central to legitimate decision making in the sceptic's constitution.*

For the issue at hand, however, the immediate consequence of this paradox is that the context of a democratically-backed decision to entrench can neither *oblige* the majoritarian democrat to accept the result as legitimate, *nor* to reject it outright as illegitimate. The logic goes both ways, and so these two extremes must be rejected. As a matter of principle, it is justifiable both to demand an acceptance the legitimacy of a decision to entrench *and* to reject its legitimacy, on the same democratic grounds of respect for political equality, as it is understood by the majoritarian. Thus, the prima facie democratic case against entrenchment is need of qualification in this context: in this specific context, that case is underdetermining.

7.6. Defending Entrenchment: Some Common Responses Considered

Having set out the grounds of the prima facie democratic case against entrenchment, and having made some necessary qualifications to that case, this section will test it against some responses which might be made in defence of entrenchment. First, the claim that the democrat's case against entrenchment is self-defeating, appealing to the majority principle (a close relative of the of the democratic provenance justification to entrenchment analysed above) will be considered and rejected.

Next, the popular "democratic precommitment" justification, presenting entrenchment as a conscious decision by a democratic body to protect itself against the defects of rationality that risk infecting democratic politics, especially in times of emergency or panic, will be discussed in detail. In doing so, this defence will be broken down into the two key parts underlying its appeal: the idea that a responsible decision-maker ought to protect its future self against irrational decisions – the seminal treatment of which draws analogies to the mythological tale of Ulysses – and that, as an act of *self*-binding through the democratic process, a decision-maker is acting legitimately. Both will be rejected as unable to avoid the prima facie case.

7.6.1. Is the Democratic Objection to Entrenchment Self-Defeating?

The majoritarian focus of the prima facie democratic case has given rise to a critical response to the democratic rejection of entrenchment. Dworkin uses it, in his advocacy of the incorporation of a Bill of Rights into UK law, to put forward a supposedly 'decisive answer' to democratic critics of such proposals.[862] This is that majoritarian democratic objections to

[862] Dworkin, *A Bill of Rights For Britain* (fn680) 36. While put forward in the context of the debate over judicially-enforced constitutionalised Bills of Rights, the core logic of this reply to the democratic criticisms of such proposals would apply equally to the general case against

entrenched Bills of Rights, based on their implications for political equality and participation, are 'self-defeating'.[863] They are self-defeating because based on a conception of democracy – what Dworkin calls 'crude statistical democracy'[864] – which the majority of people in fact reject.[865] It has apparently been rejected 'throughout Western Europe as well as in North America', and, at the time Dworkin was writing there were polls suggesting that 71 per cent of British people believed that British democracy would be improved by a constitutional Bill of Rights limiting the legislature and, indirectly, themselves.[866] These facts, assuming they are such, provided Dworkin's "decisive" answer to the democratic objection.

The immediate issue raised then, is whether such overwhelming majoritarian support for entrenchment renders the prima facie democratic objections raised above self-defeating and obsolete. This issue is similar to that just considered in relation to democratic provenance in the sense that it also focuses on the core majoritarian logic and its consequences. It is different however in the sense that this criticism centres on the supposedly democratic *nature* of decision-making under entrenchment on the majoritarian's own premises, not merely its legitimacy in circumstances of a democratic vote to entrench. If successful, the immediate argument concerning the democratic nature of decision-making under entrenchment would undercut the democratic objection itself. The prima facie case would not even get off the ground in *any circumstance*, as long as the majority of people do in fact reject the majoritarian's standard of democracy. The key question, then, is: *would*

entrenchment set out above, because it depends not on the content of the entrenched laws, but the principles relied on by the majoritarian.

[863] ibid.

[864] On the grounds rejected in **Chapter 6, section 6.3**

[865] Dworkin, *A Bill of Rights For Britain* (fn680) 36.

[866] ibid 36–37.

maintaining the majoritarian democratic case against entrenchment catch the democrat in self-defeat, as Dworkin claims?

It is immediately noteworthy that for this argument to work on its own terms, it has to be assumed that future majorities in generations to come also back this particular conception of democracy. Otherwise, there is simply no case to answer. Dworkin does assume this.[867] For the purposes of the response here, it can also be assumed, because even so, it is contended, Dworkin's argument still does not succeed.

Firstly, the nature of entrenchment – the way it structures decision-making and the effects of this – does not change in the event of majority support. It is still the case that, as Sadurski points out, the members of a potential majority at T_2 would be treated as of less than equal weight to a minority in the decision-making process at that time.[868] Thus, the only way that entrenchment would stop being undemocratic on the grounds above is if abstract majority preference could alter the conception of democracy taken to evaluate it. This is indeed what Dworkin's argument implies when he points to the fact that 'the great majority of British people themselves rejects the crude statistical view of democracy in which the argument is based', in favour of a conception which guarantees each individual fundamental rights which 'no combination of other citizens can take away no matter how numerous',[869] to back up his claim that the democrat is self-defeating.

To this, Waldron points out that 'although democracy connotes the idea of popular voting, it is not part of the concept of democracy that its own content be fixed by popular voting'.[870] Similarly, Allan clarifies that a commitment to democratic decision-making does *'not* imply

[867] ibid 38 ('...and if we assume that this sense of justice will be shared by their descendants, then the argument that incorporation is undemocratic will have been defeated on its own terms').
[868] Sadurski (fn446) 67–68.
[869] Dworkin, *A Bill of Rights For Britain* (fn680) 35–36.
[870] Waldron, 'A Rights-Based Critique' (fn629) 46–47.

that the *meaning and content of democracy itself* can be determined by a majority vote (any more than the number of planets in the solar system' can be so decided).[871] The reference to cosmic fact should not, on the philosophical first principles of this thesis, be taken to suggest that there is an independent fact-of-the-matter concerning the meaning of democracy; indeed, it would be problematic for Allan too if this was his suggestion, given his sceptical stance concerning objective morality. It is also noteworthy that Waldron and Allan are both reading the argument as a claim as to the consequences of a majority *vote*, whereas the Dworkinian case as read here is more of a conceptual one. The consequences of a majority *vote* for entrenchment, and the effects this might have via the democrat's concern for legitimacy have already been considered above. The issues raised there, concerned as they are with *legitimacy*, rather than *democratic nature* are slightly different.

On similar logic to Waldron and Allan, however, there is nonetheless a persuasive response here. This proceeds from pointing out that the conception of democracy supported in this thesis does not derive from the majority principle itself. Its normative attraction does not lie in the idea that it is itself supported by a majority of individuals, as it must if a majority preference is to successfully collapse the democratic objection into itself as Dworkin suggests. As well as amounting to a circular, un-argued, and therefore unpersuasive claim, this would be to treat majoritarianism as a first principle, rather than the logical result of a commitment to the idea that each individual is a sovereign authority, normatively equal to others that this thesis has argued it is. As the majoritarian principle is grounded in these more fundamental values, which were supported on the logic of moral scepticism, the conception of democracy that follows is not itself up for grabs. It is therefore not self-defeating to stand by it, even if it were the case that a majority of citizens rejected it.

[871] Allan, 'Bills of Rights and Judicial Power - A Liberal's Quandary' (fn193) 350.

This normative independence does give support to Allan's conclusion that even '[u]nanimous support for a Bill of Rights does not, of itself, make the conflict-resolving procedures it contains democratic',[872] and Dworkin's claim that the democratic objection to entrenchment could not be maintained in these circumstances is therefore rejected. The initial democratic case against entrenchment stands.

7.6.2. The Precommitment Justification for Entrenchment Considered

The seminal expression of the precommitment justification for entrenchment was put by Elster: the 'Ulysses strategy', as he calls it, 'is to precommit later generations by laying down a constitution including clauses that prevent its being easily changed'.[873] The heart of this justification can be found by looking closer at the Ulysses analogy, 'much cited' in the literature.[874] The reference is to Homer's *The Odyssey*, telling the tale of Ulysses and the sirens, in which Ulysses commands that he be bound to the mast of his ship, and for his crew to ignore any calls to be released, so that he can resist the charming song of the sirens, responding to which would likely lead to his death.[875] Applying this to constitutional theory, as Marmor explains, makes Ulysses 'the framer of the constitution' – the body taking the decision to entrench at T_1 – and future 'democratic procedures...the potential victims of the sirens. Their singing is delightful, but their influence deadly'.[876] Thus, entrenchment is seen as 'a precommitment to remove certain issues from the ordinary democratic procedures, precisely because we know in advance that the democratic procedure is not to be trusted

[872] ibid 350–351.
[873] J Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge University Press 1979) 94.
[874] RH Fallon Jr, 'The Core of an Uneasy Case For Judicial Review' (2008) 121 Harvard Law Review 1693, 1724.
[875] See Homer, *The Odyssey of Homer* (JS Watson ed, A Pope tr, Wentworth Press 2016).
[876] Marmor (fn740) 97.

when the sirens sing'.[877] To complete the application of the analogy, the sirens' singing is the 'anger, panic, or greed that is often thought to be endemic in democratic politics'.[878] As Holmes puts it:

> 'A Constitution is Peter sober while the electorate is Peter drunk. Citizens need a constitution, just as Ulysses needed to be bound to his mast. If voters were allowed to get what they wanted, they would inevitably shipwreck themselves. By binding themselves to rigid rules, they can better achieve their solid and long-term collective aims'.[879]

Thus, the core of this conception of entrenchment is as a self-imposed protection, in times of clarity, against the risks of future irrationality; a safeguard against our own defects.

7.6.2.1. Cognitive Asymmetry

Entrenchment, then, is based on an awareness of potential defects in rationality, and the harm they can cause. The concern is what Kis describes as 'cognitive asymmetry'; the present generation, viewed as rational and able to make sensible decisions, is acting out of concern that they in future may be affected by a state of 'irrationality'.[880] Just as 'Ulysses had good reasons not to trust his judgment once his ship approached the sirens' and committed himself in advance on this basis, the judgement of future decision-makers may be infected by defects of rationality, to their 'detriment and regret'.[881] However, while an attempt to save future decision-makers from the pathologies of judgement sounds sensible – even honourable –and

[877] ibid.
[878] Waldron, *Law and Disagreement* (fn4) 266.
[879] Holmes (fn791) 135.
[880] J Kis, 'Constitutional Precommitment Revisited' (2009) 40 Journal of Social Philosophy 570, 572.
[881] Dorf (fn781) 1643.

less like a problematic denial of political equality, it is argued that this defence nonetheless falls foul of the democratic case made above, and is, further, conceptually inappropriate.

A common response to this conception and defence of entrenchment from political constitutionalists is to point to the existence of disagreement. As Waldron points out, 'in the constitutional case we are almost always dealing with a society whose members disagree in principle and detail, even in their "calm" or "lucid" moments' about matters of right and principle.[882] For Waldron, again, this point has particular significance in relation to the *enforcement* of the entrenched provisions, which, in this context of disagreement differs greatly from the apparently appealing Ulysses analogy. In the case of Ulysses, it is clear that his moving towards the sirens is the irrational decision to be protected against. As a matter of enforcement, if 'Ulysses were somehow to untie himself and get ready to dive over the side of the boat and swim to the sirens, it would be clear to his crew that this was exactly the action he commanded them to restrain'.[883] In contrast however, 'in most constitutional cases, opinions differ among citizens as to whether the legislation in question is the sort of thing they wanted (or would or should have wanted) in a founding moment to pre-empt'.[884] As a concern surrounding the *enforcement* of entrenchment once again, this response will be put to one side for the moment.

However, this issue of disagreement can also be seen as going to the concept of entrenchment itself. As Marmor argues, distinguishing the political context of entrenchment from the Ulysses analogy: in the latter case we know 'that the sirens' singing is a deadly temptation, we may not quite know this in the constitutional case'.[885] In the constitutional

[882] Waldron, *Law and Disagreement* (fn4) 268.
[883] ibid.
[884] ibid.
[885] Marmor (fn740) 97.

case, 'we tend to have serious and reasonable disagreements about who [the] sirens are and when their singing is deadly'.[886] This context of disagreement forms what Marmor describes as 'the problem of pluralism' in relation to entrenched constitutionalism.[887] Despite the references to what we do or do not "know" in the Ulysses and political contexts, the problem is not for Marmor an epistemic one; the problem of disagreement turns on a 'moral concern' to respect 'value pluralism' and disagreement, which is further based 'on the idea that at least some significant proportion' of disagreements over conceptions of the good and the just 'is *reasonable*'.[888] It is 'very difficult to see', the argument continues, how the 'shielding' of particular conceptions of the good that comes with entrenchment 'is compatible with respect for pluralism'.[889]

7.6.2.2. Cognitive Asymmetry as Normative Asymmetry

The above criticism, premised on a moral concern to respect disagreement, draws out well a problem with the precommitment, Ulysses-style defence of entrenchment. While proponents offer a description of entrenchment as saving future lawmakers from ill-thought out, dangerous decisions, this response from disagreement reminds us that it does more than that. Entrenchment does not merely protect against defects of rationality, it protects a *particular view of what a "sensible" decision would be.* Not only is the *effect* of entrenchment to favour particular conceptions of the good, as outlined above, but this is its *core purpose*, even on the Ulysses-style conception: concerns about rationality or defects of judgement in future decision-making are merely *instrumental* to this aim of preventing amendment or repeal of the particular standards preferred by the entrenchers.

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[886] ibid.
[887] ibid.
[888] ibid 100.
[889] ibid.

This is evident in the very structure of the precommitment strategy. As Elster describes it, '[p]recommitment, or self-binding, is a self-limiting act carried out by an agent *for the purpose of achieving a better outcome, as assessed by his preferences at the time of action*', than what would arise if full freedom of action had been retained.[890] Returning to the Ulysses tale itself, the aim of his actions is to avoid straying from his predetermined course into likely death – responding to the sirens is seen as something which should not be done *because of the consequences* that would follow. Other scholars are particularly forthright with this. Wolfe, for example, expresses the idea as being that a country must be tied 'to a legal mast' in order to 'prevent a society from succumbing to the sirens' call to do what is expedient *rather than what is right*'.[891]

Once this is noted, what proponents describe as a sensible attempt to save future decisions from the pathologies of judgement, is better described as a concern to maintain the privileging of one set of views concerning what is "sensible", in need of protection, over others. It is not so much a concern for cognitive asymmetry that underlies the precommitment defence, but a more fundamental concern for what can be described as *normative* asymmetry. The Ulysses defence, therefore, is at its core a motivation to violate political equality: from the perspective taken in this thesis, what is "sensible" is a judgment that belongs to each sovereign individual – not to one, or a group seeking to protect their own views in this way. The Ulysses conception of precommitment, in both its effect and intent, therefore, runs straight into the political equality grounded criticism of entrenchment. It is but elitism in disguise.

[890] Elster, 'Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment' (fn740) 1783 (emphasis added).
[891] MW Wolfe, 'The Shadows of Future Generations' (2008) 57(6) Duke Law Journal 1902, 1902 (emphasis added).

7.6.2.3. Entrenchment as the Binding of the Self

Another key part of the appeal of the precommitment defence is that it conceives of entrenchment as a *self-imposed* restraint. The analogy to Ulysses having himself tied to the mast in order to avoid shipwreck invokes this image of voluntary self-restraint. This is also clear from the language of this conception. To return to Elster's definition, for example, entrenchment is a '*self*-binding', or '*self*-limiting act carried out by *an agent*'.[892] Recall further Holmes's definition set out earlier: entrenchment involves voters 'binding *themselves* to rigid rules' so that they 'can better achieve their solid and long-term collective aims'.[893] As Waldron considers, if the existence of restraints on future decision-making can be conceived of as 'mechanisms of restraint that the people have deliberately and for good reasons chosen to impose on themselves', then the democratic objection seems to have been answered.[894]

Indeed, this kind of argument is used by Freeman in his defence of American strong judicial review. Drawing on the Ulysses idea, Freeman argues that judicial review can be conceived of as a 'rational and shared precommitment among free and equal citizens', who, 'agree to a safeguard that prevents them, in the future exercise of their equal political rights, from later changing their minds, and deviating from their agreement'.[895] This same logic can easily apply to entrenchment itself: in similar fashion to a smoker who wants to quit hiding their own cigarettes, or a heavy drinker trusting a friend with their car keys, entrenchment arrangements can be seen not as derogations from freedom 'but as the epitome of self-government'.[896]

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[892] Elster, 'Don't Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment' (fn740) 1783 (emphases added).
[893] Holmes (fn791) 135 (emphasis added).
[894] Waldron, *Law and Disagreement* (fn4) 257.
[895] Freeman (fn811) 353.
[896] Waldron, *Law and Disagreement* (fn4) 259.

In the political context however this legitimating feature of the Ulysses defence can be quickly disposed of. It is not a case of 'Ulysses tying *himself* to the mast, but a Ulysses who ties *others*, his political successors, to the mast with him'.[897] The analogy thus falls short. In this context, it is more a case of Ulysses binding his distant relatives than himself. Marmor makes this argument to set out the problem of intergenerational constraint that results from the precommitment account. As a formulation of the intergenerational problem, this response takes a collectivist focus, formulating decision-makers as a single entity – a "We, the people" – but it also raises significant issues on the present individualist approach. These issues are more problematic from the current perspective given that, as explained above, due to the nature of the positive democratic case set out in this thesis, the intergenerational concern reduces to a concern with political equality between individuals at any one point in time.[898]

As soon as it is noted that the group doing the entrenching are binding not only themselves in the future, but other individuals and groups too, any justificatory power from the idea of *self*-commitment disappears. It leads one straight back into the issue surrounding political equality raised above; it is not one "people" binding themselves - it is a group of individuals claiming political authority over, and undermining the political authority of, other individuals in future who may differ from the favoured conception of the good. Thus, an attempt to emphasise the self of "self-binding" does not provide a way out of the democratic objection to entrenchment, on any of the formulations considered in this chapter – it exacerbates it.

[897] Marmor (fn740) 97.
[898] See above, **section 7.3.2**.

7.7. Conclusion

This chapter concerned itself with the concept of entrenchment, at the core of constitutional theory and debate. Its aim was to develop a sceptical account, a task which will be continued in the next chapter. This first chapter started this exploration by looking at the concept of entrenchment in the abstract and drawing out the democratic issues raised. Both the classic Jefferson-style intergenerational objection – based on the rights of current generations to live unbound by the past – and what can in distinction be described as the *intra*-generational objection, based on political equality between individuals, were examined.

It was noted that from the sceptical perspective taken, it is the latter which is key; the intergenerational problem, from this viewpoint, reduces to the concern from political equality. It is the *knock-on effect* of intergenerational constraints on the political equality of individuals within future generations that is of ultimate concern. This is in line with the argument for majority rule set out in **Chapter 5** and its underlying normative basis set out in **Chapter 4**, both of which are individualistic in nature. That is, they are based on giving each normatively-sovereign individual maximal decisional weight in the collective decision-making of society, rather than giving "The People" as *a collective, or conglomerate*, the final say over the rules under which they are expected to live.

The key contribution of this chapter is thus that it sets out a prima facie and general case against entrenchment, grounded in the democratic approach built up and defended from the sceptical perspective. On this view, entrenchment conceptually involves a violation of the political equality valued by the majoritarian conception of democracy put forward. *Entrenchment is, at this general level, democratically dubious, illegitimate, and to be opposed on principled grounds.*

This argument was then put into the specific institutionalisation of the democratic ideal sketched in **Chapter 5.** Combining both representative and direct elements raises the issue of the relationship between the two, and this was seen to impact on the issue of the democratic legitimacy of entrenchment in some contexts. In the case of constraining representative politics through referendum requirements, there is a clear democratic case for entrenchment: they serve to empower the individual in precisely the way valued by the majoritarian. As such, adding a referendum requirement in the legislative process does not attract the prima facie case against entrenchment. Rather it can be seen as an attractive device for furthering the democratic ideal, rather than a danger to it.

The strong democratic argument that such entrenchment is, in principle, *mandated* when it comes to fundamental constitutional issues was rejected. It relies on a general distinction which, on the conception of democracy put here, does not follow. As will be explored more fully in the next chapter, to the extent that there *may* be a distinction between categories of law where the legitimacy of entrenchment is concerned – based in protecting the conditions of democratic legitimacy themselves – this would apply equally to direct and indirect processes of law-making.

The democratic case against entrenchment was further tested against objections and defences of entrenchment. The argument that it is straightforwardly self-defeating was rejected as failing to appreciate that the majoritarian principle is itself grounded in more fundamental values of political equality and responsiveness. Once this is recognised, it is clear that its force does not itself rest on majority support – it is *instrumental to* these more fundamental values – and as such does not collapse into itself in the face of majority opposition.

The popular precommitment account of entrenchment was also rejected. Its notion of cognitive asymmetry was seen to reduce into a notion of *normative* asymmetry on the topic of what a "sensible", "rational" decision in need of protection *actually is*. This runs the case straight into the core of the democratic objection surrounding political equality. The precommitment account's emphasis of the idea of "*self*-binding" was also seen to be wholly unconvincing: entrenchment has the effect of binding *other individuals* in later generations, and creating the problematic disparity of political equality which is, again, at the heart of the democratic objection.

This chapter also dealt with the thorny issue of how the democrat ought to respond to an ideally democratic decision to entrench particular laws. Is the democrat committed, as a matter of principle to accept this as a legitimate decision? Or would doing so in fact *conflict* with their democratic values, suggesting a commitment to reject such action as illegitimate? Both lines of logic on this difficult issue were explored, and both were seen to be plausible on the fundamental principles underlying the prima facie democratic objection to entrenchment, and, indeed, the legitimacy of the majoritarian process itself. This also included an investigation of how far that second line of logic could go, considering a case for the entrenchment of an anti-entrenchment principle in order to maintain democratic legitimacy. The conclusion on this issue is that the principle goes several ways, with consequences of varying strengths: the committed majoritarian democrat could accept the decision to entrench as democratically legitimate; they may also be inclined to campaign against it and for its reversal, pointing to its dubious democratic *content.* Just as easily, however, the committed democrat *could* justifiably reject even a democratically-endorsed entrenchment as illegitimate, leading to an immutable anti-entrenchment principle or provision. The democratic case is underdetermining on this issue.

The argument that all of these lines of logic are equally plausible on principled grounds gave rise to our first glance at a paradox which will be explored further in the next chapter: where maintaining the fundamental principles and conditions of democratic legitimacy themselves is concerned, entrenchment can be seen as both legitimate *and* illegitimate on the basis of the same principles. The next chapter will discuss this paradox and its consequences for constitutional theory in further detail.

Chapter 8

A Sceptical Take on Entrenchment II: The Paradoxes of Democratic Entrenchment

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8.1. Introduction

The previous chapter set out a general case against entrenchment grounded in the account of democracy developed from sceptical premises in this thesis. The argument was that the stronger forms of entrenchment conflict with the core value of equal decisional-weight underlying the account of legitimate decision-making authority set out in **Chapter 5**. This chapter continues to explore the possibility of what might be called *democratic entrenchment*: entrenchment designed to protect the institutions of democracy itself. This possibility was touched on briefly in the previous chapter, arising out the chains of logic following a democratic decision to entrench and its effect on the prima facie democratic case against entrenchment. Does the democratic case against entrenchment still stand in this context, where it is the legitimating conditions of entrenchment themselves being entrenched? More strongly, might we find that the majoritarian democrat is actually *committed* to supporting this kind of entrenchment, in the name of democracy itself? This chapter explores the logic of democratic entrenchment more fully and investigates just how far it might justifiably go.

The issues raised by the above questions tie into a fundamental concern surrounding the supposed dangers of majoritarian decision-making – the worry that democracy contains within it the seeds of its own destruction via a tyrannical majority. As Waldron notes, concern over the infamous "tyranny of the majority" is '[t]he most commonly expressed misgiving about unrestrained legislative authority'[899] and has long been raised to support counter-majoritarian devices and constitutional restraints.[900] Indeed, what can be termed the '"democratic autophagy"' fear, that a democracy may 'through democratic means...subvert those principles and norms' essential to it, thereby 'consuming itself',[901] can be dated back at least as far as Plato.[902] In more modern times, fuel for these concerns can be found in the experiences of the short-lived Weimar Republic and the rise of Hitler in Germany – the flexibility of the Weimar constitution often being taken as a 'contributing cause of the rise of Nazism and the ensuing human tragedy'.[903] More recently still, concern abounds that Turkey might be in the midst of voting its own democracy out of existence in a series of controversial constitutional referendums.[904]

In light of past and current events, is it not justifiable to entrench the fundamental principles of democracy?[905] Furthermore, does the concern for democracy underlying the criticism of

[899] Waldron, *Law and Disagreement* (fn4) 13.
[900] For an overview, see Elster, 'Majority Rule and Individual Rights' (fn464).
[901] M Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2007) 157.
[902] ibid 7.
[903] ibid 153.
[904] M Ramgotra, 'Can Democracy Vote Itself Out of Existence?' *The Conversation* (16 July 2018) <https://theconversation.com/can-democracy-vote-itself-out-of-existence-99988> accessed 17 July 2018.; The Economist, 'Turkey's Referendum: Turkey Is Sliding into Dictatorship' *The Economist* (15 April 2017) <https://www.economist.com/leaders/2017/04/15/turkey-is-sliding-into-dictatorship> accessed 26 July 2018.; SP Watmough and AE Öztürk, 'Will Turkey's Referendum Mark the End of Democracy and the Birth of "Erdoğanistan"?' *The Conversation* (14 April 2017) <https://theconversation.com/will-turkeys-referendum-mark-the-end-of-democracy-and-the-birth-of-erdoganistan-76038> accessed 26 July 2018.
[905] This idea bears some similarities to the concept of "militant democracy", found within political theory, and particularly international democratic theory. The term was coined by Karl Lowenstein in 1937 in response to a dissatisfaction with democracy's apparent inability to protect itself from

entrenchment more generally, set out in the previous chapter not point in this direction? The examination of entrenchment set out in that chapter, then, gives rise to longstanding, and as will be seen, difficult issues going to the heart of democratic and political theory.

Section 8.2 explores in detail the idea of a majoritarian case for democratic entrenchment. It will be argued that the most persuasive case for the limiting of majoritarian democracy is a principled one that appeals to the fundamental basis of democratic legitimacy itself. This uses a chain of logic in which the principled case against entrenchment is undercut; entrenchment can be seen as the expression of the very values grounding that case, and indeed democracy itself.

While the most promising argument for limiting the majoritarian process, it is argued that this line falls short of providing a *decisive* argument in that direction. Rather, there is a fundamental paradox at play, for the very success of this argument immediately provides grounds on which it can be contradicted. **Section 8.3** contends that if the principled case for limiting majority rule works at all, then it also works in the opposite way: if undermining political equality *is* a problem that undermines the legitimacy of a system, and allowing the violation of equal decisional weight is to undermine political equality, then the legitimacy of democratic entrenchment is itself undermined. The undercutting logic undercuts itself. The lesson to be learned from this is that the majoritarian principles developed in this thesis

being dismantled from within (K Lowenstein, 'Militant Democracy and Fundamental Rights, I' [1937] 31(3) The American Political Science Review 417). It advocates that democracy might justifiably preserve itself, and certainly more effectively do so, by forgoing some of its own standards in relation to those who seek to undermine the system. As Lowenstein bluntly put it, in the mood of the time, '[f]ascism has declared war on democracy…If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles' (432). This might involve the temporary suspension of fundamental rights, for example.

both support and deny the case for entrenching the fundamental conditions of democracy itself.

We first encountered this paradox in the previous chapter when considering the possibility of a legitimate refusal to accept even a seemingly democratic decision to entrench on any topic. After elaborating the precise nature of this paradox, the rest of this chapter concerns itself with its consequences for constitutional theory. This involves exploring each side of the paradox, tracing the path down which it leads the committed democrat.

Section 8.3.1, considers the direction pointed to by the *negative* side of the paradox of democratic entrenchment – one which rejects the case for the legitimacy of entrenching democracy itself. Establishing precisely how far this negative side goes will require returning to some of the conclusions drawn in the previous chapter, because, as will be seen, the issues examined there regarding the legitimacy of a vote to entrench are closely intertwined with the issues raised in this chapter. Drawing conclusions in one area has a knock-on effect on one's logical commitments in another.

Drawing these together it is contended that taking the negative side of the paradox sets the democrat onto a chain of logic on which they *are* committed to accepting the democratic legitimacy of an ideal vote to entrench. In one sense this would appear surprising, given that the democrat has a wholesale anti-entrenchment position – but one that has led them to a position in which they are committed to accepting a form of entrenchment. However, as seen there, *rejecting* such a vote would also commit the democrat to entrenchment – this time to the entrenchment of an anti-entrenchment principle. Avoiding a vicious contradiction of principle here would then see the democrat switch down to the positive side of the paradox – accepting the legitimacy of limiting majoritarianism on democratic grounds.

Section 8.4 explores the consequences of this positive side in detail, setting out a vision as to how it could be operationalised: what exactly would be entrenched on the logic of democratic entrenchment? The familiar objection of disagreement on these matters, leading majoritarian democrats to reject the case for democratic entrenchment as an impractical non-starter will be considered and rejected (**section 8.4.1**). The objection from disagreement is either empty or self-defeating, and thoroughly misses its target once the basis of the conception of democracy put forward in this thesis is recalled. In line with the nature of this thesis, it is the internal perspective – the sceptically-grounded majoritarian perspective – that is key; disagreement can thus be put back safely in its place.

With the objection from disagreement disposed of, the chapter will push on with the task of applying this perspective to provide a sketch of the content of democratic entrenchment (**section 8.4.2**). For reasons of space and scope, this sketch is necessarily brief, but it is noteworthy just how far-reaching the democratic case for entrenchment seems to end up being. Taking the pro-democratic-entrenchment position sets one quickly down a path that seems to lead inexorably to entrenchment of a whole host of political, civil, and even some minimal social rights. The consequences are wider than just constitutional theory: the line thus traced from scepticism to a series of fundamental rights might come of some surprise to those who see that philosophy as dangerous, and destructive, as well as those who see the concept of human rights as unavoidably objectivist (**section 8.4.2.3**).

The chapter further considers how a system of enforcement of these entrenched provisions could work, while remaining thoroughly in line with core democratic principles (**section 8.4.3**). Having by this point explored both sides of the paradox at play in democratic entrenchment, some possible ways forward – a possible means of breaking free from it and deciding between both plausible lines of logic – will be considered (**section 8.5**). Whether

one takes this way out or not, the conclusion of this chapter is that this core, logical paradox within the majoritarian democrat's relationship with democratic entrenchment does indeed exist. This has some significance for constitutional theory, and in particular the majoritarian outlook.

8.2. A Majoritarian Case for Democratic Entrenchment

8.2.1. John Hart Ely: Protecting the Democratic Process

A famous argument advocating the limiting of the otherwise legitimate democratic process in order to protect the processes and institutions of democracy itself is put forward by John Hart Ely in his defence of strong judicial review.[906] While this case is presented as a defence of US-style judicial review of legislative action, complete with strike down powers, and within a purely representative democracy at that, the core principle of limiting the power of majorities on democratic grounds is directly in point in the entrenchment context.

Ely argues that, while the 'selection and accommodation of substantive values' should be left to the political process,[907] limitations can justifiably be placed on the democratic process in order to protect against systemic malfunctions that would undermine its legitimacy. He points to two main ways in which such a malfunction might occur: first, there is the risk of those in power 'choking off the channels of political change to ensure that they will stay in and the outs will stay out' - essentially, dismantling the democratic process in order to hold on to power.[908] Secondly, 'although no one is actually denied a voice or vote', a majority

[906] See the seminal JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).
[907] ibid 87.
[908] ibid 103.

could use its power to systemically disadvantage 'some minority out of simple hostility' or prejudice.[909] In both cases, the 'elected representatives in fact are not representing the interests of those whom the system presupposes they are'.[910] On this ground, it would be justifiable to strike down the problematic moves; it would be necessary to maintain the valued democratic system, and to ensure it actually delivers on the promises of the principled case underpinning it.

8.2.1.1. A Value-Free Case?

Ely is at pains to distinguish this 'participation-oriented, representation reinforcing'[911] justification for limiting majority rule via the institution of strong judicial review from what he calls 'old-fashioned value imposition'.[912] While value determinations are to be left to the political process, the limits he envisages are concerned with ensuring that the system lives up to its promises by maintaining the integrity of the legitimate process through which value judgements *are* properly made. Thus, Ely attempts to answer the democratic criticism of strong judicial review by putting forward a theory based on protecting democracy itself, while avoiding 'inevitably controversial claims about substantive rights and values'.[913] The significance of such a claim is widely recognised, even among critics. The attempt to 'cordon off "process" from "value"' would, according to one commentator, render Ely's thesis positing limits to majority rule 'unanswerable' to even the most hardened majoritarian democrat.[914]

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[909] ibid.
[910] ibid.
[911] ibid 87.
[912] ibid 75.
[913] L Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89(6) Yale Law Journal 1063, 1079.
[914] P Zylherberg, 'The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective' (1992) 37 McGill Law Journal 27, 49.

Ely's thesis has, however, been heavily criticised on the ground that the purported distinction between process-based and substantive values does not in fact hold. For example, to put the concern to protect the integrity of the process to any use requires judgements to be made as to *what* a "properly" functioning process looks like, which implicates value-laden questions such as the 'proper degree of influence to give an individual or group' in the process.[915] Such distinctions, as another critic puts it, do not simply 'fall out of the heavens'[916] – they are value judgements implicating a number of more fundamental moral questions, such as 'who constitutes a political community', 'which relations in society must be horizontal rather than vertical',[917] who 'deserve[s] a particular status,[918] and the fundamental values underlying various answers to such questions. The same can be said of the attempt to classify the prevention of systemic prejudice in the political system as protecting the "process" rather than substantive value judgements. This requires *judgements* about when a measure amounts to "prejudice" – ill-motivated discrimination – as opposed to an acceptable distinction, especially given that, as Ortiz notes, 'every statute classifies and thus discriminates' to an extent.[919]

For these reasons, it has been noted that Ely's supposedly process-based theory of restricting majority rule through judicial review 'ultimately contravene[s]' its 'own premises...by smuggling in substantive value judgments'.[920] While these points are well made against Ely's presentation of his case, however, the next section will show that, contrary to his critics, and largely Ely himself, the fact that this case *is* to some extent value-based is where its true

[915] D Ortiz, 'Pursuing a Perfect Politics: The Allure and Failure of Process Theory' [1991] Virginia Law Review 721, 728.
[916] ibid.
[917] Tribe (fn913) 1071.
[918] Ortiz (fn915) 728.
[919] ibid 731.
[920] ibid 728.

strength lies. There is no need to smuggle. In any event, the promise of an entirely value-free case on matters of high importance such as this was never particularly realistic: it is difficult to see what an argument which avoids bringing in *some* moral value-based judgement could look like. *Some* such value presupposition seems unavoidable if one is to *argue for* anything at all. The task that Ely set himself, for that reason, seems unachievable.

Interestingly, despite his frequent protests to the contrary, Ely at one point accepts that his approach *can* be seen as value-laden. In a footnote to *Democracy and Distrust*, he acknowledges that '[p]articipation itself can obviously be regarded as a value'.[921] To those who 'insisted on that terminology', he replies, his point would be that participational values are ones which the courts 'should pursue' (impose?).[922] It is quite striking that Ely would make what is on his own terms quite a concession in a mere footnote, and one gets the impression, especially given his packaging of his theory as a move away from the traditional value-imposition he diagnosed in American constitutional theory, that he was uncomfortable with this aspect of his thought. The point made here, however, is that, rather than a pathology, this is where the true *strength* of the democratic case for limiting majority rule lies.

8.2.2. A Value-Based Case for Limiting Majority Rule: The Undercutting Logic

The force of this justification for limiting simple majority rule, and its ability to avoid the democratic objection to entrenchment already considered, comes from the fact that it can be seen as flowing from the *same* values which ground that case, and indeed the case for majoritarianism in the first place. As seen in the previous chapter, the case against entrenchment is based firmly on the principle of political equality: entrenchment is at its

[921] Ely (fn906) 75, n*.
[922] ibid.

core a violation of the principle of equal decisional weight and therefore to be prima facie rejected. However, if what is being insulated from change, or given greater weight in the process are the processes and institutions which themselves express that value, then entrenchment can be described as, ultimately, *serving* rather than violating it. Given that it is the supposed *violation* of this value that led to the general rejection of entrenchment above, that case can be seen as logically undercut in this context.

Putting it another way, if equal decisional weight, and the principle of equal participation *is* an expression of the value of political equality – as both the case for majoritarianism in **Chapter 5** and the prima facie case against entrenchment in **Chapter 7** suppose that it is – then this equality is respected in the entrenched provision itself. It is respected both in the *content* of the provisions, *and* in the act of entrenching it. Insulating the institutional expressions of political equality – one person one vote, equal voting rights, and perhaps others[923] – from change is to, in effect, protect those values. Insulating these provisions against change is then also an expression of respect for the value itself.

In this context the attitude of 'self assurance' and disrespect for the decision-making capacities of views of others implicit in entrenchment that Waldron takes issue with looks very different:[924] the only self-assurance being displayed is *in the value of equal respect itself*. Allowing entrenchment of such provisions thus shows a strong attachment to the underlying principle of political equality, and an exceptionally strong expression of the belief in it. Hence the case *against* entrenchment based in political equality is neutralised.

This logic would lend support to Dahl's view that 'conflict' between the protection of particular 'substantive outcomes and the democratic process would vanish if...the substantive

[923] See below, **section 8.4.2**.
[924] Waldron, *Law and Disagreement* (fn4) 221.

outcome in question' is an 'integral part of the democratic process'.[925] This is the logic we first came across in the previous chapter when setting out the plausible argument that the entrenchment of an anti-entrenchment principle might not be as contradictory as some suggest: it can be seen as a strong expression of respect for the principle that grounds majoritarianism and the general *anti*-entrenchment case in the first place. Indeed, that earlier case can be seen as a specific iteration of the aim of protecting democracy itself, in its majoritarian form. This value can be argued to qualify the prima facie case against entrenchment.[926]

8.2.2.1. The Democrat as Committed to Limiting Majority Rule

As was considered there, the logic that gives support to the entrenchment of an anti-entrenchment principle may have stronger implications more generally. Not only is there a plausible neutralising of the democrat's objection to entrenchment in the context of protecting the institutions of political equality; the undercutting logic may go even deeper. Some have posited the idea, on similar grounds, that the democrat may be logically *committed* to accepting limits more generally on majority rule. Such a claim can be found in Dahl's argument that 'the democratic process isn't completely open-ended'[927] – it may not be used to remove or infringe a 'right, entitlement, or other claim to something integral to the democratic process'.[928] A demos does *not* have the 'authority' to *'rightfully*' deprive groups of their 'primary political rights'.[929] To show this, Dahl makes a claim of logical consistency: 'people committed to the democratic process would be bound, logically, to uphold the rights necessary to the democratic process', because if it is 'desirable that a people

[925] Dahl (fn445) 168.
[926] See **Chapter 7, section 7.5**.
[927] Dahl (fn445) 171.
[928] ibid 167.
[929] ibid 171–172.

should govern itself democratically, then it cannot be desirable that it should be governed undemocratically'.[930] If one allows the infringement of these rights essential to the democratic process, they 'thereby declare that they want to reject the democratic process'.[931] Put bluntly, democrats 'can't have it both ways'.[932] They cannot affirm their support for democracy while at the same time leaving it open to being undermined. Thus, for the democrat, the 'proper sphere for political decisions' lies only 'outside' the 'preservation of the democratic process'. [933] Maintaining this process is an 'inviolable' interest.[934] In short, where the broad democratic process is concerned, there is simply *no choice*.[935]

A similar point can be found in Christiano's argument positing the existence of 'clear limits to the authority of democracy'.[936] These limits are 'derived from the same principle of public equality that underlies democratic authority'.[937] Where that principle is violated, the value of the democratic process is defeated and any claim to authority that process makes is thereby undercut. Such undercutting limits to democratic authority are 'made possible by the fact that the considerations involved are the same kinds of considerations that underwrite democratic authority' in the first place.[938] Applying this logic here, it can be said that the authority of the majoritarian process based on political equality is undercut whenever that process purports to be used to undermine that same value. With the justificatory condition undercut, the outcome loses legitimacy. Thus, political equality not only grounds the majoritarian process, it also plausibly grounds its limits. In these circumstances, not only

[930] ibid 172.
[931] ibid.
[932] ibid 171.
[933] ibid 182.
[934] ibid.
[935] ibid.
[936] Christiano (fn447) 260.
[937] ibid.
[938] ibid 262.

does entrenchment of the institutions of political equality seem *unproblematic* in principle from the majoritarian perspective, it seems to be the logical *consequence* of that perspective.

Such an argument has been deployed as a response to Waldron's wholesale majoritarian anti-entrenchment case, set out in the previous chapter. While that case, it will be recalled, rests on his attachment to the "right of rights" – the right to participate in collective decision-making on equal terms – and the legitimacy this gives to ordinary majority rule, Mildenberger suggests that this catches Waldron in self-contradiction when he also refuses to accept counter-majoritarian limits as legitimate:

> '...to call a process that permits the potential revocation of the right of rights "legitimate" seems to contradict a necessary premise, i.e. the paramount importance of that very right, which is required for the justification of Waldronian fair procedure to begin with'.[939]

On this argument, Waldron's case turns out to be self-defeating. For if one *truly* values political equality and the right to participate in decision-making, one would not support a process that puts this right at risk. If political equality is the key to legitimacy, then a process which sees the destruction of that value as within its bounds would be illegitimate. Thus, not only might entrenchment actually serve the underlying value of the anti-entrenchment case, it would *undermine* that value to reject it in this context.

This logic has particular appeal from the perspective of this thesis once it is recalled that the basis of its justification of democratic majoritarianism is that it creates a situation in which each normatively sovereign individual is given maximal decisional weight in the decision-making process for society. It can thus be seen as an instrumental good. That is to say, the

[939] Mildenberger (fn860) 76–77.

process is not valuable in its own right, rather it is valued *in order to achieve this goal*. To stand back and allow the democratic process to be used to violate the institutions essential to political equality and maximal decisiveness would not only allow the whole point of the democratic process to be compromised, it would in effect reverse this approach: it would be to value the process over the ends which justify it. This is incompatible with the value-based democratic approach taken here. On that approach, then, it seems that one is indeed committed to placing limits on the potential outcomes of the democratic process where the fundamental values of that system are concerned.

Once again, the strength of this undercutting argument stems from its appeal to the same fundamental value on which the opposition to entrenchment is based: if one truly values the principle of equal decisiveness, as in the democratic criticism of entrenchment, then one cannot consistently allow the process to be put to ends which themselves violate it. Hence, those who continue to oppose entrenchment even in the context of protecting democracy itself could be justifiably accused of forgetting their priorities, and losing sight of their reasons for supporting the process in the first place.

8.3. The Paradox of Democratic Entrenchment

For Dahl, a principled case like the above is so strong that it manages to avoid a problematic paradox which he notes may be pointed to in the case for limiting democracy: if a majority is prevented from infringing the political rights of others, or otherwise dismantling the democratic process, 'then it is thereby deprived of its rights; but if a majority is entitled to do so, then it can deprive the minority of *its* rights'.[940] The problem, he notes, is that it may

[940] Dahl (fn445) 171.

then seem that ‘no solution can be both democratic and just’ at the same time.[941] Dahl dismisses this paradox as 'spurious'.[942] On the logic set out above, he claims, it is a misnomer to suggest that there can be any democratic legitimacy accorded to a decision to dismantle democracy itself, or the rights and goods essential to it. As these are decisions outside the bounds of democracy, there is simply no conflict between limiting the power of majorities, and democracy, where the rights essential to the democratic nature of the process are at stake. To exceed those limits is to violate democracy, and so cannot be described as legitimate in the first place.[943] To uphold the limits against anti-democratic majorities, then, would be 'fully compatible with the democratic process'.[944] Dahl reaches this conclusion in relation to both entrenchment and the requirement of special majorities,[945] and to judicial strike-down powers, referring to Ely's theory as support.[946] By positing such limits on majority rule as a logical, 'moral and constitutional' matter, Dahl suggests the democrat can avoid the self-contradiction at the heart of this paradox.[947]

One incarnation of this paradox was already identified earlier, in the previous chapter (**section 7.5.3**). There it took the form of the idea that a democratic principle against entrenchment might itself amount to a form of entrenchment, thereby violating the principle of equal decisional weight. As was the case there, this incarnation cannot be dismissed so easily. Rather than avoiding the paradox, the logic of Dahl's dismissal, it is contended, leads him straight back into an apparent contradiction. If committed democrats are, as he suggests, logically bound to uphold the rights and institutions essential to the democratic process, and

[941] ibid.
[942] ibid.
[943] ibid 171–172.
[944] ibid 191.
[945] ibid 185.
[946] ibid 191.
[947] ibid 172.

therefore cannot justify their infringement, then they are bound to reject entrenchment *as itself a rejection of those rights.* This is because, as per the core case made in the previous chapter, entrenchment is, structurally and conceptually, *the violation of political equality.*

If so, and if it is the case that, as Dahl puts, a knowing infringement of democratic rights entails a declaration that one 'want[s] to reject the democratic process',[948] then supporting entrenchment entails a rejection of the democratic process. And, if an individual's 'right to the democratic process and whatever is essential to it' really is 'inviolable', then the decision to entrench is a decision to violate the inviolable.[949] As with the paradox of anti-entrenchment, the problem is that, if ensuring equal weight in the decision making process *is* the ultimate expression of political equality, and allowing its violation *is* a disrespectful undermining of political equality, then entrenchment is itself an inherent expression of disrespect. Appealing to the undercutting logic of keeping democracy within the bounds of itself does not get one very far away from this problem, because if to violate political equality undermines authority and legitimacy – an assertion that, as seen above, that line of logic requires – then the legitimacy of entrenchment is also undermined. That is, *the undercutting logic ends up undercutting itself.*

Once again, then, it is a step too far to hold that the democrat is, where democracy is concerned, *committed* to entrenchment on the basis of their fundamental values. If respect for the value of political equality commits one to anything, it commits one to both reject entrenchment *and* accept it in this context, because it leads to two equally plausible lines of logic. It might be helpful in terms of clarity to summarise these two lines of logic succinctly alongside each other:

[948] ibid.
[949] ibid 183.

a) The Principled Case for Democratic Entrenchment:

Entrenching the valued institutions of political equality respects the value of equal decisiveness in the entrenched provision itself, and thus *insulating it from change can be seen as the logical, ultimate expression of taking it seriously.*

b) The Principled Case Against Democratic Entrenchment:

Entrenching the valued institutions of political equality involves an undermining of these institutions of political equality in the very process. If these institutions *really are* an expression of that value, then entrenchment expresses a violation of it. *The rejection of entrenchment is, on this view, the logical, ultimate consequence of taking political equality seriously.*

8.3.1. Consequences of the Democratic Paradox

Given these two equally plausible cases, pointing in strongly opposing directions, the only conclusion which can be drawn as a matter of principle is that when it comes to the features of democracy itself, entrenchment is both compatible *and* incompatible with the fundamental normative outlook of majoritarian democracy. The paradox that Dahl dismisses as "spurious" rather seems inescapable on principled grounds. The *consequences* of this paradox differ from the account given by Dahl however.

Dahl envisaged that, if correct, the paradox would mean that a solution to the danger of democracy dismantling itself is incapable of being both democratic and just at the same time. However, in line with the nature of the paradox, it is contended that the consequence is rather that the solution of limiting democracy through means such as entrenchment is both

democratic and just, *and* undemocratic and unjust. Democratic entrenchment can be described as both a contradiction of the value attached to political equality, *and* its full flowering. Thus, in the context of protecting the institutions of the democratic system itself through entrenchment, the sceptically-grounded majoritarianism of this thesis can, in principle, ground a case for and against that device.

In these circumstances, a helpful contribution is to provide an account of where each side of the paradox may lead.

8.3.1.1. The Negative Side of the Democratic Entrenchment Paradox

On the negative side of the entrenchment paradox (that is, **(b)**, above) one could object wholesale to entrenchment – even where the institutions of democracy are themselves at stake. In this context, this would clearly lead one to reject the idea of democratic entrenchment, by pointing to its defects as a violation of democratic values.

To get the whole picture of what the negative side of the paradox looks like however, we must put this into the context of the lessons learned from the previous chapter, where the paradox was first encountered. Returning to those lessons, this line would seem to decisively commit the democrat to accept a democratic vote to entrench – whatever the subject. This is because, as found there, rejecting the legitimacy of such a vote would be to accept entrenchment after all.[950] The tension often attributed to this stance dissolves once one recalls that the idea that entrenchment is democratically dubious and should ideally be opposed concerns the *content* of a decision, whereas the idea that a vote to entrench should be accepted as legitimate in the interim concerns its democratic *credentials, or background.*

[950] See **sections 7.5.2 and 7.5.3** .

If one *were* to reject the legitimacy of a democratic vote to entrench, *while still maintaining the negative side of the paradox set out in **(b)*** – that even entrenchment of democracy itself is not legitimate – then there *would* be a tension. For if the committed democrat takes the strong legitimacy-denying objection to entrenchment they are accepting the justifiability of limiting the democratic process out of respect for democratic value. That is, the line of logic set out in **a)** above.

If this not to be a straightforward self-defeat, then, one must have moved into the alternative part of the paradox (set out in **(a)**, above). They would thereby be committing themselves to accepting the democratic credentials of limiting majority rule in order to protect democracy itself. Once this is recognised, any image of self-defeat or of a vicious paradox disappears, because the core democratic value – respect for the values underlying democracy – remains constant, and on this side of the paradox, fulfilled. Self-defeat only creeps in where one leaves the prima facie case unqualified even in the realm of entrenching the institutions of democracy itself, *and at the same time rejects (or would reject) a democratic vote to entrench as a democratically possible, legitimate, outcome*.

On the purely negative side of the paradox **(b)**, then, the most the democrat could consistently do, in circumstances where a democratic vote has resulted in entrenchment would be to continue to campaign against the entrenchment – hoping to reverse it, while undoubtedly resenting the position of political inequality they have been put into on this matter – while still uncomfortably endorsing its being put into practice. This is something like the stance Waldron takes, and indeed something which we are all used to in democratic systems where, inevitably, one does not always get their own way. The negative side of the paradox can go no further than this.

To reiterate, however, this is *not* the same as saying, as Waldron does, that the committed democrat *must* be committed to accepting the democratic legitimacy of a majority vote to entrench. Rather, it is just to say that *if* they want to *reject* it, then they seem committed to the line of logic set out in **a)** – the opposite of Waldron's stance. The key point is that such a stance, is contrary to Waldron's suggestion, *no less justified in principle.*

8.4. The Positive Side of the Paradox: What Could a Justified System of Democratic Entrenchment Look Like?

However, while this chapter has argued that the positive case for democratic entrenchment is a plausible one to take on democratic grounds – establishing a principled case for limiting majority rule where the system is itself at stake – that case remains abstract. The logic that the democrat can justify entrenchment in order to protect the values of equal participation and maximal decisiveness in the process of decision-making, along with the institutions which express them, must be operationalised to be of any use. What precisely is covered? What could justifiably be entrenched and how might this work in practice?

These are themselves complex and difficult issues, the pursuing of which could easily lead one far outside the confines of this thesis, and so in what follows only a sketch of what a sceptically grounded democratic entrenchment *could* look like is offered. The purpose is to sketch how this line could operate if one were to take it, while recalling that the majoritarian democrat is not necessarily *obliged* to as a matter of broad principle.

8.4.1. A Dead-End? The Democratic Rejoinder from Disagreement

An initial objection that must first be dealt with is the claim that this very task – moving from the abstract to the specific – reveals the principled case for democratic entrenchment

to be a dead-end of a non-starter. Moving from notions of "political equality" or "participation" to the entrenchment of specific measures designed to protect them raises the problem of disagreement, and this, the argument goes, renders the democratic case, *even if acceptable in the abstract*, unworkable.

This is the argument put by Waldron in his rejection of the Ely-style justification for judicial review – a case which sees him also reject the idea of democratic entrenchment, and, more generally still, the core idea of limiting of majority rule to protect the democratic process. As he often does from his disagreement-based stance, Waldron does this while acknowledging the merits of the above case in principle. Waldron accepts that it is arguable that 'according to the logic of [his] argument', the participatory rights on which it is based '*at least* should be entrenched'.[951] That is, '[s]ince it is the right to a say' that is 'so important, surely *this* should be put beyond the reach of majoritarian revision'.[952] Waldron acknowledges this possibility not only in relation to the so-called "right of rights", but also more generally to include 'rights that are...constitutive of the democratic process', and those which 'even though they are not formally constitutive of democracy, nevertheless embody conditions necessary for its legitimacy'.[953] Objections against constraining the democratic process to protect these rights, Waldron acknowledges, could hardly be made 'in the name of democracy, for a democracy unconstrained by such rights would be scarcely worthy of the name'.[954] Instead, the objections would, problematically, appear to be 'directed against

[951] Waldron, 'A Rights-Based Critique' (fn629) 39.
[952] ibid. Waldron quickly brings this discussion to the judicial review issue, but it is clear from his logic that it applies to the idea of entrenchment itself. The same idea - limiting ordinary majority rule on fundamental democratic grounds - is in play.
[953] Waldron, *Law and Disagreement* (fn4) 283.
[954] ibid 284.

the establishment or protection of the very conditions that made democracy an ideal worth appealing to'.[955]

However, while accepting, or at least acknowledging the force of, the elementary logic of the argument for limiting democracy to protect democratic rights, Waldron argues that the principled case falls apart once the fact of intractable disagreement over the content and operation of the rights at stake is factored in:

> 'Unfortunately, the proceduralist argument will not work. The truth about participation and process is as complex and disputable as anything else in politics...People disagree about how participatory rights should be understood and about how they should be balanced against other values. They have views on constituency boundaries, proportional representation, the frequency of elections, the funding of parties, the relation between free speech and political advertising, the desirability of referendums, and so on'.[956]

This issue affects both the issue of exactly *what* to entrench, on what formulation (entrenchment *per se*), and how it should play out in practice (the *enforcement* of the entrenched provision). Indeed, the issue of disagreement – if it is an issue – is exacerbated in the latter case due to the need to engage in additional complicated value judgements and balancing exercises in working out the precise content and limits of a specific provision in order to enforce it. Broad statements of rights and principle – the kind found in Bills of Rights – are more likely to attract consensus. As Allan puts it, statements of entitlements are easy to support 'while they remain up in the Olympian heights' of abstract, 'vague,

[955] ibid.
[956] Waldron, 'A Rights-Based Critique' (fn629) 39.

amorphous, very broad terms'.[957] 'Who, after all', he asks, 'would say she [or he] is against free speech?'[958] But once one moves into the 'quagmire of detail' as to how such entitlements should play out in practice, 'disagreement and dissensus virtually always exist'.[959] For example, where should the line be drawn 'when it comes to pornography and hate speech?'[960] Or, as Waldron asks, drawing on US constitutional experience: '"Is pornography speech?" "Is burning a flag speech?" "Is topless dancing speech?" "Is pan-handling speech?" "Is racial abuse speech?" and so on'.[961]

In this context of disagreement, just as in relation to other issues on his theory, Waldron argues that respecting the political capacities of individuals requires that their 'voices be heard', and their opinions counted equally on these matters.[962] It would be 'absurd to deny [an individual's right to participate on equal terms] on the ground that the question was one about democracy' itself, rather than other substantive issues.[963] Rather, questions 'about democracy, as much as any political question, should be settled by democratic means'.[964] In short, the point Waldron makes is that *because* matters of participation are subject to disagreement, this means they must be resolved democratically, in a process itself based on political equality. If correct, the disagreements encountered moving from theory to practice and giving flesh to the abstract principled case for democratic entrenchment above would turn out to give us a reason to reject that case. This might also offer a means out the paradox

[957] Allan, 'An Unashamed Majoritarian' (fn192) 543.
[958] ibid.
[959] ibid 542–543.
[960] ibid 543.
[961] Waldron, 'A Rights-Based Critique' (fn629) 26.
[962] ibid 39.
[963] Waldron, *Law and Disagreement* (fn4) 293.
[964] ibid.

identified there; if the principled case for entrenchment cannot be sustained in anything other than uselessly abstract terms, then perhaps it can simply and safely be put to one side.

8.4.1.1. The Self-Defeating Nature of the Objection from Disagreement

The problem with the response from disagreement, however, is that it is incoherently self-destructive. As Christiano has shown in his examination of Waldron's opposition to the democratic case for strong judicial review specifically, Waldron cannot maintain his opposition to limitations on democracy on this ground without falling 'into incoherence'.[965] The use of disagreement in opposition to the case for limiting majority rule, and more fundamentally as the basis for the authority of pure majoritarian democracy, 'threatens to lead to a regress or self-defeat'.[966]

The first problem arises because if it is the case that 'in all disagreements, individuals must have a say in the resolution' on a basis of political equality, then there is a regress as a result of disagreements about equality, participation, democracy, and the theses Waldron himself puts forward on these matters.[967] Because of such disagreement over the premises Waldron relies on – *substantial* disagreement at that – he commits himself to relying on a further legitimate (presumably majoritarian) procedure to resolve disagreements over his majoritarianism, including whether majoritarianism is in fact fair, or whether the premises he relies on are in fact sound. But there is likely to be the same –and perhaps additional – disagreement over the merits of *that* procedure, requiring *another* procedure, and so on. At each level of procedure, disagreement is likely to exist – especially if, it is added here, Waldron's claims about the prevalence of disagreement in modern society are correct[968] –

[965] Christiano (fn447) 285.
[966] ibid.
[967] ibid 285–286.
[968] See e.g. Waldron, *Law and Disagreement* (fn4) 1 and 105–106.

and so the regress 'is likely to have no end'.[969] The result, Christiano notes, is that Waldron's theory 'ends up defending nothing at all'.[970]

Avoiding such a regress would require Waldron to ignore disagreement over the fairest way to resolve disagreements and the procedures to be used for that task, and simply push on with his preferred majoritarian process. But he would thereby disrespect the judgements of the individuals he claims to respect. This would lead to self-defeat.[971] It can be added that Waldron's criticism from disagreement in fact commits him to accept that this would be a violation of his theory, because it makes explicit his view that equal respect is required *even on the question of the procedures and values that ground democracy in the first place*.

These problems go deeper than just giving us reason to question Waldron's objection to the democratic case for limiting majority rule in practice. As Christiano has argued, these problems go to the heart of Waldron's support for the democratic process itself on the basis of the need to respect disagreement.[972] Indeed others have also attacked Waldron's democratic theory on this basis.[973] For present purposes, however, the relevance is that if Waldron's objection from disagreement is well-placed, then it would catch more than he presumably intends: it would take down not only the democratic case for entrenchment, but also his foundational democratic case, and, indeed, the response he seeks to make based on

[969] Christiano (fn447) 286.
[970] ibid. Waldron's response to Christiano's critique is that he has made 'no attempt to show that this is a *vicious* regress' (Waldron, 'Core of the Case' [fn642] 1371 [emphasis added]). However, whether it is technically "vicious" or not, the fact that Waldron is left defending *nothing* is a major problem. For a similar point, see C Mac Amhlaigh, 'Putting Political Constitutionalism in Its Place' (2016) 14(1) International Journal of Constitutional Law 175, 184, n63.
[971] Christiano (fn759) 521–522.
[972] ibid esp. 520-522.
[973] See e.g. Kavanagh (fn586) 467 ('if disagreement about the best means of protecting rights is the ground on which we should reject the institution of judicial review, then it is difficult to see why it does not impugn participatory majoritarianism on the very same grounds').

it. The rejoinder from disagreement is thus wholly incoherent and self-destructive and can be dismissed on this basis.

8.4.1.2. Putting Disagreement in its Place

That this problem affects, and in fact *stems from* Waldron's fundamental case for the authority of the majoritarian democratic process in circumstances of disagreement (premised on the same need to respect disagreement) reveals another way in which the response misses its mark when applied to the case for democratic entrenchment set out in this thesis. There may indeed be disagreement over how, and even whether, to ensure that the premises of the majoritarian process are respected – that is, whether and how to ensure that each individual is given maximal decisional weight (on an equal basis to others). However, this is only a concern for those who, as Waldron does, put the need to respect disagreement at the core of their democratic case. The theory presented in this thesis does not.

The case is not that according each individual maximal decisional weight is necessary to respect disagreement among individuals, endowed as they are with dignity, as it is for Waldron.[974] Rather, as set out in **Chapters 4 and 5**, it is the logical result of the particular conception of the individual derived from the philosophical scepticism which forms the backbone of this thesis, elaborated in **Chapter 2**. The conception of the individual which forms the bridge between philosophy and political and constitutional theory is as an authoritative moral legislator, effectively standing in the space left by the rejection of metaphysical authority and natural right. As it is grounded in *this* premise, the burden of the democratic case put forward here is not to respect disagreement *per se*, but to work out the consequences of, and remain in line with, this sceptically-grounded conception.

[974] See especially Waldron, *Law and Disagreement* (fn4).

Another way of putting this refers back to the nature of this thesis: its aim is to broadly set out a persuasive constitutionalist theory in line with the sceptical perspective taken. All that is required, then, is to provide a persuasive account of the limits of majority rule consistent with its premises. As an *internal* matter, the account of those limits would then be justified. Of course, the views of others are always relevant to a theory to the extent that dealing with them is part of the process of the formation, testing and promulgation of one's own views, as well as persuading others to come to the same conclusions.[975] But the mere *existence* of opposing views does not, and *cannot* undermine or limit the theory, as Waldron's criticism would have it. Given that the purpose of this thesis is to set out a *sceptical account* of aspects of constitutional theory, it is the *internal perspective* which is decisive.

In short, the point is that the sceptic democrat can proceed to work out the implications of the majoritarian theory put forward, and what specific limits to majority rule might follow from it, uninhibited by the problem of disagreement. Some, necessarily brief, thoughts on that task follow.

8.4.2. The Scope of Democratic Entrenchment: Entrenchment of *What*?

8.4.2.1. A Minimum: Protecting the Core Institutions of Majoritarianism

The institutional consequences of the sceptical conception of the individual taken have already been argued for in **Chapters 5 and 6**. Majority rule is instrumental to achieving that conception in practice. In fact, it is logically the *only* collective decision-making procedure compatible with it. Thus, the most obvious limit to majority rule on the principled grounds above would be to protect the key features of that process *as it has been set out*. This catches most clearly the mechanics of the system itself: voting equality for citizens in the decision-

[975] See **Chapter 2, section 2.4.1.2.**

making process (voting equality being a direct reflection of equal decisional weight); the right of petition to initiate referendums and the equality of opportunity to do so (an essential means to the ideal of direct decision-making, which is itself instrumental to maximal decisiveness). This would be the content of the category of rights Waldron refers to as those 'actually constitutive of the democratic process',[976] on the theory constructed in this thesis – these features are constitutive of the process envisaged by the present sceptically-grounded majoritarianism.

Disagreements over these issues – whether these are rights and procedures worth putting into place at all, and worth endowing with the protection of entrenchment – can be resolved by referring back to the founding premises of that theory in **Chapter 4** and the applied logic of **Chapters 5 and 6**. However, the content of this minimum democratic entrenchment is not, for the purposes of this thesis, decisively fixed. For reasons of space and scope, it must be left open-ended. So, to take one of Waldron's examples (see above): *if* it turns out that, as with majority rule itself, a decisive logical case can be made for the establishment of a system of proportional representation as the voting system for representative institutions more in line with the sceptical theory, then this would also cut through the disagreement Waldron identifies over that issue. This specific issue, and others like it is not something that can be pursued here, however. Another contentious issue pointed to by Waldron *has* however already been pursued – the place and function of referendums in the sceptic's constitution having been set out in **Chapter 5** and at various points in **Chapter 7**.

[976] Waldron, *Law and Disagreement* (fn4) 283.

In any case, with the requisite tentativeness noted surrounding *other* possible inclusions, the right to vote, and to take part in citizen-initiated referendums are firmly declared to form the minimal core of democratic entrenchment.

8.4.2.2. Widening the List: The Case for a Set of "Participation Guarantees"

Aside from this core, there may be a case that other aspects of the process, and further rights and interests must also be protected on the same logic. For example, as Waldron also recognises, his favoured participatory rights and processes, and their value, can be said to '*presuppose*' the existence of other rights.[977] As a matter of legitimacy, this case 'represents one set of rights as the conditions of the *legitimate* exercise of another'; that is, there 'are surely some rights such that if they were not respected in a community, no political legitimacy could possibly be accorded to any majoritarian decision-procedure'.[978]

Likewise, Dahl identifies a category of rights as 'integral to the democratic process', which is to say, 'an essential part of the very conception of the democratic process itself'.[979] He gives the rights to freedom of speech and assembly as examples.[980] Within this category, one could quickly add freedom of thought, for example, on the logic that limiting these rights would limit one's ability to formulate or develop one's own views, which would then limit one's ability to determine the outcomes for societal decision-making according to their own preferences. Given that it is in this equalised power that the legitimacy of the democratic

[977] ibid 284.
[978] ibid.
[979] Dahl (fn445) 167.
[980] ibid. In Australia, something like this was found in holding that a constitutional protection of free speech was implied by the democratic nature of the constitution. The court found that 'freedom of communication' in public and political matters is 'indispensable' to the democratic system of representative government, and its underlying basis in the authority of the Australian People (see *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] 45 HCA (High Court of Australia) [37–38]).

process lies, this would undermine the legitimacy of the process.[981] Similarly, some form of a right to privacy (at the least, freedom from pervasive state surveillance) could be seen as essential to the free formation of one's own views and ideas, and thus be grounded in this same logic.[982]

Relatedly, further rights, at first glance detached from the democratic process, can also be said to be presupposed as a factual or causal matter; that the meaningful exercise of the democratic rights requires suitable conditions to be in place. For example, as Waldron notes, 'one cannot meaningfully exercise the right to vote in conditions of terror or starvation'.[983] Similarly, Dahl describes such rights or entitlements as '*external* to the democratic process but necessary to it', pointing to a widespread recognition that the 'functioning of democratic processes will be impaired if citizens are vastly unequal in economic means or other crucial resources'.[984] This could ground restrictions on campaign spending, or even a right to an economic minimum, for example.[985] Thus, as Colón-Ríos notes, the enterprise of protecting democracy through entrenchment would seem to require entrenchment of a whole host of 'economic and social rights without which the exercise of other fundamental rights would be impossible'.[986]

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[981] For a classic argument grounding the protection of free speech and the limited legislative authority of legislatures on democratic theory, see A Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper and Row 1948).

[982] Indeed, Neil Richards presents free speech and a right to privacy as essential to one another; privacy is necessary to the autonomous formation of views *prior* to free speech. See Part II of N Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press 2015). He argues that '[w]ithout some meaningful guarantee of intellectual privacy, political freedom as we understand it would become impossible' (101).

[983] Waldron, *Law and Disagreement* (fn4) 284.

[984] Dahl (fn445) 167.

[985] For an argument that failure to ensure an adequate economic minimum such that individuals are limited in their ability to successfully exercise their democratic (and, on his public equality based theory, liberal) rights weakens the authority of a democratic body see Christiano (fn447) 272–275.

[986] Colón-Ríos (fn835) 25.

The above suggests a line of logic that can be used for the purpose of identifying which rights and interests form legitimate limits to the ordinary democratic process, thus overcoming the democratic objection to entrenchment: as long as the right can be shown to be instrumental to the process in which each individual is accorded maximal decisional weight, then it is caught by the logic for democratic entrenchment. While the theorists above separate the rights implicated in democracy into different categories – those integral to the process as necessary for its legitimacy, and those instrumental to the operation of those rights – on the view taken in this thesis they are all different ways of expressing this common democratic instrumentalist logic. The right to vote is instrumental to the goal of maximising the decisional power of individuals, just as a right to the conditions in which one can have the leisure of thinking and voting is.

This thesis is not in a position to present an exhaustive list of all of the rights and interests which can be justified in this way – this must be left for future work – but it is easy to see how this logic could, quite quickly, lead to a wholesale Bill of Rights resembling something like the European Convention on Human Rights, for example. The argument might even extend to justify the protection of rights which, at first glance, seem very far away from the right to democratic participation and maximal decision-making. The right to life is one example: put bluntly, dead people cannot vote. More technically, the killing of an individual extinguishes their Godlet status. It extinguishes their ability to contribute to the authoritative determination of the rules for society. Thus, if the process and its limits are to be instrumental to that status, then the protection of life would necessarily seem to form one such limit. Less extreme, a right against arbitrary detention can be grounded in this logic; detention being a

plausible – and throughout history much-used – means of preventing political participation and debilitating opposition, whether physically, or through intimidation.[987]

8.4.2.3. No Baggage Required: Rights as Sceptical Guarantees

From the sceptical perspective, however, these rights-based limits would not be described as "fundamental" or "human rights", as they are traditionally understood. These terms come with metaphysical baggage which is incompatible with the sceptical point of view. The basis for "human rights" usually offered is, at its foundation, that individuals have some kind of "inherent dignity" and thus ought to be treated as inviolable.[988] As Perry notes, this idea, fundamental to the traditional Western idea of human rights, is 'inescapably religious', in the sense that it is 'grounded in a vision of the finally or ultimately meaningful nature of the world and our place in it' – in short, in 'Ultimate Reality'.[989] On this traditional understanding, the 'fundamental wrong done' when rights are violated is that the 'normative order of the world' is 'transgressed'.[990] These are, it will be recalled, all ideas which were dropped with the discarding of the realist worldview in **Chapter 2**.

Some have argued, however, that such claims and ideas are *unavoidable* if the idea of human rights is to work at all. When Perry states that the idea of human rights is 'ineliminably

[987] A recent example can be found in the actions of the Venezuelan government under the rule of President Maduro (see Human Rights Watch, 'Venezuala: Events of 2017' *World Report 2018* (2018) <https://www.hrw.org/world-report/2018/country-chapters/venezuela> accessed 23 August 2018.

[988] MJ Perry, *The Idea of Human Rights* (Oxford University Press 1998) 13. See, for example, the preamble to the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (referring to the 'recognition of the inherent dignity...of all members of the human family'). See also the preamble to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (stating that the rights found there 'derive from the inherent dignity of the human person'). The argument from dignity is also, it will be recalled, the basis of Waldron's right-based democratic theory as presented in, for example, Waldron, *Law and Disagreement* (fn4).

[989] Perry (fn988) 13.

[990] ibid 38.

religious',[991] he means that it cannot be 'embedded in', 'supported by', or even 'cohere with' a view according to which 'the world is, at the end of the day, not meaningful but meaningless, or a cosmological agnosticism that neither affirms nor denies the ultimate meaningfulness of the world'.[992] Similarly, another commentator claims that a theory of rights requires 'a doctrine of human dignity, preciousness and sacredness *that cannot be properly detached from...a world view that would properly be called religious in some metaphysically profound sense'*.[993]

To these theorists at least, it may come as some surprise that we have potentially stumbled across a foundation for a comprehensive scheme of rights in a sceptical, anti-realist philosophy which rejects the very ideas of religious worldviews, Ultimate Realities, and that the world has any meaning other than that which we ascribe to it. On the logic presented in this thesis, and especially this chapter, the claim that rights cannot be convincingly grounded in anything other than some kind of objectivist, or realist philosophy is thus rejected.[994] To

[991] ibid 12.

[992] ibid 16.

[993] J Murphy, 'Afterword: Constitutionalism, Moral Skepticism, and Religious Belief' in AS Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (Praeger 1988) 248 (emphasis added).

[994] Another non-objectivist basis for human rights was famously developed by Gewirth through his principle of generic consistency, grounding rights in a line of supposedly subjectively unavoidable logic stemming from the necessary conditions of agency (A Gewirth, *Reason and Morality* [University of Chicago Press 1978]). In the author's view, however, while promising in that it seems to avoid dubious concepts of moral objectivity and independent moral truths, this basis turns out to be unconvincing. Even assuming Gewirth's starting point and the merits of his dialogical method, one problem is that at least one of the steps - the crucial rights-claim step in particular - in the series leading to his supreme moral principle is not convincingly shown to be the logically necessary entailment of the previous. Gewirth therefore fails to live up to the requirements of his own method and deliver on his promise. Space precludes the kind of detailed attention Gewirth's complex argument requires, but for similar criticism see EM Adams, 'Gewirth on Reason and Morality' (1980) 33 Review of Metaphysics 579; LE Lomasky, 'Gewirth's Generation of Rights' (1981) 31 The Philosophical Quarterly 248; E Regis Jr, 'Gewirth on Rights' (1981) 78 Journal of Philosophy 786; MG Singer, 'On Gewirth's Derivation of the Principle of Generic Consistency' (1985) 95 Ethics 297; C McMahon, 'Gewirth's Justification of Morality' (1986) 50 Philosophical Studies 261. The author has also made a detailed argument to this effect elsewhere - see Murray, 'The Constitutionalist Debate: A Sceptical Take' (fn2) 21–37.

reflect this lineage, and in an attempt to leave behind such metaphysical and objectivist baggage, this thesis would term the "rights" established, "*sceptic's guarantees"*: their purpose is not to reflect the inherent dignity of the individual as mandated by the normative order of the World or Reality, but rather to ensure that the residual status ascribed to individuals on the basis of *dropping* these concepts is reflected.

The main point of this section, for present purposes, however, is that the core logic for democratic entrenchment has escalated, rather quickly into a possible basis for a whole host of what are commonly regarded as "fundamental rights". And all this from sceptical philosophical first principles, leading into majoritarian political and constitutional ones.

8.4.3. Putting Entrenchment to Work: Enforcement and Practice

As well as offering a way of cutting through disagreement over precisely what "democratic" provisions might justifiably be protected in principle, the theory developed here is also capable of dealing with concerns surrounding the *enforcement* of these provisions. The concern is that, even if agreeable in the abstract, putting the idea of democratic entrenchment into practice will lead to *even more disagreement*. Indeed, as already noted, it is often the *enforcement* of entrenchment that quickly takes Waldron's attention in his democratic critique.[995] It should, however, also be recalled from the examination in the previous chapter that the concepts of entrenchment and enforcement are separable. The consequence is that criticisms which draw on the enforcement of the provision, strictly speaking, do not implicate the argument for or against entrenchment itself. Accepting the case for entrenchment does not commit one to any view regarding the *enforcement* of the relevant provisions.

[995] See **section 7.2.2,** and **fn814.**

Indeed, there can be value in entrenchment aside from its strict enforcement. As briefly noted earlier, the issue goes to the heart of a collective and their identity, and can thus have symbolic significance.[996] The expressive value of entrenchment has been noted by Richard Albert, pointing out that it can serve to 'express an important message' to citizens concerning the fundamental principles of the state, and 'setting down markers distinguishing proper from improper conduct'.[997] The device of entrenchment, distinguishing the provision from non-entrenched, "ordinary" rules, 'conveys the symbolic value' of its content, and in this way can act as a 'powerful' means of influencing social norms.[998] In fact, for Albert this is its '*most* powerful [] virtue'.[999] This is significant given the importance of political culture to the maintenance of a constitutional regime. Given that decisions are, ultimately, taken by people, it is the commitments, values and attitudes of a community that are ultimately key to ensuring appropriate outcomes. Institutional mechanisms alone – in the 'absence of a shared commitment' among the members of a community – cannot sustain democracy.[1000]

If, however, entrenchment *is* to be enforced, here again, once disagreement is put in its place, a way forward emerges. To work out how an entrenched provision should play out in practice, one need only work out the consequences of the premises and logic relied on by the theory set out so far. Once again, as an internal matter, disagreement is not an issue. In some cases, the logic as to what amounts to a violation of the entrenched right will be clear.

[996] See **Chapter 7, section 7.1**.
[997] R Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 699.
[998] ibid 699–700.
[999] ibid 700.
[1000] Schwartzberg (fn901) 205. See also Waldron, *Law and Disagreement* (fn4) 310 (noting the importance of raising moral barriers as opposed to legal); L Hand, 'The Contribution of an Independent Judiciary to Civilisation' in I Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (3rd edn, Knopf 1960) 164 (pointing out that no court needs to save a society imbued with the 'spirit of moderation').

In others, less so. The latter is where problems will emerge – not from the lack of agreement, externally, but from the *indeterminacy* of the theory, internally.

8.4.3.1. Clear Cases: Limiting the Democratic Process

In some cases, direct violations of the institutions described in **Chapter 5** will be clear: if it is held that each individual should have equal decisive weight in the decision-making process (as it is), a move towards a qualified majority, for example, would be a clear violation.[1001] Likewise, the removal of the right to petition for law-making and abrogative referendums, or the institution of referendums entirely, would be a clear violation of the system set out in previous chapters, and therefore a violation of the values on which it is based, on the logic already presented there. Removing one's right to vote entirely would also, on the same grounds, be a prima facie violation.

There is of course considerable controversy at the periphery of the right to vote concerning the justifiability of prisoner disenfranchisement.[1002] This *might* suggest that the issue is not so clear cut in this specific context. That might move the right to vote concerning prisoners into the next category, below (occasions where the democratic case is indeterminate). However, the logic presented here would seem capable of cutting through the controversy straight away, from the internal perspective. To see this, recall the key premises of the current theory: equality of voting weight was premised on the idea of each individual having moral legislative authority, which, in turn, was derived from the rejection of independent

[1001] Outside the use of such a device for the protection of democratic institutions themselves, at least.

[1002] See, for example, the line of case law in the UK and ECHR, and associated controversy: *Smith v Scott* (2007) 9 CSIH 345; *Hirst v United Kingdom (No 2)* [2005] ECHR 681. In Canada, see the equally controversial *Sauvé v Canada (Chief Electoral Officer)* (2002) 3 SCR 519, and the sharp divisions evident in the majority and minority judgments. For commentary, see J Hodgson and K Roach, 'Disenfranchisement as Punishment: European Court of Human Rights, UK, and Canadian Responses to Prisoner Voting' (2017) 3 Public Law 450.

authority on linguistic grounds. The criteria of being such a moral authority has thereby already been determined in the theory. Normative authority, *of which the right to vote is a reflection*, comes with linguistic competence.[1003]

On this basis, arguing that prisoners ought to lose the vote, because, for example, in committing a crime 'they have broken their contract with society' to the extent that they lose a number of rights, including 'their right to vote',[1004] can be quickly dismissed. As a direct reflection of one's moral authority, voting is not a privilege to be earned. It is logically accorded on the basis of one's Godlet status. The other side of this is that it is not a privilege that can be lost while the basis of the right still persists. This logic leads to the conclusion that as long as one remains conscious and of medically sound mind, such that they are able to evaluate – to *have* preferences – they remain entitled to voting power. For *this* is the basis on which normative authority – and equality – was accorded in the first place.

For this first category of cases, where the theory itself can handle disagreement over what counts as a violation of the abstract rights, the matter is straightforward: *the outcomes are set by the theory, which can serve as guidance to the enforcing body.* Supposed laws which violate the entrenched provisions would be beyond the limits of legitimacy. Taken to its logical extreme, in this situation, they would be outside the power of the lawmaker, and it would be justifiable to strike them down.

8.4.3.2. Indeterminacy: Self-Policing Democracy

However, it must be recognised that the logic will not always be so clear cut. Indeed, given the complex issues which arise in rights conflicts, it is perhaps unrealistic to expect

[1003] For an expanded version of the logic underlying this claim, see the defence of normative equality in **Chapter 4, section 4.4.2.3**.
[1004] HC Deb, 10 Feb 2011 vol 523 col 494 (David Davis).

fundamental premises to lead to logically airtight cases in all but a handful of examples. Generally speaking, the further one moves away from the core mechanics of the majority process (equal voting weight and other institutions set out in **Chapter 5**) the greater the risk that the theory will be underdetermining. There are also likely to remain somewhat arbitrary decisions to be made concerning, for example, the number of signatures required to start the referendum process, what the upper limit on election or referendum campaign spending should be, or other administrative matters. The age at which individuals should be given the right to vote, if not resolvable through scientific evidence surrounding the age at which individuals are linguistically and mentally capable of making their own normative decisions (views which they can take mental responsibility *for,* not what we might perceive of as responsible *decisions*) would be another such matter.

It is *here* that Waldron's argument that disagreements should be resolved through the majoritarian process itself holds. Not because, as he holds, this is what is needed to respect disagreement itself (an argument shown to be incoherent, and more fundamentally beside the point), but because this is where the scope of the theory itself is *legitimately* up for grabs. This is another reflection of the logic behind the legitimacy of democratic entrenchment: the principles themselves are not up for grabs, but, in these cases, the specific *operationalisations* of them are. Allowing these decisions to be taken through the majoritarian process, even though they are decisions bearing directly on the conditions of democracy, thus does not fall foul of the case for limiting democracy set out above –on the positive side of the paradox being explored here.

Most likely, those coming to opposing judgements on these matters will conclude that the other side is allowing the violation of democracy, that they are therefore contradicting fundamental democratic premises *as they see them,* and thereby acting illegitimately. But,

as an internal matter, in these cases the current theory sees no contradiction; there *can be* no contradiction where the premises run out. In this context, assuming *some* decision has to be made, the only solution consistent with the core of these premises which *has* been determined is precisely the same as when collective decisions are required on other matters: the majoritarian process based on the principle of equal decisional weight.

Briefly, this could operate in practice through a modified version of "democratic dialogue" theory. On the classic version currently prominent in constitutional theory,[1005] the idea is that the rights-based decisions of the judiciary – most commonly the enforcers of constitutional restraints – are 'open to legislative reversal, modification or avoidance', by elected representatives.[1006] There are various versions, of differing strengths based on how much power is given to the judiciary as an initial matter. Canada is an example of a stronger model, combining judicial strike-down powers with a legislative override – the famous "notwithstanding" clause.[1007] At the formally weaker end, under the UK's Human Rights Act, courts merely have the authority to issue declarations of incompatibility, with no legal

[1005] Theories of dialogue abound in a number of jurisdictions. The seminal article, arising from the Canadian Charter, is PW Hogg and AA Bushell, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 Osgoode Hall Law Journal 75. In the UK, theories of dialogue have rose to prominence following the enactment of the Human Rights Act 1998. See for example: F Klug, 'The Human Rights Act -a "Third Way" or a "Third Wave" Bill of Rights' [2001] European Human Rights Law Review 361; AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) ch 5. For analysis of dialogue in the UK constitution more generally see AL Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017). For an application of dialogue theory to a range of countries throughout the Commonwealth see S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013); JL Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 Modern Law Review 7.

[1006] Hogg and Bushell (fn1005) 79.

[1007] Section 33(1) of the Canadian Charter of Rights and Freedoms (fn745). provides that 'Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15'.

effect on the legislation.[1008] Common to all versions of the theory, however, is the attempt to safeguard democratic legitimacy in a rights-regime through the existence of a 'formal legislative power to have the final word by ordinary majority vote'.[1009] The key underlying idea behind these institutional arrangements that may be put to use here is that the enforcing institution does not 'have a monopoly on constitutional interpretation'.[1010] Rather a judicial decision is seen as a contribution to public debate on the matter, guided by the broad values expressed in the rights provisions. In this debate, it is the democratic bodies, broadly representative of the electorate, that are given the final say. Thus, the constitution and the rights set out 'would not necessarily be whatever the courts', or any non-democratic body for that matter, say it is.[1011]

As presently envisaged, the dialogue idea is centred on the relationship between the political branches (representative legislature and executive) and the judiciary. In the majoritarian constitutional arrangement concerning the indeterminate rights envisaged *here*, this would be expanded to include individuals acting through direct processes of law-making, rather than purely through the legislature. The judgements of the courts (or whatever body is doing the enforcing)[1012] would be seen as a contribution to the democratic debate on the issue, with

[1008] Human Rights Act 1998 s 4. Similar arrangements have been introduced on a state basis in Australia. See, for example, Victoria's Charter of Human Rights and Responsibilities Act 2006.
[1009] S Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8 International Journal of Constitutional Law 167, 169.
[1010] C Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 Brooklyn Law Review 1109.
[1011] L Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617, 624.
[1012] This thesis has no real attachment to entrusting enforcement roles to legal institutions at all, although this is overwhelmingly assumed in the literature, most often without question. Enforcement *could* be entrusted to a political body, such as a parliamentary committee, for example, or perhaps even something resembling a constitutional jury – randomly selecting a group of individuals to determine whether there has been a violation of the entrenched provision. Indeed, a significant part of the political constitutionalist theory is that legal institutions, with their restricted forms of argumentation, are not well suited for effective resolution of the kinds of issues involved in the application of rights. See, for example, A Tomkins, *Our Republican Constitution* (Hart

the interpretation they reach being open to rejection by individuals acting directly through a collective majoritarian process. There is room also for a representative legislature – still a primary law-making institution on the theory developed – to contribute, and, given its superior democratic credentials in terms of its responsiveness to citizens, this contribution would as a matter of principle prevail over that of the courts. Ultimately, however, and crucial to this model, both the contributions of the courts *and* legislature would be subject to rejection or modification through the direct, and ideal, processes of law-making. This is fitting to the fact that both representative and judicial institutions are, to differing extents, inegalitarian and normatively elitist.[1013]

The above provides a practical, and principled way of dealing with the issue of indeterminacy that survives the rejection of the disagreement objection to putting the positive side of the paradox of democratic entrenchment into action.

Where the theory is, as an internal matter decisive as to how matters should be resolved – admittedly likely to be a rare, but not non-existent, occurrence – disagreement is not an issue. The enforcing body must apply the consequences of the theory. Just as the theory was clear in **Chapters 5 and 6** that a majoritarian process is necessary, it will sometimes be equally clear what violates that ideal. In cases where the limits implied by the theory are unclear – where the principle runs out, or a clear answer is yet to be worked out on the logic of the theory – the democratic process can and *should* be left to police itself. That means it must be left to the majoritarian system of decision-making developed in this thesis, in the same way as the vast majority of other decisions are left to this process. An expanded version of

Publishing 2005) 27–30; Waldron, *Law and Disagreement* (fn4) 290. This debate will not be commented on further here. What is key to the version of dialogue contemplated is that, on appropriate issues, the people have a means of asserting their final say, through a direct majoritarian process.

[1013] On the former, see **Chapter 5, section 5.6.2.1**.

democratic dialogue is a helpful way of conceptualising this system and the place of the various participants in a constitutional regime putting the principled case for limiting democracy into practice.

While some brief examples have been given to explain the logic set out, exactly *what* decisions would be subject to these arrangements is not something which can be exhaustively stated, and the examples which are given, are tentative.[1014] Going beyond this would require lengthy investigations of a range of rights, applying the core premises developed to various debates. This large-scale task can only be carried out incrementally, and, for these reasons must fall outside the scope of this thesis. In the meantime, what is offered is a framework and way of thinking which can be used for this task, should the principled case for entrenchment in the context of protecting and furthering democracy itself be accepted.

8.5. Leaving the Paradox? A Contextual Way Forward

Both sides of the paradox have now been pursued to show what a principled, sceptical, embracement of each line of logic would look like. Contrary to some democratic critics, we have seen that the positive side – the side in favour of the principled case for democratic entrenchment – *can* offer a practical way forward consistent with democratic principle.[1015] That was, albeit tentatively, sketched in the last section. To some, however, this embracing

[1014] There may, of course, be room for doubt over which category a situation falls within, even among those who accept the tenets of the sceptical theory presented here. In such situations, it would be safer to exercise caution. This effectively amounts to a heavy presumption in favour of the democratic process, but this is indeed in line with the democratic outlook at the centre of this thesis.

[1015] The consequences of the negative side of the paradox – rejecting the democratic argument for the legitimate limiting of democracy – were set out in **section 8.3.1.1**.

of the paradox of democratic entrenchment might seem unhelpfully indecisive. To that it can be immediately replied that this chapter has found that the principles themselves under-determine the question of democratic entrenchment, and this fulfils the scope of this thesis: *a principled exploration of the consequences of scepticism for constitutional theory*. Thinking of a way forward, however, perhaps it is worth asking where else one could take the sceptical constitutional theory. Where the principles run out, where does one go for their constitutional theory? There are a number of avenues one could pursue.

8.5.1. A Contextual Approach: Needs Must

In recognition of the limits of the principled case, one could appeal to practice and context: are entrenched limits to decision-making, for the collective at hand, *needed* in order to preserve its democratic institutions? This way forward has the advantage of appealing to the common goal of the both the democrats who take the positive, and those who take the negative, sides of the paradox – the maintenance of democratic legitimacy.

It may be that in some areas, with a longstanding commitment to democracy and an ingrained political culture reflective of democratic values, entrenchment would be superfluous. Perhaps in these places, democracy can be self-policing, with enough resources outside of entrenchment to maintain the ideal of democratic decision-making with its core respect for political equality. In other places, where democratic institutions have not been in place long enough for a strong political culture to take hold, and/or where there is a minority

group to whom the majority have consistently sought to deny full citizenship, or even actively persecuted,[1016] entrenchment may be necessary to preserve the system.

This possible way forward bears some structural similarities to Heinze's overall argument concerning the regulation of hate speech. In this argument, Heinze invokes the concept of *Longstanding, Stable, and Prosperous Democracies* (LSPD) – systems which perform strongly on democratic indices such as "electoral process", "functioning of government", "political participation", "political culture" and "civil liberties", for example.[1017] The key idea is that in such LSPDs, the system – through formal and informal channels – is capable of protecting against the harms of hate speech against vulnerable groups 'without having to impose viewpoint-selective penalties within public discourse', which Heinze firmly rejects as counter to the basis of democratic legitimacy.[1018] The forces behind such harms 'by no means disappear', but a 'sufficiently democratized society' is robust enough to deal with them, and offer the required protection, without leaving the realm of clear democratic legitimacy.[1019] In systems lacking this robustness, hate speech bans *could* be justified as a security measure, as contextually necessary. They *may* be appropriate given that these systems 'cannot always be expected to fulfil the totality of their legitimating conditions as easily as LSPDs'.[1020]

The core similarity to the approach being considered as a way forward from the paradox of democratic entrenchment is the contextual stance that different systems require different

[1016] The systemic persecution and campaign of violence against Rohingya Muslims in Myanmar provides a particularly acute example such treatment of minorities. See Human Rights Watch, 'Myanmar: Events of 2018' [2019] *World Report 2019* <https://www.hrw.org/world-report/2019/country-chapters/burma> accessed 26 March 2019.
[1017] Heinze (fn412) 70.
[1018] ibid 72.
[1019] ibid.
[1020] ibid 71.

approaches to achieving the ideal of a flourishing democracy. Some states might require a regime of democratic entrenchment in order to combat the anti-democratic forces threatening the survival of a system even resembling the democratic ideal in any meaningful way. Others may be found, upon analysis, to be more likely to be able to deal with anti-democratic forces within a regime of strong, ideal democracy, without resorting to anything which could be seen as democratically dubious, and without unleashing the paradoxes at the fore of this chapter. In the former, contextual considerations may point to entrenchment as the way forward in order to achieve the core values underlying the democratic ideal, and grounding both sides of the paradox. In these circumstances, it could serve as something of a tie-break, suggesting that there is a greater justification for entrenchment of the institutions of democracy.[1021]

8.5.2. Putting the Idea to Work: Operationalising a Contextual Approach

It should be noted that for this approach to operate effectively and persuasively, it would seem to require a number of preliminary issues to be satisfied. Most obviously, the standard of measurement of the strength of a "democracy" must be set. What does it mean for a state to be "sufficiently democratic" to be classed as something like an LSPD in the first place? Heinze provides an account of the core components of an LSPD which might be of use here.

[1021] If made out, this would be a case even Waldron himself – otherwise ardently on the anti-entrenchment side of the paradox – would seemingly accept. In a later iteration of his argument, he noted that his "core case" against judicial review is dependent on a number of assumptions, such as that there exists 'democratic institutions in reasonably good working order', including, for example, 'universal adult suffrage' and a commitment to rights (Waldron, 'Core of the Case' [fn642] 1360). His argument is, he declares here, 'relative to these assumptions' (ibid). Where his assumptions do *not* hold, Waldron is willing to contemplate the tempering of democratic majoritarian decision-making (1401-1406). Thus, for all of his anti-entrenchment objections, Waldron might be said to have come to endorse something like entrenchment through the back door: particular conditions are entrenched in the presuppositions of the theory. The immediate point, though, is that if successful the contextual line set out in the text would seem capable of persuading even the most ardent of majoritarians. It thus seems capable of bridging the paradox.

For example, "longstanding" is used to refer to 'an era during which norms, practices, and expectations of democratic citizenship penetrate a substantial portion of the population'.[1022] In short, there is a robust 'democratic culture' at the core of the system.[1023] "Prosperous" is used to refer to a state 'sufficiently wealthy to assure adequate measures against violence and discrimination, as well as means of combating intolerance and protecting vulnerable individuals'.[1024] "Stable" refers to a democracy 'able to police itself', in order to maintain protections for individuals.[1025] To be of use, criteria such as this must be further operationalised: *what are the indices* of these qualities, and, more fundamentally, what is the *standard* used to develop these?

There are a number of resources one could turn to for this, most obviously in the realm of political science. The *Economist's* annual *Democracy Index* might be of use in its ranking of the democratic credentials of states on a number of criteria including those listed above (e.g. "political participation", "political culture", "civil liberties" and the like).[1026] Its category of "full democracies" versus "flawed democracies" might indicate systems robust enough to do without democratic entrenchment. The precise measurements and criteria used by such indexes would need attention. Disagreement over what should attract a high score on the "civil liberties" or "political participation" fronts will presumably arise as they do over those ideas directly among theorists and others.

[1022] Heinze (fn412) 72.
[1023] ibid.
[1024] ibid 73.
[1025] ibid.
[1026] Economist Intelligence Unit, 'Democracy Index 2018' [2018] *The Economist* <https://www.eiu.com/topic/democracy-index> accessed 9 March 2019. See also Dahl's extrapolation of five ideal criteria to judge political systems by according to his theory of the democratic process: effective participation, voting equality, enlightened understanding; control of the agenda, inclusiveness (Dahl [fn445] 8).

Disagreement, as noted above, might thus be thought fatal to the principled operation of this task going forward. A contextual approach might be dismissed as another incarnation of what Waldron sees as dubious instrumentalism, unable to be put into practice without disrespecting the capacities of individuals who disagree (see above, **section 8.4.1**).[1027] Such objections from disagreement are not necessarily detrimental to the task at hand, however. As set out in relation to enforcement, disagreement moving from the abstract to the specific is not itself an issue as long as one is armed with a theory of democracy that is, from the internal perspective, decisive on these matters.

That is a matter of democratic theory, but further work would still be required to put these measurements to use in the entrenchment context. Empirical data, suggesting what qualities are conducive to the maintenance of a theoretically ideal democratic system, and crucially, the *impact of entrenchment on those qualities* would be essential if this way forward is to come up with practical answers. This is especially so given that logical, theoretical arguments can be made in several directions as to the likely impact of entrenchment on these matters.

Recognising that the maintenance of a democratic system must, ultimately depend on *people being willing to uphold such a system and to respect its values,* one might mainly concern themselves with the effect entrenchment has on a political culture. Is entrenchment conducive to a culture in which a meaningful attachment to the core values of political equality and responsiveness thrives among citizens? A plausible case that it is, or is likely to be, could draw on the expressive value of entrenchment and its symbolic role in society: entrenching the values most fundamental to democracy might itself be an effective means

[1027] See also Waldron, *Law and Disagreement* (fn4) 252–254 ('The Trouble With Rights-Instrumentalism'); Waldron, 'Core of the Case' (fn642).

of fostering a recognition of their importance among citizens – something of a state-signalling effect.[1028] Alternatively however, it could just as plausibly be the case that, as one commentator suggests, rights gain their most effective power from an air of vulnerability, leaving them as values which must be fought for, and sparking a sustained concern among citizens, ready to mobilize where needed. In contrast, entrenchment might send out the signal that these matters are safe, thereby having a 'rest on our laurels' effect on a democratic culture.[1029] This would end up being counterproductive to the fight for democracy, rendering a political culture less able, and less *willing*, to stand against anti-democratic tensions within.

Thus, another difficult symmetry of logic may arise in the attempt to move beyond the symmetry of principle underling the paradox of democratic entrenchment. To be a practical way forward from that paradox this theoretical dispute must be capable of convincing resolution. Perhaps the most obvious way to cut through these competing lines of logic – both of which seem plausible – would be to construct an empirical investigation, comparing systems with and without entrenchment in terms of their democratic cultures. Potentially useful quantitative data might already exist on this. Perhaps it is noteworthy, for example, that the latest Freedom House Report shows that seven of the ten most highly ranked countries do not have an entrenched Bill of Rights.[1030] This forms the basis of Jeff King's strong misgiving about the argument that entrenched charters are instrumental to better rights protection.[1031] Such data might likewise give some food for thought for those who

[1028] On the expressive value of entrenchment see Albert (fn997) 699–700. See further above, **section 8.4.3**).
[1029] Honig (fn800) 800.
[1030] Freedom House, 'Freedom in the World 2018' <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> accessed 9 March 2019. See further King (fn51) (forthcoming).
[1031] See King (fn51). There is a vast literature on the consequences of strong judicial review for rights outcomes, which might be of some use where the rights integral and essential to democratic legitimacy are concerned. However, work must be done in disentangling the judicial review and entrenchment issues which, as noted in the previous chapter, are conceptually separable.

suggest that entrenchment is likely to be conducive to a more ideal democratic culture. In this task, complex issues of causation would need to be dealt with: is entrenchment, or the lack thereof, instrumental to a particular culture, or was the political culture such that entrenchment, or its absence, was the result? If a lack of entrenchment works in one culture, will it necessarily work in another? What other contextual factors are in play? If not the empirical route, then perhaps psychological and sociological theory concerning the likely thought-processes of individuals and societies could provide a weaker, but still useful, indication of which of the two plausible logics is more likely in practice.

All of this, of course, is very far from the scope of this thesis. The point here is merely that there *may* be a productive way forward out of the paradox of democratic entrenchment for those inclined to take it. Any such task must be left for another day.

8.6. Conclusion

The structure of the investigation presented in these final two chapters on the topic of entrenchment reflected its exploratory nature, raising new lines of enquiry to be pursued along the way, and following through on the logical consequences and further lines raised by those results as far as space would allow. The result has been a complex and detailed trail through constitutional and political theory. It seems especially important, then, to return to the broader picture and draw together the key findings from both chapters which together from a sceptical take on the topic of entrenchment.

From this, the following conclusions can be drawn: entrenchment is, generally, to be objected to as a violation of the principles grounding majority rule. It is however, to be accepted – even welcomed – where the entrenching device is a referendum, aiming to limit

representative institutions within a dualist system where the power to trigger such a referendum rests with individuals directly. This qualification applies whatever the subject matter of the provision concerned. How far the democratic objection goes is less clear cut, however. As a matter of principle, equally compelling cases can be made that the democrat would be at liberty, and perhaps required, to reject even a democratic attempt to move away from the majoritarian system of decision-making as illegitimate *and* that this would conflict with the democratic principles on which it is supposedly made, thereby rendering itself illegitimate.

Following on from the previous chapter, setting out the prima facie democratic case against entrenchment generally, this chapter continued the task of testing this case in a number of specific contexts. Primarily, its purpose was to explore the possibility that the democratic objection could be overcome, and a positive, persuasive case for entrenchment made, *where the conditions of democracy itself are involved in the substance of the provision*. This is what was termed *democratic entrenchment.* This exploration revealed a paradox going to the very heart of the concept of democratic entrenchment: where the fundamental institutions and processes of democracy are concerned, a principled case can be made both for and against entrenchment. A compelling case for limiting democracy in order to achieve the very ends for which it is valued in the first place was found. Its compelling nature arises from the fact that it is an instrumental case of the same nature and based on the same values as the case for majoritarian democracy itself, and, crucially, the case *against* entrenchment in other contexts.

On the one hand, this principled case establishing the limits of democratic legitimacy would seem to undercut the general objection to entrenchment. It shows that, in this context, entrenchment can serve the very values that concern the anti-entrenchment democrat.

Entrenchment of the institutions and principles of democracy itself can thus be seen as democratically justified, even necessary, on their own logic. On the other hand, however, if this logic surrounding the values of political equality, and its necessary conditions works at all, it works just as well the other way too. If undermining political equality *is* a problem that undermines the legitimacy of a system, and allowing the violation of equal decisional weight *is* to undermine political equality, then the legitimacy of a system of entrenchment is itself undermined. Thus, the undercutting logic cuts in both directions – *both for and against* the legitimacy of democratic entrenchment.

This realisation is enough to dismiss two extremes regarding the democratic case for entrenchment: the democrat is neither committed to, nor prohibited from, supporting or rejecting the legitimacy of democratic entrenchment. This is similar to the conclusion reached, in the previous chapter, on the effect of democratic provenance. There it was seen that the majoritarian democrat is neither committed to accepting nor rejecting a vote to entrench as a legitimate outcome of the democratic process to be brought into force. A principled case can be made either way.

In light of the arguments made in this chapter, more can be said on that issue. Taking the negative side of the paradox – *rejecting* the argument establishing the entrenchment of democracy as democratically legitimate – means that one is committed to accepting a democratic vote to entrench as an outcome which must, on democratic grounds, be put into force. Rejecting that vote would either conflict with democracy itself, on this interpretation, or lead one straight into the principled case *for* democratic entrenchment after all. Thus, accepting the negative side of the democratic entrenchment paradox would, in certain circumstances, lead to an uncomfortable, but principled acceptance of entrenchment. To some this might seem uncomfortable to the extent of being itself paradoxical. However, the

tension is dissolved by the consistency of the democratic principle at play. It is only where one rejects the legitimacy of a democratic vote to entrench while *also* rejecting the logic of democratic entrenchment that a contradiction arises. This is because limiting the process against entrenchment is itself a form of entrenchment. Seeing the limitation of democracy against a vote to entrench on general matters as justified thus commits one to the logic of democratic entrenchment, and thereby to accepting the legitimacy of a whole host of specific entrenchments where the democratic process is at stake.

In exploring how far taking the positive side of the paradox in this way would go, it was seen that accepting the logic of democratic entrenchment quickly commits one to the entrenchment of a whole host of matters. Most obviously this includes entrenching the core features of the legitimate majoritarian process itself, as described in previous chapters. Political equality expressed through a universal franchise, and maximum responsiveness as expressed through the right to petition for decisive citizen initiatives would fall into this category. In theory, the rights and interests essential to the exercise of these directly democratic rights, and essential to the achievement of their underlying values – political equality and maximal decisiveness derived from moral scepticism – would also need to be entrenched.

Thus, a, perhaps surprising, line of argument from a radical moral scepticism to an enthusiastic entrenchment of a number of fundamental rights, will, on this logic, have been established. This runs counter to the orthodox view of fundamental rights as inherently realist or objectivist in nature, and even more so to the view of moral scepticism as a dangerous, destructive philosophy. This sceptical rehabilitation of the way we conceive of rights – repackaging "human rights" as *participation guarantees* is something that can be explored in future work. Indeed, working out the full-scale implications of this argument –

exploring what rights can be argued for on sceptical grounds, and delineating their precise content – is a large task, apt for a lifetime's worth of fruitful work.

Some thoughts were also offered on further operationalising the idea of democratic entrenchment, setting out a sketch not only for its content, but also for a legitimate system of enforcement, sensitive to the complexity of the issues involved in balancing rights and the indeterminacy of abstract principle. While these sketches were necessarily brief, what is offered in this chapter are the means through which more thorough accounts can follow, again in future work.

In any case, the demonstration of the paradox of democratic entrenchment is itself a significant conclusion for analytical political philosophy. It gives us reason to question the common assumption that majoritarians must be categorically opposed to entrenchment on democratic grounds, as seen in the apparently unbridled majoritarianism of Jeremy Waldron or James Allan, for example. However, it gives us just as much reason to question those who claim to have found a decisive democratic case in favour of entrenchment, or who seek to embarrass the anti-entrenchment democrat as fundamentally inconsistent, failing to take their own values seriously. Analytically, a wholehearted attachment to the principles of majoritarian democracy is capable of supporting either side of the democratic entrenchment debate. Furthermore, focussing on the account of the positive case for democratic entrenchment provided in this chapter, we have further reason to reject the idea of majoritarianism as a threat to, or incapable of supporting, anything other than a crude, statistical vision of democracy, where what are commonly seen as fundamental rights and interests are left to the mercy of temporary majorities (it will be recalled that this is part of

the criticism made by Dworkin as set out in **Chapter 6**).[1032] The conclusions of this chapter ought to give food for thought to both sides of the debate in this area.

The finding that there is a fundamental paradox at the heart of the issue of democratic entrenchment may seem unfortunately indecisive, but it is nothing to be disappointed at in the context of a thesis whose task it is to explore the consequences of the perspective taken, wherever they may go. However, it does still raise the legitimate question of whether and how one might choose between the two principled cases found. While answering this question is, strictly speaking, outside the scope of this thesis, a possible way out was flagged. A contextual approach to entrenchment, sensitive to the particular conditions and political culture of the society at hand was briefly explored. This would be to ask when entrenchment might be justified in order to maintain an effective democratic system, and when it might be superfluous, or perhaps even counter-productive. While offering a *potential* way out of the paradox – effectively breaking the tie of the principled cases of democratic entrenchment – developing and operationalising this contextual approach would be a complex, multi-faceted task, requiring a number of empirical or sociological investigations. Even then, the risk is that one would return empty handed. Again, this is something which could be explored in future work.

[1032] See **section 6.3**.

Chapter 9

Conclusions

'My abyss speaks, I have turned my ultimate depth into the light!'

(Friedrich Nietzsche)[1033]

9.1. Out of the Abyss: The Roads Travelled

9.1.1. The Core Thesis

This thesis has traced a clear route from moral scepticism through to normative and political theory, and, further, into constitutional theory. I therefore submit that this thesis has delivered on the task it set for itself in the **Introduction**, and its key purpose: to provide a significant contribution to constitutional theory grounded in moral scepticism and its fundamental features, with an effort to rely on as few external assumptions as possible. In this sense, the arguments and conclusions offered along the way, I contend persuasively grounded in the tenets of moral scepticism, can be aptly described as together forming a *sceptical contribution to constitutional theory.* These offerings, while often theoretical in nature, I submit, also practically demonstrate my core thesis: *that morally sceptical, anti-foundationalist philosophy has significant, constructive, and positive contributions to make to constitutional theory.*

[1033] F Nietzsche, *Thus Spoke Zarathustra* (RJ Hollingdale tr, Penguin Classics 1969) 233.

The road to this conclusion has also been wider than that, however, most obviously leading the sceptical perspective to some firm conclusions in moral, political, and most prominently democratic theory. The results will, it is hoped, be of interest to constitutional lawyers, and philosophers alike. The significance of the contributions made by this thesis will be reflected upon further in a moment, but first a summary of precisely how it has sought to establish that contribution, and how the chapters come together to establish the core thesis above, is in order.

9.1.2. The Road from Nowhere: From Scepticism to Constitutional Theory

The task began with a summary of the core moral sceptic perspective at the heart of this thesis (**Chapter 2**). The key contribution of this first substantive chapter was to elaborate and develop the sceptical perspective in enough detail so that it could be applied in the chapters which followed. Particularly crucial is the account of the linguistic anti-foundationalist grounds on which it is held – drawing heavily on strands of the work the pragmatic philosopher Richard Rorty. This fundamental logic, drawing attention to the ubiquity of language and dropping the idea of any extra-linguistic basis constraining the validity or acceptability our ultimate moral premises, was central to the arguments which followed concerning the consequences of scepticism.

Before those could be set out, the suggestion that moral scepticism is an inherently destructive, debilitating perspective was tackled head on in **Chapter 3**. If well-placed, this characterisation of moral scepticism would clearly have been detrimental to the prospects of this thesis – the sceptical perspective would be shown to be incapable of contributing positively to *anything*, never mind constitutional theory. Fortunately, it was concluded to be fundamentally misguided, revealing more of the thoroughly realist framework, and other external presuppositions, of those who put it forward than of moral scepticism itself.

Bringing matters back to the sceptical perspective – with its thorough rejection of the realist-foundationalist project – these attacks miss their target. The consequence of moral scepticism is not, or *need not be,* a debilitating nihilism as caricatured by realist critics.

Chapter 4 started the process of *demonstrating* this point further, setting out what the positive consequences of scepticism *are*. It began by exploring the existing accounts provided by two theorists whose philosophies overlap to some extent with the perspective of this thesis. Both James Allan's and Richard Rorty's accounts of the consequences of scepticism for normative and political theory were examined in detail. They were both criticised on a number of substantive grounds, but the key criticism made of both in equal measure was of the disappointingly tired and retiring view of moral scepticism and its relevance to normative theory they share. Both accounts were seen to express the view that moral scepticism, with its rejection of objective moral reality and higher order moral constraints, has little, *if anything* worthwhile to say within normative theory. Both saw the moral sceptic perspective as, at best, useful for *framing* substantive debates, and freeing them from the dubious artefacts of moral realism, but with nothing themselves to add.

While this thesis criticised these accounts as disappointing, it was seen that both theorists would likely reply that it expects too much of moral scepticism and seeks to put it to uses it cannot serve. This reveals a significant difference on the value and consequences of scepticism – on the role scepticism can play in normative and political discourse. While it is frequently thought that anti-foundationalism has nothing to offer political theory in terms of positive substance, this chapter contended that scepticism can play more than a merely framing role. Rather, it can play a persuasive and constructive role in supporting stances *within* normative and political theory.

After making this point as a matter of theory, the chapter moved on to laying the groundwork for its demonstration. Applying the method of drawing out the internal implications of the fundamental logic of the form of moral scepticism developed here, to the exclusion of external assumptions and values, led to what was termed the *Godlet Conception*. In the absence of objective moral reality, the individual becomes the constituting force. Viewing morality as the construct of language, and with God (which can be taken as a metaphor for an independent and constraining moral reality) out of the picture, the individual steps into the metaphysical shoes God once filled. That is, the rejection of the realist-foundationalist project, on the linguistic grounds set out in **Chapter 2** leaves the language-bearing individual in a position of evaluative freedom. Like God's, their utterances become performative, constituting morality through their linguistic descriptions.

This forms one key component of the Godlet Conception – what can be termed the "authoritative aspect", but which can also be seen as a form of *anti*-authoritarianism, in the sense that it rejects the idea of moral authority external to the individual. The Godlet Conception, putting the individual at the centre, can therefore be seen as the result of taking the metaphysically anti-authoritarian strands of anti-foundationalist thought truly seriously. On this view, the anti-authoritarian revolt, seeking to 'wrest power from God…or to dispense with the idea of human answerability to something nonhuman' which Rorty identifies with pragmatism, is finally complete – taken to its appropriate conclusion.[1034]

The second component – which it was argued follows directly and persuasively from the same linguistic premises – is what was termed "normative equality". This holds that each individual has equal normative force, on the grounds that they are, through the power of

[1034] Rorty, *Truth and Progress* (fn63) 143. The anti-authoritarian links drawn by Rorty were discussed further in **Chapter 4, section 4.4.1**.

language, equally constituting of morality. History is full of means of distinguishing between individuals' moral worth or authority and creating hierarchies, but these were rejected as requiring one to step outside the sceptical perspective itself, or to introduce distinctions which are not relevant to the basis of the Godlet's authority on moral matters. This Godlet Conception, and, crucially, the argument grounding it in the sceptical perspective was the key contribution of this lengthy chapter. It was argued that this conception, with its central values, follows more directly and more persuasively from the sceptical perspective than the accounts offered by Allan and Rorty.

Given the centrality of this conception to what followed, and the nature of the argument used to support it – which saw the key method of this thesis in action – this chapter can in a sense be seen as the core of the thesis. It also gave us the tools with which to diagnose the logic which led Leff to his despair. For Leff, in these circumstances of evaluative freedom there simply could not be *any* legitimate normative authority, and no defensible system.

Chapter 5 showed a way out by offering an account of legitimate decision-making authority grounded in the Godlet Conception, and compatible with the logic that led Leff to his debilitating conclusion. Majoritarianism, through its quality of maximal decisiveness – ensuring maximum decisional weight for each individual compatible with an equal amount for others – accords with both aspects of the Godlet Conception. It reflects the paradoxical fact the individual is, on linguistic grounds, *the* moral authority, but on an equal basis to others. This *is* a paradox, but it is one which majoritarianism renders *stable*. Majoritarianism is an approach to political authority which respects all sides of the logic which drove Leff to his overwhelmingly negative conclusions, while also offering *a* way forward for collective decision-making. It is thus to be commended as a principle fit for the Godlets, and for a constitutional system grounded in sceptical philosophy. With a nod to practicality, an

account of how this could work was offered, combining elements of both representative and direct democracy. However, the ideal firmly remains a directly responsive system, in which individuals themselves take the decisions. This follows directly from the Godlet Conception itself.

Chapter 6 further defended this sceptically-grounded majoritarianism from some problematic criticisms. This included the ancient "ignorance of the masses", elitist, rejection of the political equality at the heart of majoritarianism. A thoroughly sceptical response was offered, arguing that this objection falls away once one exposes its necessary moral realist foundations. Another criticism responded to, while not going as far as rejecting the idea of equal decisional weight entirely, objected that it amounts to an implausibly narrow and incomplete picture of equality, in turn leading to a "crude", "narrow" democracy. It was responded that the conception of political equality within majoritarianism most obviously reflects the normative equality which follows directly from the morally sceptical perspective and the logic set out in **Chapter 4**. This is not to say that other, more substantive, values might not follow from this however, as Dworkin assumes in his criticism, but only that any further values must themselves be derived from the core premise of normative equality. Ironically, this follows the broad logic and structure of Dworkin's own arguments from his differing conception of equality as equal concern and respect. The key contribution of **Chapters 5 and 6** taken together, then, is to establish a positive sceptical approach to legitimate decision-making authority. This is found in the principle of majoritarianism.

Chapters 7 and 8 continued the move into core constitutional theory by addressing the topic of entrenchment. To the majoritarian democrat, the principled case against entrenchment seems straightforward, and indeed **Chapter 7** set out a prima facie objection to entrenchment based simply on the same factors which led to the argument for majoritarianism in the first

place. This is hardly surprising given that, on the account of the concept set out there, entrenchment *by definition* involves a move away from the ordinary majoritarian process. On close inspection, however, matters were seen to be not so clear cut.

First, applying the democratic case against entrenchment to the institutional context supported in this thesis – combining both direct and indirect elements – required an immediate qualification on that case. Where a directly majoritarian form of entrenchment – a referendum – is used to constrain representative law-making authority, the democratic case against entrenchment does not apply. In fact, such entrenchment can be seen as desirable once the democratic ideal as accounted for in **Chapter 5** is recalled. That is, once representative law-making is put firmly back into its place as a fundamentally elitist and inegalitarian institution.

This chapter also addressed the difficult issue concerning the appropriate response to a democratic decision to entrench. Is the democrat obliged to accept such a decision, and what would that entail? It was shown that while a democratic decision to entrench cannot alleviate the principled criticism of the resulting political inequality, the issue of its *legitimacy* is up for grabs. Two equally plausible lines of logic were found, showing that the majoritarian could justifiably both accept *and* reject the legitimacy of a democratic decision to entrench. The logic as to why that is was central to **Chapter 8** which explored the idea of *democratic entrenchment* in detail. It was seen that when it comes to the entrenchment of democracy itself, there exists an intriguing paradox in the majoritarian principle: entrenchment of the institutions of democracy can be seen as both required and prohibited by democratic principle. The principle cuts both ways; it is both legitimacy-giving and legitimacy-robbing.

Bearing this in mind, the next logical step was to consider where each side of the paradox would go. A particularly surprising result, given its reputation as a dangerous political

theory, is just how far the positive side of this paradox can go in deriving limits to majority rule. It was seen that a whole host of not only civil and political, but also social rights and principles can be quickly derived from the majoritarian principle itself.

Given the complex and multifaceted nature of the argument on entrenchment, it is perhaps especially important to be clear: the argument is not that democracy *requires* entrenchment – which would seem to require one to forgo their majoritarianism entirely – but that they are not *necessarily inconsistent* in all circumstances. There is a strong prima facie case against entrenchment generally, but democratic entrenchment *could* be justified, or it *could not*. If one wants a tie-break to try and escape the paradox, this chapter sketched a possible practical way forward, tuned to context: where it is found that the system at hand has a strong enough democratic culture to sustain itself, the principled case *against* democratic entrenchment gets stronger – it is unnecessary to take this, on some lines, democratically dubious step. Where the opposite is clear, and entrenchment is needed *practically*, the positive case *for* democratic entrenchment should be emphasised. What is bridging all propositions here is that they are instrumental to the same end of a thoroughly principled and practical democracy in which individuals are given maximal decisional-weight in collective decisions – a vision of political empowerment appealing to the sceptic.

9.2. How Far We Have Come: Reflections on the Road from Nowhere

In light of the above, I submit that this thesis has provided a positive account of the consequences that can flow persuasively from a radical, thoroughgoing moral scepticism. What initially appears to be a destructive philosophy, one that is for many defined by its negativity, has been put to constructive use. This can serve as a sharp rejoinder to those who warn of its useless or otherwise dangerous nature. In fact, on the account provided in this

thesis, and again contrary to its reputation, moral scepticism not only allows one to hold to widely-cherished values such as democracy and equality, but actively, and *enthusiastically*, supports such values. Indeed, a sceptical backdrop renders the case for these values a particularly strong one. To my mind, this is far from the destructive – either in the sense of debilitating, or otherwise dangerous – or supposedly denigrating implications warned by critics. It is certainly far from the apocalyptic vision set out in the **Introduction** (although this was admittedly somewhat of a caricature, it was grounded in the kinds of claims which critics *do* in fact make about moral scepticism, all of which, I contend, are not made out in theory, or practice).

This positive contribution and message about the constructive capabilities of moral scepticism has consequences beyond constitutional theory, but this thesis has, in the process made significant contributions here also. This thesis has developed a sceptical approach to democratic legitimacy, finding a way through some controversial debates along the way: how best to operationalise the democratic idea; the merits of direct vs indirect democracy; a thoroughgoing response to elitist dismissals of the democratic ideal, which, it is contended, is only strengthened by the open embracing of moral scepticism (in contrast to the existing responses of democrats like Waldron and Estlund who appear unwilling to take this leap); responding to rejections of majoritarianism as crude or narrow, as well as providing a *decisive* case for majority rule over other forms of decision-making grounded in political equality. Thus, the sceptical perspective and the bridge into political and constitutional theory has been successfully put to work in cutting through a number of significant issues.

The theoretically multi-faceted issue of democratic entrenchment is one area where the principles seemed to run out. However, the conclusion there that the democratic principle – and its underlying values – is Janus-faced, paradoxically providing a strong case both for

the acceptance and rejection of the legitimacy of this device, is itself significant for analytical political philosophy. It gives us reason to reject both democratic extremes on this issue. Waldron's wholesale anti-entrenchment case, which leads him to a somewhat uncomfortable commitment to accepting majoritarian moves away from his prized democracy itself, was shown to be theoretically coherent, but by no means mandated. Likewise, Dworkin's dismissal of such a stance as contrary to "real" democracy, or else fundamentally self-defeating was rejected. Both cases are too extreme and absolutist. In contrast, this thesis contends that a more plausible conclusion is that the principle itself is underdetermining: it all depends on what side of the paradox one takes. Pursuing the opposing sides of the paradox also resulted in some significant discoveries: the idea that a radical moral scepticism can, rather quickly, and rather enthusiastically provide a *principled* basis for fundamental rights, is a significant and interesting one, given that rights are most often linked to the project of realist-foundationalism, and indeed are often seen as threatened by the suggestions of moral scepticism.

9.3. Roads to be Travelled: Continuing the Road from Nowhere

That last suggestion of the possibility of a rigorously sceptical foundation for fundamental rights – or what, in recognition of the metaethical baggage of that term, are perhaps better described as *sceptical guarantees* – raises an exciting line of enquiry to be pursued in future work. What rights might follow from the sceptical perspective? What rights do Godlets have? What is their content, and how ought they play out in practice? Answering these questions seems a fruitful, no doubt lengthy task to be pursued over the coming years.

On a similar note, while I submit this thesis as presenting a significant contribution in bridging sceptical philosophy and constitutional theory – and other realms in-between – I

also see it as a necessary part of a broader task. The road to something resembling a thoroughgoing, wholesale, constitutional theory is a necessarily long, and no doubt challenging one, and there is much exploring yet to be done. The bridge into constitutional theory constructed, and particularly the normative implications of scepticism drawn out in earlier chapters, provides a framework through which further issues of constitutional theory can be explored. This includes further issues of political, democratic, and constitutional theory beyond the core matters explored here, but the possibilities are also wider than that. The Godlet Conception, as a fundamental view of the individual and grounded in a philosophical worldview, seems capable of providing fruitful contributions to many areas of thought, and life. For any such future endeavours, at least some elements of the present work provide a useful groundwork. This section sets out a brief sketch of where this future might take the thesis within constitutional theory – a set of markers for future work in this area.

9.3.1. Unfinished Business: The Entrenchment Paradox

The conclusions reached following the lengthy exploration of the idea of democratic entrenchment in **Chapters 7 and 8**, left a further line of inquiry to be pursued in future. One possible route out of the normative stalemate which resulted from the finding that the majoritarian principle is underdetermining on the issue of democratic entrenchment, would be to move the inquiry onto more practical ground. There (see **section 8.5**), I suggested the possibility of a contextual approach, reformulating the question as one of when entrenchment of this kind is likely to be *needed, if at all, for the particular collective at hand, in order to effectively preserve a flourishing democratic system* – a goal of concern on both sides of the democratic entrenchment argument. In starting from this shared goal and moving to this more practical question of means rather than ends, the idea is that this

approach could offer a pragmatic, and productive way forward in the entrenchment debate. It is certainly worth trying in light of the conclusions reached in those chapters.

There is much work to be done in further formulating, setting up and executing this inquiry. As noted in detail in **section 8.5,** a significant issue which arises straight away is of how to operationalise such an approach. *How* would the likely impact, or effectiveness of entrenchment be assessed? What, *exactly*, would be measured and on what metric? The theories developed, and particularly the theory of democratic legitimacy and its ideal institutionalisation will be a starting point in informing these questions, although there is work to be done in fleshing this out.

Those are theoretical questions, but there are also empirical roads to consider. It may be informative to construct a comparative empirical investigation, for example, comparing the democratic cultures of systems with and without entrenchment, according to the indices developed. This might allow us to shift the focus from abstract logic and normative principle, which, as argued in this thesis, have been underdetermining. Is it noteworthy, for example, that seven of the ten most highly ranked democracies (according the Freedom House democracy index) do not have entrenched Bills of Rights?[1035] Existing indexes such as these, again themselves assessed from the theoretical outlook developed here, will likely be invaluable in this task.

There will, no doubt, be complex issues of causation, exacerbated by the idiosyncratic nature of constitutional democracies around the world to take into account with a project of this nature. How far this might impact on the usefulness of such a study and the practical comparisons drawn would need careful consideration. However, while this would be a

[1035] Freedom House, 'Freedom in the World 2018' <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> accessed 9 March 2019.

complex task, if possible, it would provide a potentially significant and valuable contribution to the debate, as well as an effective way forward from the issues raised in the course of this thesis.

9.3.2. A Sceptical Approach to Adjudication

Moving towards a more complete constitutional theory will also require a more detailed consideration of the role of judges, and the enterprise of adjudication, than it has been possible to provide in this thesis. While some brief thoughts were offered in **Chapter 8** (**section 8.4**) when discussing the enforcement of a system of democratic entrenchment, the issue of adjudication in a constitutional democracy more generally from the sceptical outlook needs sustained attention.

Several broad questions can be identified from the outset: how should we conceive of the judicial role in a sceptically grounded democracy? How ought the courts conceive of their role, and how should they approach their task? Both questions bring a broader inquiry into play concerning the relationship between judicial institutions and other constitutional "key players": once the courts have undertaken their allocated task, what should the consequences be? What responses are available to other players? How should we regard the output of the court? Ultimately, how much power should the courts have in a sceptical democracy, considering their notoriously "counter-majoritarian" nature? These questions tie into further areas of constitutional theory, involving the rule of law, and significantly, the separation of power in a constitutional system, which will also require attention (see further below, **section 9.3.3** for some research questions regarding the separation of powers in a strong democratic system, and conceiving of the role of the courts).

I have already begun some preliminary, published work in this area, reviewing one recent attempt to engage in detail with constitutional adjudication and metaethics.[1036] Tripković's book – *The Metaethics of Constitutional Adjudication* – does indeed provide some useful groundwork in this area.[1037] For example, the analytical work it contributes in identifying and elaborating various styles of judicial reasoning and their engagement with morality currently prominent in constitutional adjudication around the world, and particularly the deconstruction of their underling metaethical commitments, will no doubt provide a helpful starting point in developing a sceptical account.

Tripković's constructive work – seeking to develop a 'theory of ethical argument in constitutional adjudication that would be supported by sound understanding of value'[1038] – is of particular interest given the anti-realist, or at least realist-sceptical nature of his own metaethics. This metaethical theory he applies is, to use Tripković's words, 'cautious about presupposing mind-independently true moral answers, and even more cautious about developing a theory of constitutional interpretation from that premise'.[1039] While he is careful not to sell the resulting theory as a reading of constitutional adjudication *for* 'moral sceptics',[1040] Tripković's own philosophical leanings are very much on the non-realist side of the spectrum, making this a potentially valuable contribution in moving towards such a theory in future.

The review referenced above raises a number of issues and questions regarding both the content of the theory Tripković does offer, and the argument used to reach it, which it will be useful to consider further. Both the content of his theory of adjudication and his method

[1036] KL Murray, 'Book Review: The Metaethics of Constitutional Adjudication' [2019] Jurisprudence <https://doi.org/10.1080/20403313.2019.1694784>.
[1037] B Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2018).
[1038] ibid 6.
[1039] ibid 7.
[1040] ibid.

of argument fall into ethnocentric appeals to what "we" believe or think in "our" community, and how "we" think and talk about morality itself. Interestingly, such appeals are strikingly similar to those which came to characterise Rorty's later thought (although Rorty is only briefly mentioned in passing). The issues taken with such ethnocentric appeals, from the perspective of this thesis – including its connection with anti-realism itself – have already been noted (see **section 4.3**), but when put into the context of judicial decision-making, they come with an extra layer of legitimacy-based concerns. This further concern arises because Tripković's theory of adjudication requires that courts consider the question of which interpretation in the case at hand would best fit with "our" shared values – the ultimate goal of inquiry is to find a 'better understanding' of "our" constitutional identity.[1041] But w*ho decides* what "we" *really* believe in "our" constitutional community? Should the courts enforce their own (contested) interpretation of "our" constitutional culture?[1042] These issues need attention.

The consequences of such an ethnocentric form of argument for the nature of a project such as this are also noteworthy: Tripković offers what turns out to be 'a refurbished version of *what the courts have already been doing*', focussed as he is on reconstructing and remedying the flaws and confusions in *current* methods of reasoning he identifies.[1043] Indeed at times it seems as though Tripković supports his theory of value, and ultimately of adjudication, on the grounds that it helps us to "better" explain current approaches. But, as I put it there, this almost conservative account of justification can be questioned: 'Why does the conception of value have to be able to explain existing approaches, rather than future approaches having

[1041] ibid 224.
[1042] See further, Murray, 'Book Review: The Metaethics of Constitutional Adjudication' (fn1036) 7–9.
[1043] ibid 7.

to change – potentially quite radically – according to a better conception of value?'[1044] Put another way, '[i]f the courts really *have* been "getting morality wrong"' (as Tripković suggests they might be), 'why assume they have been getting their methods of adjudication even *broadly* right?'.[1045] My future work in this area will seek to pursue these questions and consider where a the sceptical approach, less constrained by a problematic ethnocentric focus such as this, might lead in the area of constitutional adjudication.

9.3.3. Balancing Power in a Sceptic's Constitution

Questions surrounding the role of the courts, and issues of legitimacy are interconnected with broader theories of the separation and balance of powers in a constitution. How much power should judges have in coming to complex balancing and morally laden judgements in a system in which individual empowerment and equal decisional weight are key concerns? How much power should they have vis-à-vis other branches of government? Elaborating further the idea of an expanded, multi-level "dialogue", briefly suggested in **Chapter 8 (pp371 – 373)** might provide a useful way of thinking through these questions. This framework was originally suggested as a solution to the issue of indeterminacy of potentially entrenched rights, as it might affect their enforcement. However, the issues it raises would seem more generally applicable, given that it is in effect a way of conceiving of the relationship between different bodies in the process of public decision-making.

As noted there, the idea of "democratic dialogue" currently prominent in constitutional theory (although not without some vocal doubts concerning the usefulness of the metaphor),[1046] is centred on the relationship between the legislature, executive and judiciary

[1044] ibid.
[1045] ibid.
[1046] See A Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66(1) University of Toronto Law Journal 83.

in a representative democracy. In light of the arguments of this thesis, however, an avenue to explore would be whether and how this idea might attractively be expanded to better take into account *direct* democratic input and the ideal role of the empowered individual. The intuitive idea would be that the judgements of the courts, as well as the elected institutions would be conceived of as contributions to public debate – significant, but ultimately advisory contributions, open to rejection or modification through an overarching direct democratic system.[1047] This would reflect the idea that both judicial and representative, elected institutions are, albeit to differing extents, inegalitarian in their distribution of decision-making power on moral issues, and thus normatively elitist. Trenchant criticisms have, however, been made of such an "advisory" conception of the judicial role.[1048] While these have been made in the context of a strong parliamentary system, in which the legislature conceives of judgments as advisory only, rather than the multi-level dialogue proposed here, their attacks on the very idea of reconceiving of the judicial role along these lines would need to be carefully considered.

Thus, the aim of this research would be to develop a theory of a *thoroughly democratic* dialogue, involving legislature, executive, courts, and ultimately people themselves in a meaningful and appropriate way. The precise roles of each of these institutions, and the mechanisms of this are areas to explore in coming to a more complete account of a democratised balance of power on the theory developed in this thesis.

[1047] For a broadly similar idea of recalibrating the way the authority of the US constitutional court is conceived - as subject to the higher authority of the people - see LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press).

[1048] See J King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2014) 30(1) Constitutional Commentary 101; T Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] Public Law 306.

9.3.4. Democratising the Executive

Another branch of government that will need further attention taking this thesis forward is the executive. As it stands, the thesis says little about this branch directly – focussed as it is on, first, bridging philosophy and constitutional theory, and then with the fundamental issue of legislative decision-making. While the above research will contribute something to this task, in terms of a broad framework through which to calibrate power between the different branches of the state and individuals, the form, role, and, crucially, accountability of the executive will require detailed attention.

The formation of the executive will be the first issue to consider: how would the executive be chosen? From whom, by whom, and through what process? It would seem logical to start with the familiar distinction between presidential and parliamentary systems. Intuitively, it would seem that the arrangement which places the choice of the holders of executive power, to some extent, *directly* in the hands of individuals would be preferable. In current terms, this would point to a presidential style system, with citizens electing the head of the executive directly, rather than the indirect system found in the UK for example. However, the by now familiar problems with representation from the account of democratic equality expressed in this thesis, might apply here also – that is, to a system of electing the executive. What the response should be to such a concern, and how far it might be possible to go, is for further research: how can the executive be democratised in a theoretically rigorous, yet practical way?

A particular issue which flows from these questions is the means through which the executive is held to account in a constitutional system. Mechanically, the way a government is formed, to some extent, entails the means of holding them to account – it identifies who the executive is immediately responsible to, and how accountability will initially operate. In

a direct system it will, ultimately, be the responsibility of individuals to hold the government to account. Most obviously, this would occur through a system of regular elections. However, a question to pursue will be how to strengthen the mechanisms of accountability further. What further points of direct input could there be to allow citizens themselves to hold the executive to account? Some initial possibilities might include, for example, "votes of confidence" among the electorate at large; a power to trigger public inquiries through citizen initiative; a popular (political) power to challenge specific government policies, and to have them put to public debate and choice.[1049] Generally, as a starting point, it would seem that many of the current methods of holding the executive to account in representative systems can be widened and strengthened on democratic lines, although again, this should not be taken to necessarily exhaust the inquiry – perhaps it is possible to imagine further transformation. Underscoring all of this would be the direct decision-making power of individuals through citizen initiatives, including, potentially, a power to trigger elections and votes on individual issues. This is all for future research, the purpose of which will be to investigate the possibilities for the democratisation of executive power.

9.3.5. Putting Parliament in its Place: Sovereignty in the UK Constitution

While the above lines of inquiry are fundamental topics of abstract constitutional theory, it will be instructive and potentially significant to bring the theories to a specific practical system. With this in mind, as well as taking inspiration from more directly democratic systems such as Switzerland, future research will seek to apply the theories and conclusions developed in this thesis, particularly regarding democratic legitimacy, to the UK.

[1049] See, for a suggestion along these lines, I Budge, *The New Challenge of Direct Democracy* (Polity Press 1996) 184–186.

This will involve a critical analysis and reconstruction of the UK constitution's apparent conception of democratic legitimacy, and in particular the basis and normative force of what has long been taken as its bedrock – parliamentary sovereignty. The goal of this inquiry will be to assess the democratic credentials of the UK system, and, further, to explore the possibilities of moving towards a more ideal constitutional arrangement in a normatively attractive but realistic way. What reforms can be introduced to unlock the UK's democratic potential?

This seems to be a particularly apt time to press these questions given that UK democracy has been at the fore of public debate and scrutiny in the midst of the Brexit process, and indeed is a significant part of the newly elected Conservative Government's manifesto. Indeed, I have already begun some preliminary work in this area, and plan to pursue further the issues broadly raised in my recent UKCLA blog post on Brexit and the second referendum debate.[1050] There, I made an initial attempt to broadly apply the theory of legitimacy developed in **Chapter 5** of this thesis to this contemporary political issue, including the arguments surrounding the normative relationship between direct and representative politics sketched in **Chapter 7.** As I noted there, Brexit was, and is, seen by many as a chance to reinvigorate UK democracy – to "take back control". How to achieve this – how to take this sentiment seriously – is a question that will be considered in the years to come, and it is precisely this question that arises from many of the arguments in this thesis.

[1050] KL Murray, 'Putting Parliament in Its Place: The Pro-Brexit, Democratic Case for a Second Brexit Referendum' *UK Constitutional Law Association Blog* (26 July 2019) <https://ukconstitutionallaw.org/2019/07/26/kyle-murray-putting-parliament-in-its-place-the-pro-brexit-democratic-case-for-a-second-brexit-referendum/> accessed 17 December 2019.

9.4. A Sceptical Postscript

The positive account of the consequences of scepticism pushed in this thesis clashes with the negative account provided even, and at times *especially*, by sceptics themselves – those who share elements of its philosophical outlook. Rorty, Allan, and Leff – the characters featuring in the Tale of Three Sceptics told in the **Introduction** – are the main examples engaged with at various points throughout this thesis. Arthur Leff provided a particularly poignant example of sceptical – if darkly humorous – despair. It may be recalled that he finished his last article on the topic of the groundability of normative assertions – his seminal "Unspeakable Ethics, Unnatural Law" – with a sceptical poem, finishing with an ironic plea of "God help us".[1051] In light of the contrasting account put forward here – pressing the fruitful, liberating and empowering qualities of a radical moral scepticism – it would seem a fitting way to end with something of a reply:

If moral scepticism shows us anything – if talk of "*showing*" anything is appropriate here – it is that morality is nothing if it is not speakable by us. To some, this is *terrifying*, and to metaphysical blankets they cling – to others, it is just *terrific*, and so, they sing:

> *As an idea which makes no sense, the old God is dead;*[1052]
> *But do not fear, and do not dread, keep those blankets on the bed;*
> *The Abyss may not speak – as it did to Nietzsche – but nor does it stare;*
> *The World does not speak, and the world does not care;*
> *And so we are free ourselves to declare:*

[1051] Leff, 'Unspeakable Ethics' (fn26) 1249. For the full poem see **Chapter 5, section 5.3, p168**.
[1052] See F Nietzsche, *The Gay Science* (Walter Kaufmann tr, Vintage Books 1974) 181 [Aphorism 125] ('God is dead. God remains dead. And we have killed him').

_ _ _ _ is bad

_ _ _ _ is good

This _ _ _ _ you should not do, but this _ _ _ _ you should;

You can squint all you like, there are no answers there to see;
For who is to fill in these blanks if not He/She/Ze?

Well that's just it, it's down to you, and it's down to me
"Me too!", "And me!", "And me!", "Don't forget me!"

[All together now]:

*"God **help** us? God **is** us!*

And no matter what we say, we are free;

*For as long as we **do** say, there is no other way to be".*

Bibliography

Legislation

Basic Law for the Federal Republic of Germany (Germany)

Canadian Charter of Rights and Freedoms 1982 (Canada)

Charter of Human Rights and Responsibilities Act 2006 (Victoria, Australia)

Human Rights Act 1998

International Conventions

Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("European Convention on Human Rights")

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III)

Cases

Australian Capital Television Pty Ltd & New South Wales v Commonwealth [1992] 45 HCA (High Court of Australia)

Hirst v United Kingdom (No 2) [2005] ECHR 681.

Sauvé v Canada (Chief Electoral Officer) (2002) 3 SCR 519 (Canadian Supreme Court)

Smith v Scott (2007) 9 CSIH 345

Secondary Sources

Ackerman B, *Social Justice in the Liberal State* (Yale University Press 1980)

——, *We the People: Foundations* (Harvard University Press 1993)

Adams E, 'Gewirth on Reason and Morality' (1980) 33 Review of Metaphysics 579

Albert R, ‘Nonconstitutional Amendments’ (2009) 22(1) Canadian Journal of Law and Jurisprudence 5

——, ‘Constitutional Handcuffs’ (2010) 42 Arizona State Law Journal 663

Alexander L, ‘Is Judicial Review Democratic? A Comment on Harel’ (2003) 22 Law and Philosophy 277

——, ‘Constitutionalism’ in MP Golding and WA Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2004) <http://www.blackwellreference.com.ezphost.dur.ac.uk/subscriber/tocnode.html?id=g9780631228325_chunk_g978063122832519> accessed 18 June 2018

Allan J, ‘Bills of Rights and Judicial Power - A Liberal’s Quandary’ (1996) 16(2) Oxford Journal of Legal Studies 337

——, ‘A Doubter’s Guide to Law and Natural Rights’ (1998) 28 Victoria University of Wellington Law Review 243

——, *A Sceptical Theory of Morality and Law* (Peter Lang 1998)

——, ‘Internal and Engaged or External and Detached?’ (1999) 12 Canadian Journal of Law and Jurisprudence 5

——, ‘Rights, Paternalism, Constitutions and Judges’ in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002)

——, *Sympathy and Antipathy: Essays Legal and Political* (Ashgate 2002)

——, ‘An Unashamed Majoritarian’ (2004) 27 Dalhousie Law Journal 537

——, ‘Doing Things the Hurd Way: A Map For All Reasons?’ (2005) 30 Australian Journal of Legal Philosophy 59

Anderson E, ‘What Is the Point of Equality?’ (1999) 109(2) Ethics 287

Arendt H, *On Revolution* (Penguin Books 1973)

Arneson R, ‘Democratic Rights at National and Workplace Levels’ in D Copp, J Hampton and J Roemer (eds), *The Idea of Democracy* (Cambridge University Press 1993)

——, ‘Democracy Is Not Intrinsically Just’ in K Dowding, RE Goodin and C Pateman (eds), *Justice and Democracy: Essays for Brian Barry* (Cambridge University Press 2004)

——, ‘The Supposed Right to a Democratic Say’ in T Christiano and J Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009)

——, ‘Elitism’, *Oxford Studies in Political Philosophy*, vol 2 (Oxford University Press 2016)

Aubert J-F, ‘Switzerland’ in D Butler and A Ranney (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research 1978)

Bacon M, *Richard Rorty: Pragmatism and Political Liberalism* (Lexington Books 2008)

Baker P, ‘“We the People”: The Battle to Define Populism’ *The Guardian* (10 January 2019) <https://www.theguardian.com/news/2019/jan/10/we-the-people-the-battle-to-define-populism> accessed 30 January 2019

Barber B, *Strong Democracy: Participatory Politics for a New Age* (Twentieth Anniversary Edition, University of California Press 2003)

Bartley III W, *The Retreat to Commitment* (2nd edn, Open Court 1984)

Baruchello G and Weber R, ‘“Who Are We?” On Rorty, Rhetoric, and Politics’ (2014) 19(2) The European Legacy 197

Bateup C, ‘The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue’ (2006) 71 Brooklyn Law Review

Beetham D, ‘Liberal Democracy and the Limits of Democratization’ (1992) 40(1) Political Studies 40

Beitz C, *Political Equality: An Essay in Democratic Theory* (Princeton University Press 1989)

Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007)

——, ‘Legislative Comment: Political Constitutionalism and the Human Rights Act’ (2011) 9 International Journal of Constitutional Law 86

Bernstein R, ‘One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy’ (1987) 15 Political Theory 538

——, ‘Rorty’s Inspirational Liberalism’ in C Guignon and DR Hiley (eds), *Richard Rorty* (Cambridge University Press 2003)

Bevir M, ‘The Westminser Model, Governance and Judicial Reform’ (2008) 61(4) Parliamentary Affairs 559

Bosanquet B, *The Philosophical Theory of the State* (2nd edn, Macmillan & Co 1910)

Brint M, Weaver W and Garmon M, ‘What Difference Does Anti-Foundationalism Make to Political Theory?’ (1995) 26 New Literary History 225

Budge I, *The New Challenge of Direct Democracy* (Polity Press 1996)

——, *The New Challenge of Direct Democracy* (Polity Press 1996)

Burke E, *The Works of the Right Honourable Edmund Burke*, vol 1 (Henry G Bohn 1854)

Butler P and Duncan P, ‘People with “nowhere Else to Turn” Fuel Rise in Food Bank Use - Study’ *The Guardian* (24 April 2018) <https://www.theguardian.com/society/2018/apr/24/food-bank-use-trussell-trust-universal-credit-figures> accessed 2 March 2019

Cavell S, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford University Press 1979)

Chander A, ‘Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights’ (1991) 101(2) Yale Law Journal 457

Chemerinsky E, ‘The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review’ (1984) 62 Texas Law Review 1207

Cholbi M, ‘Moral Expertise and the Credentials Problem’ (2007) 10(4) Ethical Theory and Moral Practice 323

Christiano T, ‘Waldron on Law and Disagreement’ (2000) 19 Law and Philosophy 513

——, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008)

Coleman J, ‘Taking Rights Seriously (Book Review)’ (1978) 66(4) California Law Review 885

Collier D, Hidalgo F and Maciuceanu A, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11(3) Journal of Political Ideologies 211

Colón-Ríos J, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012)

Comay R, ‘Interrupting the Conversation: Notes on Rorty’ (1986) 69 Telos 119

Condorcet M de, ‘Essay on the Application of Mathematics to the Probability of Decisions Reached by Majority Vote’ in KM Baker (ed), *Condorcet: Selected Writings* (Bobbs-Merrill 1976)

Dahl R, *Democracy and Its Critics* (Yale University Press 1989)

Dana D and Koniak S, ‘Bargaining in the Shadow of Democracy’ (1999) 148 University of Pennsylvania Law Review 473

Dawkins R, ‘David Cameron’s Reckless Folly’ [2016] *Prospect* <https://www.prospectmagazine.co.uk/politics/david-camerons-reckless-folly> accessed 1 April 2017

Delannoi G, Dowlen O and Stone P, *The Lottery as a Democratic Institution* (Policy Institute, University of Dublin, Trinity College Dublin 2013)

Derrida J, *Writing and Difference* (A Bass tr, University of Chicago Press 1978)

Dewey J, ‘Maeterlinck’s Philosophy of Life’, *The Middle Works of John Dewey, Volume 6* (Southern Illinois University Press 1978)

DeWolfe Howe M, *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski Volume 1, 1916-1935* (Harvard University Press 1953)

Dicey A, ‘The Referendum and Its Critics’ (1910) 212 Quarterly Review 538

——, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915)

Dorf M, ‘The Aspirational Constitution’ (2009) 77(5–6) George Washington Law Review 1631

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978)

——, ‘Rights as Trumps’ in J Waldron (ed), *Theories of Rights* (Oxford University Press 1984)

——, *A Matter of Principle* (Harvard University Press 1985)

——, *A Bill of Rights For Britain* (Chatto & Windus 1990)

——, ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25 Philosophy and Public Affairs 87

——, *Law’s Empire* (Hart Publishing 1998)

——, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000)

——, *Justice For Hedgehogs* (Harvard University Press 2011)

Economist Intelligence Unit, ‘Democracy Index 2018’ [2018] *The Economist* <https://www.eiu.com/topic/democracy-index> accessed 9 March 2019

Economist T, ‘Turkey’s Referendum: Turkey Is Sliding into Dictatorship’ *The Economist* (15 April 2017) <https://www.economist.com/leaders/2017/04/15/turkey-is-sliding-into-dictatorship> accessed 26 July 2018

Elster J, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge University Press 1979)

——, ‘Majority Rule and Individual Rights’ in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993)

——, ‘Don’t Burn Your Bridges Before You Come to It: Some Ambiguities and Complexities of Precommitment’ (2003) 81 Texas Law Review 1751

Ely J, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980)

Enoch D, ‘Taking Disagreement Seriously: On Jeremy Waldron’s Law and Disagreement’ (2006) 39 Israel Law Review 22

Estlund D, ‘Making Truth Safe for Democracy’ in D Copp, J Hampton and J Roemer (eds), *The Idea of Democracy* (Cambridge University Press 1993)

——, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008)

Fabre C, ‘The Dignity of Rights’ (2000) 20 Oxford Journal of Legal Studies 271

Fallon Jr R, ‘The Core of an Uneasy Case For Judicial Review’ (2008) 121 Harvard Law Review 1693

Fenwick H, *Civil Liberties and Human Rights* (Routledge-Cavendish 2007)

Fenwick H, Phillipson G and Williams A, *Text, Cases and Materials on Public Law and Human Rights* (4th edn, Routledge 2017)

Fiss O, ‘Making Coffee and Other Duties of Citizenship’ (1981) 91 Yale Law Journal 224

Foucault M, ‘Polemics, Politics, and Problematizations: An Interview with Michel Foucault’ in P Rabinow (ed), *The Foucault Reader* (Pantheon Books 1984)

Fraser N, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Polity Press 1989)

Freedom House, ‘Freedom in the World 2018’ <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> accessed 9 March 2019

——, ‘Freedom in the World 2018’ <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> accessed 9 March 2019

Freeman S, ‘Constitutional Democracy and the Legitimacy of Judicial Review’ (1990) 9 Law and Philosophy 327

Gallie W, ‘Essentially Contested Concepts’ (1955) 56 Proceedings of the Aristotelian Society 167

Gander E, *The Last Conceptual Revolution: A Critique of Richard Rorty’s Political Philosophy* (State University of New York Press 1999)

Gardbaum S, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 International Journal of Constitutional Law 167

——, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013)

Gewirth A, *Reason and Morality* (University of Chicago Press 1978)

Goldoni M, ‘Two Internal Critiques of Political Constitutionalism’ (2013) 10(4) International Journal of Constitutional Law 926

Goldsworthy J, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010)

Gordon M, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015)

Greenidge A, *A Handbook of Greek Constitutional History* (Macmillan & Co 1896)

Grotius H, *De Jure Belli Ac Pacis* (1625)

Habermas J, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766

Hampton J, 'Should Political Philosophy Be Done Without Metaphysics?' (1989) 99 Ethics 791

Hand L, 'The Contribution of an Independent Judiciary to Civilisation' in I Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (3rd edn, Knopf 1960)

Hanlon A, 'Postmodernism Didn't Cause Trump. It Explains Him' *The Washington Post* (31 August 2018) <https://www.washingtonpost.com/outlook/postmodernism-didnt-cause-trump-it-explains-him/2018/08/30/0939f7c4-9b12-11e8-843b-36e177f3081c_story.html?noredirect=on&utm_term=.54f58cb31a44> accessed 11 February 2019

Harel A, 'Notes on Waldron's Law and Disagreement: Defending Judicial Review' (2006) 39(3) Israel Law Review 13

Heer J, 'America's First Postmodern President' [2017] *The New Republic* <https://newrepublic.com/article/143730/americas-first-postmodern-president> accessed 11 February 2019

Heinze E, *Hate Speech and Democratic Citizenship* (Oxford University Press 2016)

Hickman T, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] Public Law 306

Hiebert J, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 Modern Law Review 7

Hobbes T, *Leviathan* (Richard Tuck edn, Cambridge University Press 1996)

Hodgson J and Roach K, 'Disenfranchisement as Punishment: European Court of Human Rights, UK, and Canadian Responses to Prisoner Voting' (2017) 3 Public Law 450

Hogg P and Bushell A, 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 Osgoode Hall Law Journal 75

Holland D, 'Drivers Could Face New Charge for High Polluting Vehicles - but It Won't Be Enough to Tackle Emissions Crisis' *Chronicle Live* (8 January 2019)

<https://www.chroniclelive.co.uk/news/north-east-news/drivers-face-new-charge-high-15648601> accessed 2 March 2019

Holmes S, 'Precommitment and the Paradox of Democracy' in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press 1988)

——, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press 1995)

Homer, *The Odyssey of Homer* (JS Watson ed, A Pope tr, Wentworth Press 2016)

Honig B, 'Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"' (2001) 29(6) Political Theory 792

Human Rights Watch, 'Venezuala: Events of 2017' *World Report 2018* (2018) <https://www.hrw.org/world-report/2018/country-chapters/venezuela> accessed 23 August 2018

——, 'Myanmar: Events of 2018' [2019] *World Report 2019* <https://www.hrw.org/world-report/2019/country-chapters/burma> accessed 26 March 2019

Hutchinson A, 'The Three "Rs": Reading/Rorty/Radically' (1989) 103 Harvard Law Review 555

Hutchinson A and Colón-Ríos J, 'Democracy and Constitutional Change' (2011) 58(127) Theoria 43

James W, *The Meaning of Truth: A Sequel to 'Pragmatism'* (Longmans, Green, and Co 1909)

Jefferson T, *The Political Writings of Thomas Jefferson* (E Dumbauld ed, Liberal Arts Press 1955)

——, *Jefferson: Political Writings* (J Appleby and T Ball eds, Cambridge University Press 1999)

Johnson P, 'Nihilism and the End of Law' (1993) 31 First Things 19

Kakutani M, 'The Death of Truth: How We Gave up on Facts and Ended up with Trump' *The Guardian* (14 July 2018) <https://www.theguardian.com/books/2018/jul/14/the-death-of-truth-how-we-gave-up-on-facts-and-ended-up-with-trump> accessed 11 February 2019

Kalman L, *Yale Law School and the Sixties: Revolt and Reverberations* (University of North Carolina Press 2006)

Kavanagh A, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451

——, 'The Lure and the Limits of Dialogue' (2016) 66(1) University of Toronto Law Journal 83

‘Kellyanne Conway Denies Trump Press Secretary Lied: “He Offered Alternative Facts”’ *The Guardian* (22 January 2017) <https://www.theguardian.com/us-news/video/2017/jan/22/kellyanne-conway-trump-press-secretary-alternative-facts-video> accessed 1 February 2019

King J, ‘Rights and the Rule of Law in Third Way Constitutionalism’ (2014) 30(1) Constitutional Commentary 101

——, ‘The Democratic Case for a Written Constitution’ [2019] Current Legal Problems

Kis J, ‘Constitutional Precommitment Revisited’ (2009) 40 Journal of Social Philosophy 570

Klug F, ‘The Human Rights Act -a “Third Way” or a “Third Wave” Bill of Rights’ [2001] European Human Rights Law Review 361

Kramer L, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press)

Kyritsis D, ‘Representation and Waldron’s Objection to Judicial Review’ (2006) 26(4) Oxford Journal of Legal Studies 733

LeDuc L, *The Politics of Direct Democracy: Referendums in Global Perspective* (Broadview Press 2003)

Leff A, ‘Economic Analysis of Law: Some Realism About Nominalism’ (1974) 40 Virginia Law Review 451

——, ‘Law and Technology: On Shoring up a Void’ (1976) 8 Ottawa Law Review 536

——, ‘Memorandum’ (1977) 29 Stanford Law Review 879

——, ‘Memorandum’ (1977) 29 Stanford Law Review 879

——, ‘Unspeakable Ethics, Unnatural Law’ (1979) 6 Duke Law Journal 1229

——, ‘Unspeakable Ethics, Unnatural Law’ (1979) 6 Duke Law Journal 1229

Leff S, ‘Some Notes About Art’s Dictionary’ (1985) 94 Yale Law Journal 1850

List C and Goodin R, ‘Epistemic Democracy: Generalizing the Condorcet Jury Theorem’ (2001) 9(3) The Journal of Political Philosophy 277

Locke J, *Two Treatises of Government* (P Laslett ed, Cambridge University Press 1988)

Lomasky L, ‘Gewirth’s Generation of Rights’ (1981) 31 The Philosophical Quarterly 248

Lowenstein K, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31(3) The American Political Science Review 417

Mac Amhlaigh C, ‘Putting Political Constitutionalism in Its Place’ (2016) 14(1) International Journal of Constitutional Law 175

Madison J, Hamilton A and Jay J, *The Federalist Papers* (C Rossiter ed, Penguin Books 1961)

Manin B, *Principles of Representative Government* (Cambridge University Press 1997)

Marmor A, *Law in the Age of Pluralism* (Oxford University Press 2007)

Martin R, 'Rawls's New Theory of Justice' (1994) 69 Chicago-Kent Law Review 737

May K, 'A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision' (1952) 20(4) Econometrica 680

McCarthy T, 'Ironist Theory as a Vocation: A Response to Rorty's Reply' (1990) 16(3) Critical Inquiry 644

——, 'Private Irony and Public Decency: Richard Rorty's New Pragmatism' (1990) 16(2) Critical Inquiry 355

McGee L, 'Post-Truth Politics Is Alive and Well in Brexit Britain' *CNN* (15 January 2019) <https://edition.cnn.com/2019/01/12/uk/post-truth-politics-alive-and-well-in-brexit-britain-intl-gbr/index.html> accessed 6 February 2019

McMahon C, 'Gewirth's Justification of Morality' (1986) 50 Philosophical Studies 261

Meiklejohn A, *Free Speech and Its Relation to Self-Government* (Harper and Row 1948)

Mennel R and Compston C (eds), *Holmes and Frankfurter: Their Correspondence, 1912-1934* (University Press of New England 1996)

Michelman F, 'Constitutional Authorship by the People' (1999) 74(5) Notre Dame Law Review 1605

Mildenberger J, 'Waldron, Waluchow and the Merits of Constitutionalism' (2009) 29(1) Oxford Journal of Legal Studies 71

Mill J, *Considerations on Representative Government* (2nd edn, Parker, Son, and Bourn 1861)

Moore M, 'Moral Reality Revisited' (1992) 90 Michigan Law Review 2424

Murphy J, 'Afterword: Constitutionalism, Moral Skepticism, and Religious Belief' in AS Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (Praeger 1988)

Murray K, 'The Constitutionalist Debate: A Sceptical Take' (Master of Jurisprudence thesis, Durham University 2015)

——, 'Book Review: The Metaethics of Constitutional Adjudication' [2019] Jurisprudence <https://doi.org/10.1080/20403313.2019.1694784>

——, 'Philosophy and Constitutional Theory: The Cautionary Tale of Jeremy Waldron and the Philosopher's Stone' (2019) 32(1) Canadian Journal of Law and Jurisprudence 127

——, ‘Putting Parliament in Its Place: The Pro-Brexit, Democratic Case for a Second Brexit Referendum’ *UK Constitutional Law Association Blog* (26 July 2019) <https://ukconstitutionallaw.org/2019/07/26/kyle-murray-putting-parliament-in-its-place-the-pro-brexit-democratic-case-for-a-second-brexit-referendum/> accessed 17 December 2019

Nietzsche F, *Thus Spoke Zarathustra* (RJ Hollingdale tr, Penguin Classics 1969)

——, *The Gay Science* (Walter Kaufmann tr, Vintage Books 1974)

Norman M, ‘Whoever Wins the UK Presidential Election, We’ve Entered a Post-Truth World - There’s No Going Back Now’ *The Independent* (8 November 2016) <https://www.independent.co.uk/voices/us-election-2016-donald-trump-hillary-clinton-who-wins-post-truth-world-no-going-back-a7404826.html> accessed 19 January 2019

Nozick R, *Anarchy, State, and Utopia* (Basic Books 1974)

Oppenheim F, ‘Relativism, Absolutism, and Democracy’ (1950) 44 The American Political Science Review 951

——, ‘In Defense of Relativism’ (1955) 8 The Western Political Quarterly 411

Ortiz D, ‘Pursuing a Perfect Politics: The Allure and Failure of Process Theory’ [1991] Virginia Law Review 721

Orwell G, *Nineteen Eighty-Four* (New Ed, Penguin Classics 2004)

Oxford Dictionaries, ‘Word of the Year 2016 Is...’ *Oxford Living Dictionaries: English* (2016) <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> accessed 19 January 2019

Paine T, ‘The Rights of Man’ in P Foner (ed), *The Life and Major Writings of Thomas Paine* (Citadel 1961)

Pateman C, *Participation and Democratic Theory* (Cambridge University Press 1970)

Pennock JR, ‘Responsiveness, Responsibility, and Majority Rule’ (1952) 46(3) The American Political Science Review 790

Perry M, *The Idea of Human Rights* (Oxford University Press 1998)

Peterson M (ed), *Writings* (Library of America 1984)

Petherick S, ‘Bath Clean Air Zone Is “Blatant Tax on the Poor”, Businessman Argues in Petition’ *Somerset Live* (8 November 2018) <https://www.somersetlive.co.uk/news/somerset-news/bath-clean-air-zone-petition-2192215> accessed 2 March 2019

Plato, *The Republic* (GRF Ferrari ed, T Griffith tr, Cambridge University Press 2000)

Platts M, ‘Moral Reality’ in G Sayre-McCord (ed), *Essays on Moral Realism* (Cornell University Press 1988)

Pocklington T, ‘Philosophy Proper and Political Philosophy’ (1966) 76 Ethics 117

Popper K, *The Logic of Scientific Discovery* (Hutchinson 1959)

Posner E and Vermeule A, ‘Legislative Entrenchment: A Reappraisal’ (2002) 111 Yale Law Journal 1665

‘“Post-Truth” Declared Word of the Year by Oxford Dictionaries’ *BBC News* (16 November 2016) <https://www.bbc.co.uk/news/uk-37995600> accessed 6 February 2019

Radin M, ‘The Pragmatist and the Feminist’ (1990) 63 Southern California Law Review 1699

Rae D, *Equalities* (Harvard University Press 1981)

Ramgotra M, ‘Can Democracy Vote Itself Out of Existence?’ *The Conversation* (16 July 2018) <https://theconversation.com/can-democracy-vote-itself-out-of-existence-99988> accessed 17 July 2018

Rawls J, *A Theory of Justice* (Harvard University Press 1971)

——, ‘Kantian Constructivism in Moral Theory’ (1980) 77 Journal of Philosophy 515

——, ‘Justice as Fairness: Political Not Metaphysical’ (1985) 14 Philosophy and Public Affairs 223

——, *Political Liberalism* (Columbia University Press 1993)

Raz J, ‘The Rule of Law and Its Virtue’, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979)

——, ‘Disagreement in Politics’ (1998) 43 American Journal of Jurisprudence 25

Regis Jr E, ‘Gewirth on Rights’ (1981) 78 Journal of Philosophy 786

Richards N, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press 2015)

Ridley F, ‘There Is No British Constitution: A Dangerous Case of the Emperor’s Clothes’ (1988) 41(3) Parliamentary Affairs 340

Risse M, ‘Arguing for Majority Rule’ (2004) 12(1) The Journal of Political Philosophy 41

Rorty R, *Philosophy and the Mirror of Nature* (Princeton University Press 1980)

——, *Consequences of Pragmatism* (Harvester Press 1982)

——, ‘Postmodernist Bourgeois Liberalism’ (1983) 80(10) Journal of Philosophy 583

——, ‘Thugs and Theorists: A Reply to Bernstein’ (1987) 15 Political Theory 564

——, ‘The Priority of Democracy to Philosophy’ in M Peterson and R Vaughan (eds), *The Virginia Statute of Religious Freedom* (Cambridge University Press 1988)

——, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989)

——, 'Truth and Freedom: A Reply to Thomas McCarthy' (1990) 16(3) Critical Inquiry 633

——, *Essays on Heidegger and Others* (Cambridge University Press 1991)

——, *Objectivity, Relativism, and Truth* (Cambridge University Press 1991)

——, 'The Professor and the Prophet: Book Review of "The American Evasion of Philosophy: A Genealogy of Pragmatism" by Cornel West' (1991) 52 Transition 70

——, 'What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker' (1992) 78 Virginia Law Review 719

——, 'Human Rights, Rationality, and Sentimentality', *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993)

——, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Harvard University Press 1998)

——, *Truth and Progress* (Cambridge University Press 1998)

——, *Philosophy and Social Hope* (Penguin Books 1999)

——, 'Pragmatism as Anti-Authoritarianism' (1999) 53(207) Revue Internationale de Philosophie 7

Rose J, 'Brexit, Trump, and Post-Truth Politics' (2017) 19 Public Integrity 555

Rousseau J, *The Social Contract* (M Cranston tr, Penguin Books 1968)

Sabine G, *A History of Political Theory* (3rd edn, Holt, Rinehart, and Winston 1961)

Sadurski W, *Equality and Legitimacy* (Oxford University Press 2008)

Sager L, 'The Incorrigible Constitution' (1990) 65 New York University Law Review 893

Sarangi P, 'From Metaphysical to Political: John Rawls' Revised Version of Liberalism' (1994) 29 Economics and Political Weekly 1396

Saunders B, 'Democracy, Political Equality, and Majority Rule' (2010) 121(1) Ethics 148

Schulenberg U, 'Wanting Lovers Rather Than Knowers – Richard Rorty's Neopragmatism' (2003) 48 Amerikastudien 577

Schwartzberg M, *Democracy and Legal Change* (Cambridge University Press 2007)

Sellars W, *Science and Metaphysics* (Routledge & Kegan Paul 1968)

Sen A, *Collective Choice and Social Welfare* (Holden-Day, Inc 1970)

Setala M, ‘Referendums in Western Europe - A Wave of Direct Democracy?’ (1999) 22(4) Scandinavian Political Studies 327

Shaw R, ‘Democracy and Excellence’ (1988) 22(3) The Journal of Aesthetic Education 5

Siddique H, ‘People’s Vote March “Too Big to Ignore”, Organisers Warn MPs’ *The Guardian* (24 March 2019) <https://www.theguardian.com/politics/2019/mar/24/peoples-vote-march-too-big-to-ignore-organisers-warn-mps> accessed 26 March 2019

Singer J, ‘Should Lawyers Care About Philosophy?’ [1989] Duke Law Journal 1752

——, ‘Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism’ (1990) 63 Southern California Law Review 1821

Singer M, ‘On Gewirth’s Derivation of the Principle of Generic Consistency’ (1985) 95 Ethics 297

Sinnott-Armstrong W, *Moral Skepticisms* (Oxford University Press 2006)

Spadijer S, ‘A Hardcore Case Against (Strong) Judicial Review of Direct Democracy’ (2012) 31 University of Queensland Law Journal 55

Strauss L, *Natural Right and History* (University of Chicago Press 1953)

Sunstein C, ‘Beyond the Precuationary Principle’ (2003) 151 University of Pennsylvania Law Review 1003

Tamanaha B, *On the Rule of Law* (Cambridge University Press 2004)

The Bible (King James Version)

Tomkins A, *Our Republican Constitution* (Hart Publishing 2005)

Traub J, ‘It’s Time for the Elites to Rise Up Against the Ignorant Masses’ [2016] *Foreign Policy* <http://foreignpolicy.com/2016/06/28/its-time-for-the-elites-to-rise-up-against-ignorant-masses-trump-2016-brexit/> accessed 1 April 2017

Tremblay L, ‘The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures’ (2005) 3 International Journal of Constitutional Law 617

Tribe L, *American Constitutional Law* (Foundation Press 1978)

——, ‘The Puzzling Persistence of Process-Based Constitutional Theories’ (1980) 89(6) Yale Law Journal 1063

Tripkovic B, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2018)

Tushnet M, ‘New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries’ (2003) 38 Wake Forest Law Review 813

Upton T, ‘Rorty’s Epistemological Nihilism’ (1987) 3 The Personalist Forum 141

Urbinati N, ‘The Rule of the Many: Fundamental Issues in Democratic Theory by Christiano, Thomas (Book Review)’ (1999) 109(2) Ethics 431

Waldron J, ‘The Irrelevance of Moral Objectivity’ in RP George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992)

——, ‘A Rights-Based Critique of Constitutional Rights’ (1993) 13 Oxford Journal of Legal Studies 18

——, ‘Freeman’s Defense of Judicial Review’ (1994) 13 Law and Philosophy 27

——, ‘Legislation, Authority, and Voting’ (1995) 84 Georgetown Law Journal 2185

——, ‘Moral Truth and Judicial Review’ (1998) 43 American Journal of Jurisprudence 75

——, *Law and Disagreement* (Oxford University Press 1999)

——, *The Dignity of Legislation* (Cambridge University Press 1999)

——, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ (2002) 21(2) Law and Philosophy 137

——, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale Law Journal 1346

——, ‘A Majority in the Lifeboat’ (2010) 90 Boston University Law Review 1043

Walker R, *The Coherence Theory of Truth: Realism, Anti-Realism, Idealism* (Routledge 1989)

Watmough S and Öztürk A, ‘Will Turkey’s Referendum Mark the End of Democracy and the Birth of “Erdoğanistan”?’ *The Conversation* (14 April 2017) <https://theconversation.com/will-turkeys-referendum-mark-the-end-of-democracy-and-the-birth-of-erdoganistan-76038> accessed 26 July 2018

Weill R, ‘Dicey Was Not Diceyan’ (2003) 62(2) The Cambridge Law Journal 474

Wittgenstein L, *Philosophical Investigations* (Macmillan 1953)

Wolfe M, ‘The Shadows of Future Generations’ (2008) 57(6) Duke Law Journal 1902

Wollheim R, ‘A Paradox in the Theory of Democracy’ in P Laslett and WG Runciman (eds), *Essays in Philosophy, Politics and Society* (Barnes & Noble 1962)

Young A, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009)

——, *Democratic Dialogue and the Constitution* (Oxford University Press 2017)

Zuckert M, ‘The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?’ (1994) 11 Constitutional Commentary 227

Zylherberg P, ‘The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective’ (1992) 37 McGill Law Journal 27