

Democracy and its  
relationship with the  
market:

Impartial instrumentalism  
in politics and  
constitutional design

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# Abstract

This thesis offers an account of the justification of democracy and its proper relationship with the market. It sets out a justification of democracy that I call impartial instrumentalism. According to this account, a political system is justified by its tendency to make good decisions. However, this should be assessed in a way that is impartial between substantive conceptions of justice. In practice, impartial instrumentalism recommends those political systems that promote the knowledge and moral motivation of decision-makers. Democracy is justified as the best political system according to this standard. My account contributes to debates about epistemic democracy by integrating considerations of motivation, and by clarifying the relationship between instrumental and epistemic justifications of democracy.

The second half of the thesis evaluates the relationship between markets and democracy in light of this account. I begin by asking whether democracies should be restricted in their ability to intervene in the market. I evaluate the most plausible contemporary argument for this, that of Ilya Somin. Somin's argument does not meet the test of impartial instrumentalism, because he underrates the need for collective decisions and is not impartial between different conceptions of morality. Next, I ask how markets can influence democracy, and how we should respond to these influences. I examine two case studies: the funding of political speech, and capital strikes (situations in which governments retreat from policies out of fear of how markets will react). In both cases, markets can impede the proper working of democracy. For the former case, I propose a policy solution. However, the latter case raises unavoidable trade-offs between democracy and the economic benefits of trade.

In this thesis, I defend a normative account of constitutional design. On the basis of this account, I argue that democracy should generally have priority over the market.

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All the mistakes are my own.

# Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

# Introduction

Democracy and the market are the modern world's two main structures for co-ordinating the interactions of strangers. While both these institutional forms have deep historical roots, they have only come into their current shapes and social importance in the last couple of centuries.<sup>1</sup> It is surely no accident that in the same period the world has become a much more pleasant place for more people than ever before. That these institutions have tended to appear alongside one another suggests that they are complementary in at least some respects.<sup>2</sup> However, conflicts nonetheless arise over their interactions and over their respective spheres of influence. A major rallying cry of the contemporary Left is the need to defend democracy against the market, characterising attempts to privatise and shrink the state as attacks on democracy by free-market fundamentalists. Democracy vs. market is a major axis of political conflict, with perhaps at least as much practical salience as the egalitarian vs. libertarian axis that has dominated economic thinking in philosophy since John Rawls. Political theory can help to orient us in this conflict by exploring the normative question of what the relationship between democracy and the market should be. However, in order to make progress on this question, we first need to be clearer about what is valuable about democracy in the first place: what it is that is supposed to be under threat from the market.

This thesis contributes to thinking about these issues. It does so by asking why democracy is justified, and what the justification of democracy implies for its proper relationship with the market. In this Introduction, I set out my research aims in more detail and explain why I have chosen to pursue them in this particular way. The first sections focus on the justification of democracy, the second on markets and democracy. In the process, I situate my work within existing debates, making clear how I draw on and contribute to these discussions. The final section sets out the basic structure the thesis will follow.

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<sup>1</sup> Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1993).

<sup>2</sup> Charles Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977).

## The justification of democracy

My first research aim is to give an account of the justification of democracy. As I suggested above, some account of democracy's value is needed if I am to provide normative guidance on what relationship should hold between democracy and the market. I develop this idea further in the next section. More generally, explaining what justifies democracy means we can say why non-democratic states should become more democratic, and how existing democracies could be improved. I will develop an account of democracy's justification that I call *impartial instrumentalism*. According to this view, political systems should be evaluated by their tendency to make good decisions despite deep disagreement over what counts as good decisions. In practice, this means that the decision-making process should be organised to promote the knowledge and moral motivation of decision-makers. Democracy is justified as the political system that does this best.

Any justification of democracy needs to be set against a background account of the nature or circumstances of politics itself. This theme has been tackled in slightly different ways by authors such as Jeremy Waldron, Albert Weale, and Jack Knight and James Johnson.<sup>3</sup> This debate should be seen as a foundation for my work rather than one I intend to contribute to myself; here, I merely set out the main lessons I draw from these works.

At its core, politics is constituted by disagreement: if everyone agrees, there is no politics. To be *political*, disagreements must meet three other conditions. First, they must be practical: they must be about what to do, not only about what to think. Second, the parties to the disagreement must be interdependent: they must be able to affect one another, such that some form of co-ordination between them is necessary. Third, if they are to deal with their differences through political means, parties must forgo violence. This requires some willingness to accept that decisions will not always be in their favour.

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<sup>3</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 1–3; Albert Weale, *Democracy*, 2nd edition (Houndmills: Palgrave Macmillan, 2007), 12–18; Jack Knight and James Johnson, *The Priority of Democracy: Political Consequences of Pragmatism* (New York: Princeton University Press, 2011), 3, 18.

If politics requires dealing with practical disagreements by means other than violence, some set of rules is necessary to specify who will make decisions, and how. I call a *political system* the set of rules that specifies how decisions are to be made in the face of disagreement. We can draw a useful distinction here between two different levels of politics. On the one hand, there are first-order disagreements over policy. On the other, there are second-order questions about how we should decide policy in the face of these first-order disagreements. These second-order questions are questions about what the political system should be. They can be described as *constitutional choices* – choices about how to choose. In using this term, I do not mean to suggest that the rules of a political system should necessarily take the form of a written constitution, since political systems can also be constituted by tacit understandings. The first-order and second-order levels correspond to Waldron’s distinction between two tasks for political theory: “theorizing about justice (and rights and the common good etc.), and theorizing about politics.”<sup>4</sup> The former task of political theory is to provide guidance about first-order policy decisions, while the latter is to provide guidance about second-order constitutional choices. This thesis is a contribution to the latter task.

As the title of this section indicates, my aim is to argue that democracy is justified, rather than that it is authoritative or, as some say, legitimate. Unfortunately, these terms are not always used in the same way, and so some preliminary conceptual clarification may be helpful here.<sup>5</sup> A. John Simmons distinguishes between the *justification* and the *legitimacy* of a state or political system.<sup>6</sup> If a political system is justified, then we have reasons to want such a political system to exist. If a political system is legitimate, it has a right to be obeyed. David Estlund, by contrast, distinguishes between the *legitimacy* and *authority* of a political system. Legitimacy is the “moral permissibility of the state’s issuing and enforcing its commands owing to the process by which they were produced”, whereas authority is

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<sup>4</sup> Waldron, *Law and Disagreement*, 3.

<sup>5</sup> Fabienne Peter, ‘Political Legitimacy’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2017 (Metaphysics Research Lab, Stanford University, 2017), <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>.

<sup>6</sup> A. John Simmons, ‘Justification and Legitimacy’, *Ethics* 109, no. 4 (1 July 1999): 739–71;

A. John Simmons, *Political Philosophy* (New York: Oxford University Press, 2007), chap. 3.1.

the “moral power of one agent.... to morally require or forbid actions by others through commands.”<sup>7</sup> Estlund’s distinction implicitly relies on a Hohfeldian analysis of rights.<sup>8</sup> In Hohfeldian terms, legitimacy constitutes a *permission* (also known as a liberty-right or privilege) to coerce citizens, which correlates with citizens having *no right* not to be coerced. Authority, on the other hand, constitutes a *claim-right* to command citizens, which correlates with citizens having a *duty* to obey. (Estlund actually describes authority in terms of a *power*, the second-order equivalent of a claim-right. However, this distinction is not important for present purposes and so has been omitted for the sake of simplicity).

Integrating Simmons’ and Estlund’s analyses, we might imagine a conceptual spectrum between justification on one side, legitimacy in the middle and authority on the other side. While the extremes are clear enough, there is some disagreement about how best to understand the middle category. Estlund does not mention an independent idea of a political system being justified, apparently assimilating this idea with the concept of legitimacy. Simmons, by contrast, thinks the middle category should instead be lumped together with the concept of authority, which is then distinguished from justification.<sup>9</sup> For present purposes, what really matters is that we distinguish between the concepts at either end of the spectrum, and to avoid any ambiguity I will use the terms *justification* and *authority* to refer to these concepts. As I will use the terms, a political system which features the de facto power to coerce is justified insofar as it is relatively better than other political systems or no political system at all. A political system is authoritative insofar as citizens are morally obliged to obey directives produced by that system. This distinction maps onto a distinction made by Robert Talisse between two different “queries” in democratic theory. Talisse’s first query is about “the relative merits of democracy as compared with other regimes” (corresponding to what I call justification), and the second is about whether (and how) democracy can “produce morally binding collective decisions”

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<sup>7</sup> David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, N.J.: Princeton University Press, 2009), 2.

<sup>8</sup> Leif Wenar, ‘Rights’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2015 (Metaphysics Research Lab, Stanford University, 2015), sec. 2.1, <https://plato.stanford.edu/archives/fall2015/entries/rights/>.

<sup>9</sup> Simmons, *Political Philosophy*, 45.

(corresponding to what I call authority).<sup>10</sup> (Talisce uses the actual words “justification”, “legitimacy” and “authority” in a way which is different again, but this need not concern us here).

This thesis only addresses the first of Talisce’s queries, what I have called the justification of democracy. Only addressing the justification of democracy makes my claim weaker, and so easier to make. Clearly, to claim only one thing (that democracy is justified) is to make a weaker claim than to claim two things (that democracy is justified and authoritative). Moreover, to claim only that democracy is justified is generally taken to be a weaker and more plausible claim than to claim only that democracy is authoritative. According to Jason Brennan, “the dominant view among political philosophers is that while certain governments have legitimacy... none have authority. (Or, more precisely, they might have authority over a tiny subset of their citizenry).”<sup>11</sup> (Note that Brennan is following Estlund, and uses “legitimacy” to refer to what I have called “justification”). Even if Brennan somewhat exaggerates the philosophical unpopularity of authority, it is certainly true that political justification-without-authority is a much more popular position than authority-without-justification, although both are conceptually coherent.<sup>12</sup> Arguing for the justification of democracy but not its authority is thus to make a less ambitious claim.

Arguing for the justification of democracy but not its authority is very common in democratic theory. This is indicated by the way Talisce labels it as the first query in democratic theory. Indeed, of the two queries, this has generally been the predominant question in democratic theory, although the question of political obligation has obviously been very important in political philosophy more generally. Historically, Aristotle, Machiavelli and J.S. Mill are all examples of theorists who

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<sup>10</sup> Robert B. Talisce, ‘Sustaining Democracy: Folk Epistemology and Social Conflict’, *Critical Review of International Social and Political Philosophy* 16, no. 4 (2013): 502–3.

<sup>11</sup> Jason Brennan, ‘Murderers at the Ballot Box: When Politicians May Lie to Bad Voters’, in *Ethics in Politics: The Rights and Obligations of Individual Political Agents*, ed. Emily Crookston, David Killoren, and Jonathan Trerise (New York: Routledge, 2016), 22.

<sup>12</sup> Ibid., 21; Justification without authority is Simmons’ own position. ‘Justification and Legitimacy’, *Political Philosophy*, chaps 1–2; See also William A. Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge: Cambridge University Press, 1998), pt.

discuss the justification of democracy but not its authority, while Hélène Landemore provides a contemporary example.<sup>13</sup>

If it is asked what the prospects are for the authority of democracy if we adopt impartial instrumentalism as our account of the justification of democracy, there are three options. First, following the position held by Simmons and others, it may simply be that democracy is (and can only be) justified but not authoritative.<sup>14</sup> Second, although I make no attempt to provide such an argument here, it might be that impartial instrumentalism (or something similar to it, adjusted to answer the different question) can provide an argument for democracy's authority. Third, it might be that impartial instrumentalism itself cannot explain democracy's authority, but that some version of moral proceduralism compatible with it can. (The idea of a moral proceduralism compatible with impartial instrumentalism is explained in section 4.2 below). This would not render impartial instrumentalism redundant, since it can nonetheless render more determinate recommendations for constitutional choices than versions of moral proceduralism compatible with it (see again section 4.2). It is an advantage of impartial instrumentalism (as presented in this thesis) that it is compatible with all three possibilities, and does not presuppose any controversial doctrine of political obligation or philosophical anarchism.

Justifications of democracy can be divided into three main types, each focusing on a different type of value that political systems can have. First, political systems can be valued *instrumentally*, for the direct effects they have through the decisions they make. Second, political systems can be valued for the by-products of their decision-making processes. For example, Mill claimed that democracy cultivates virtues of impartiality and independence among citizens.<sup>15</sup> Mill claimed democracy has educative effects as a by-product of the decision-making process

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<sup>13</sup> Aristotle, 'Politics', in *Aristotle: The Politics and the Constitution of Athens*, ed. Stephen Everson, 2nd edition (Cambridge: Cambridge University Press, 1996); Machiavelli, *The Discourses*, ed. Bernard Crick, trans. Leslie Walker (London: Penguin, 1983); John Stuart Mill, 'Considerations on Representative Government', in *Utilitarianism, Liberty, Representative Government* (London: J. M. Dent & Sons, 1910); Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton; Oxford: Princeton University Press, 2013).

<sup>14</sup> Simmons, 'Justification and Legitimacy'; Edmundson, *Three Anarchical Fallacies*, pt. 1.

<sup>15</sup> Mill, 'Considerations on Representative Government', chap. 2.



itself, rather than as a direct result of decisions taken. Valuing political systems for their by-products is also to value them instrumentally. However, to distinguish this kind of value from the first, I will describe these as *incidental* values. Third, political systems can be evaluated in a *non-instrumental* or procedural way, by looking at the moral properties procedures have, regardless of their outcomes. Democratic procedures have often been valued along these lines for their fairness or respectfulness.<sup>16</sup> To the extent that they all justify democracy, instrumental, incidental and non-instrumental arguments are compatible and mutually reinforcing. However, different justifications can pull in different directions when it comes to more detailed constitutional choices about different versions of democracy.

Impartial instrumentalism justifies democracy by appealing to its instrumental value as a means to make good decisions. However, the element of *impartiality* makes impartial instrumentalism somewhat different to other instrumental justifications of democracy, and gives it certain features that are more commonly associated with non-instrumental or procedural justifications of democracy. There are good reasons to think that impartial instrumentalism is the right place to start when it comes to thinking about the justification of democracy. Jon Elster points out that any incidental values of democracy can only exist because democracy also has direct value through its decisions.<sup>17</sup> Democracy can only have educative effects (for example) to the extent that people are independently motivated to pursue concrete political goals through the democratic process. If citizens did not really care about which decisions were made, democracy would be nothing more than a game, and so unlikely to engage citizens in a way that would have deep psychological effects. Similarly, non-instrumental fairness or respect considerations only come up once a political system has already become necessary to make important common decisions. The instrumental value a political system has through its decisions thus has a certain analytical primacy over any non-instrumental

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<sup>16</sup> Thomas Christiano, 'Disagreement and the Justification of Democracy', in *The Cambridge Companion to Liberalism*, ed. Steven Wall (Cambridge: Cambridge University Press, 2015), 237–60.

<sup>17</sup> Jon Elster, 'The Market and the Forum: Three Varieties of Political Theory', in *Foundations of Social Choice Theory*, ed. Jon Elster and Aanund Hylland (Cambridge: Cambridge University Press, 1986), sec. 2.

or incidental value it might also have. Any account of democracy must include some place for its instrumental value, and so it makes sense to start one's normative analysis here.

At the same time, Elster's point certainly does not prove that democracy's instrumental value will in the end turn out to also be its most weighty value, or will trump all other considerations when it comes to constitutional design.<sup>18</sup> In chapter four, I give some pragmatic reasons why impartial instrumentalism should be preferred to other instrumental accounts, and to moral procedural accounts. However, I will not attempt to argue that impartial instrumentalism captures all the valuable features of democracy, or that the principles of constitutional design I outline trump all non-instrumental or incidental considerations. To do that would require considering the various non-instrumental arguments and incidental values that have been proposed for democracy – something that would take me far off course from my main inquiry (I will return to these issues in the Conclusion). I concentrate on putting forward a positive case for impartial instrumentalism, and showing what it implies for constitutional design – particularly for the relationship between democracy and the market.

Political theorists have often approached constitutional design in a way that is similar to impartial instrumentalism. There is nothing unusual about making constitutional recommendations based on knowledge or motivation considerations: things that people can agree are important in constitutional design even though they disagree about what policies or laws states should actually decide on. My contribution is to make explicit the combination of instrumentalism and impartiality that this kind of theorising involves, and to explain the advantages of this approach.

The main school of thought this thesis draws on and contributes to goes by the name of "epistemic democracy". We can loosely define epistemic democracy as a theory of politics (in Waldron's terms) that is committed to two main ideas. First, an important desideratum for a political system is that it should tend to produce good decisions. Second, democracy is a good political system according to this standard because of the way it processes knowledge. Within this broad definition there is room for various different versions of epistemic democracy. Impartial instrumentalism is one such version.

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<sup>18</sup> Weale, *Democracy*, 117.

While epistemic justifications of democracy have a long history, the contemporary tradition of epistemic democracy that I engage with has primarily developed out of work on deliberative democracy.<sup>19</sup> The most important text from this debate for my purposes is Estlund's *Democratic Authority*.<sup>20</sup> Estlund seeks to allay fears about epistemic justifications of political power, "making truth safe for democracy". His book is primarily an argument against purely procedural justifications of democracy. Pure proceduralism seeks to justify democracy by appealing only to the non-instrumental value of its procedures – for example, the fairness of giving people an equal say. For reasons I will go through in more detail in below (section 4.2), Estlund argues that such considerations alone are insufficient to justify our democratic practices of voting and deliberation. To explain these practices, we need to appeal at least in part to democracy's epistemic value. My discussion of the relationship between impartial instrumentalism and proceduralism draws substantially on this argument.

In terms of Estlund's positive proposal, the idea that has been most important to me is that of a "formal epistemic account... according to which a democratic process is held to have a tendency to get things right from the standpoint of justice or the common good, *whatever the best conception of those might be*".<sup>21</sup> This is also one of the aspects of Estlund's theory that has come in for most criticism.

Critics have been sceptical of the idea that we can identify whether the democratic process has a tendency to get things right from the standpoint of justice (or the common good etc.) without relying on some determinate account of what justice (etc.) consists in.<sup>22</sup> Yet, if we do rely on some particular conception of these

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<sup>19</sup> e.g. David Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, Mass: The MIT Press, 1997); Thomas Christiano, 'The Significance of Public Deliberation', in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, Mass.: MIT Press, 1997).

<sup>20</sup> Estlund, *Democratic Authority*.

<sup>21</sup> *Ibid.*, 169.

<sup>22</sup> Fabienne Peter, 'The Epistemic Circumstances of Democracy', in *The Epistemic Life of Groups: Essays in the Epistemology of Collectives*, ed. Michael S. Brady and Miranda Fricker (Oxford: Oxford University Press, 2016); Sean Ingham, 'Disagreement and Epistemic Arguments for Democracy', *Politics, Philosophy & Economics* 12, no. 2 (1 May 2013): 136–55;

things, that seems to reduce an epistemic justification of democracy to a directly instrumental one. A directly instrumental justification of democracy might say (for example) that economic growth and gender equality are good things, and democracies tend to have more of these things than alternative regimes. Directly instrumental justifications seem troubling to such critics, because they require the theorist to claim that they know better than other citizens how political decisions should go. For example, a theorist who justified democracy on the basis of economic growth and gender equality criteria would be committed to saying that when democracies occasionally choose policies that lower economic growth or reduce gender equality, they are wrong to do so. For some, this suggests a lack of commitment to democracy, because it seems to imply that the theorist's ideal outcome would be rule by philosopher-kings committed to the theorist's preferred evaluative criteria. For direct instrumentalists, if democracy ends up being the best political system in practice, this can only be because of contingent "facts about the distribution of expertise and good will".<sup>23</sup> Moreover, a directly instrumental justification for a political system is inherently limited in its appeal, since it can only appeal to those who already share the theorist's evaluative criteria (e.g., economic growth and gender equality). Yet, the disagreements that prompt the need for a political system in the first place are almost certain to include disagreements about evaluative criteria.

I will defend my own view rather than Estlund's. However, one of the main contributions this thesis makes to the epistemic democracy debate is to show how epistemic accounts of democracy can respond to objections of this sort. It does so by showing how epistemic considerations can be integrated into a justification of democracy that is ultimately instrumental, but that is nonetheless impartial between different conceptions of justice or the common good. Whereas previous accounts of epistemic democracy have focused on its relationship to forms of proceduralism such as public reason liberalism, I clarify the relationship between epistemic democracy and instrumentalism.

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Laura Valentini, 'Justice, Disagreement and Democracy', *British Journal of Political Science* 43, no. 1 (January 2013): 177–199.

<sup>23</sup> Valentini, 'Justice, Disagreement and Democracy', 190.

In the wake of Estlund’s work, epistemic democrats have taken a more practical turn, looking at the different mechanisms that are supposed to explain the epistemic merits of democracy. This is exemplified by Landemore’s book *Democratic Reason*.<sup>24</sup> Landemore describes the epistemic merits of the deliberative and voting practices that constitute democracy, and she argues that these mechanisms demonstrate the epistemic superiority of an idealised democracy over idealised dictatorship or aristocracy. Like Landemore’s, my account of democracy is oriented towards a practical question about the relative merits of different political systems. However, this thesis differs from the work of Landemore and other epistemic democrats in two significant respects.

First, impartial instrumentalism moves away from the narrow focus on knowledge suggested by the term “epistemic”. I argue that democracy’s tendency to promote the moral motivation of decision-makers is just as important as its tendency to promote the knowledge of decision-makers. This contrasts with Estlund and Landemore, who conduct their work within the idealising assumption that political actors are well intentioned – that voters and politicians aim at the common good as they see it.<sup>25</sup> Estlund and Landemore thus avoid asking how institutions themselves can affect people’s motivations. Motivational mechanisms traditionally played an important part in instrumental justifications of democracy. These considerations can also be articulated in impartial ways, as Elster has shown in recent work.<sup>26</sup> One of my contributions to the theory of epistemic democracy is to re-integrate these motivational considerations alongside epistemic considerations.

Second, this thesis focuses on different variables of institutional design. For Landemore, the alternative to democracy is a more aristocratic or elitist system of government. Her adversaries are those such as Bryan Caplan, Ilya Somin, and Jason Brennan, who point to widespread political ignorance among voters as evidence that democracy performs poorly by epistemic standards.<sup>27</sup> However, for many of

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<sup>24</sup> Landemore, *Democratic Reason*.

<sup>25</sup> Estlund, *Democratic Authority*, 14, 206; Landemore, *Democratic Reason*, 11–12.

<sup>26</sup> Jon Elster, *Securities against Misrule: Juries, Assemblies, Elections* (Cambridge; New York: Cambridge University Press, 2013).

<sup>27</sup> Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton University Press, 2011); Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (Stanford, California: Stanford University Press, 2013); Jason Brennan, ‘How

democracy's epistemic critics, the preferred alternative to democracy is not some kind of aristocracy of experts, but the market. My contribution is to focus specifically on institutional choices between democracy and the market, within the terms of an epistemic justification of democracy.

## Markets and democracy

This brings me to the second major theme that runs through this work: markets and democracy. The underlying question that motivates my inquiry is what the relationship should be between democracy and the market. In response, I defend a version of the idea that democracy should have priority over the market. This idea will be interpreted along the lines suggested by Jack Knight & James Johnson.<sup>28</sup> I will not claim that democracy has priority in the sense of being the better institution for all purposes. This distinguishes my argument from those who think some version of democracy is a generally superior method of social co-ordination compared to the market.<sup>29</sup> Instead, democracy should have priority in the sense that it should have the power to regulate the market. It should not necessarily seek to take over those functions performed by markets, but it should have control over them.

Even with this clarification, it is still unclear what exactly this priority of democracy over the market actually means in institutional terms. Knight & Johnson do not offer much guidance on this question. I suggest that a meaningful way of thinking about the normative relationship between markets and democracy is to evaluate both sides of the reciprocal influence each institution can have on the other. How far can either institution affect matters that are normally decided by the other?

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Smart Is Democracy? You Can't Answer That Question a Priori', *Critical Review* 26, no. 1–2 (3 April 2014): 33–58; Guido Pincione and Fernando R. Tesón, *Rational Choice and Democratic Deliberation: A Theory of Discourse Failure* (Cambridge; New York: Cambridge University Press, 2006); Mark Pennington, *Robust Political Economy: Classical Liberalism and the Future of Public Policy* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing Ltd, 2011), chap. 3.

<sup>28</sup> Knight and Johnson, *The Priority of Democracy*, 19.

<sup>29</sup> e.g. John O'Neill, *Markets, Deliberation and Environment* (London; New York: Routledge, 2006); Fikret Adaman and Pat Devine, 'On the Economic Theory of Socialism', *New Left Review*, I, no. 221 (1997): 54–80.

To the extent that they can, how should we respond? I thus ask the following questions:

- a) Should democracy be restricted in its influence over the market?
- b) Do markets influence democracy, and if so what should be done about this?

Answering these two questions will constitute my second and third research aims. Because both of these questions are normative, their references to *democracy* and the *market* should be interpreted not in conventional terms, but with reference to a theory of what it is that makes either institution valuable. In order to say that democracy should enjoy some kind of priority, we need an account of why democracy should enjoy this special status. This is why the account of the justification of democracy that I develop in the first four chapters is necessary to sustain the claims I make about markets and democracy in the last three chapters.

To advance my second research aim and answer question (a) above, I will critically examine the most serious contemporary argument that democracy's power to intervene in the marketplace should be constitutionally restricted. This argument has been advanced by Ilya Somin.<sup>30</sup> Somin stands as the best representative of the broader group of pro-market critics of democracy mentioned above. This inquiry can be thought of as considering markets as an alternative to democracy. By restricting the areas of social life over which democratic decisions can be made, Somin seeks to enlarge those areas governed by markets. If democracy is to be restricted, we need to know whether this will impede any useful functions democracy was previously performing, and if so whether these functions can be taken over by markets. I argue that Somin's case for constitutionally restricting the scope of democracy fails when we look at democracy through the lens of impartial instrumentalism. Compared to democracy, markets are inherently limited in their ability to make good decisions in the face of disagreement about what counts as good decisions.

To advance my third research aim and answer question (b) above, I will examine two ways markets can influence democracy. First, I look at the role of markets in paying for political speech. Second, I look at a less obvious but potentially deeper vector for market influence: capital strikes. By capital strikes, I refer to situations in which governments retreat from policies out of fear of how markets will

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<sup>30</sup> Somin, *Democracy and Political Ignorance*.

react. Whereas the previous research aim is to evaluate markets as an alternative to democracy, my aim here is to ask how markets can form an obstacle to democracy: how can the influence of markets impede the proper working of democracy? I argue that markets can indeed compromise democracy through these vectors. In terms of how we should respond to this, I will suggest some constitutional reforms to solve problems of money in politics. However, when it comes to capital strikes, I will argue that all attempts at mitigation are unsatisfactory, and raise difficult trade-offs between different values.

This question of what relationship should hold between democracy and the market has seldom been posed in exactly these terms, and so whereas the debate about epistemic democracy is relatively coherent and distinct, the political theory of markets and democracy is somewhat more amorphous. Lisa Herzog describes a belief in “the primacy of politics” as that which unites the “critical friends” of the market, one of three main traditions of philosophical thinking about markets.<sup>31</sup> In this category she includes Hegel, Mill, Keynes, Rawls, and European social democrats. This thesis can certainly be understood as a contribution to this tradition. However, it departs from Herzog’s characterisation insofar as she understands the primacy of politics primarily as a philosophical or conceptual claim: when we think about markets, we should think about them as tools for democratically decided purposes, rather than (for example) as expressions of natural rights to property. By contrast, I am interested in the primacy of politics as an institutional claim about how the political system should be organised. In this respect, my work is closer to that of Knight & Johnson, who certainly understand the priority of democracy in an institutional sense. Their argument for this institutional priority is based on a favourable comparison between deliberative democracy and the economics of general equilibrium.<sup>32</sup> I go beyond this abstract exercise to ask what the priority of democracy actually means in practice. I evaluate ways in which markets can influence democracy, and proposals for restricting democracy’s influence over the market.

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<sup>31</sup> Lisa Herzog, ‘Markets’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2016 (Metaphysics Research Lab, Stanford University, 2016), sec. 2, <https://plato.stanford.edu/archives/win2016/entries/markets/>.

<sup>32</sup> Knight and Johnson, *The Priority of Democracy*, chap. 3.



In the process of this inquiry, I will also draw on and contribute to three more specific debates and traditions.

First is the tradition of public choice theory, in which normative concerns are more likely to be about democracy corrupting the market rather than the other way around. Although a rational choice methodology can be used for many different purposes, the dominant tendency in public choice theory is to see markets as the most efficient form of social co-operation, one that is continually menaced by rent-seeking governments. The version of public choice theory I engage with is that utilised by Somin and other epistemic critics of democracy. These authors rely heavily on the thesis of “rational ignorance”: because individual votes have such a small chance of making a difference, instrumental rationality recommends spending very little effort deciding how to vote. To this pessimistic diagnosis of democracy they add a rather rosy picture of how markets operate. In this debate, my contribution is primarily negative. I will argue that even if we adopt economic efficiency as our sole normative criterion there are still good reasons to think democratic political mechanisms should not be constrained in their influence over the market.

The second tradition I draw on in thinking about markets and democracy is the relatively small and focused debate about financing political campaigns. Unsurprisingly given the particularly damaging and inflexible set of rules prevailing in the USA, this debate has largely focused on the American context. The topic has attracted the attention of the most influential contemporary American philosophers of democracy, in addition to a great many lawyers.<sup>33</sup> However, my intervention is unmoored from the specific American context. My main contribution is to offer a new, epistemic argument for egalitarian restrictions on money in politics, restrictions of the kind that one might normally expect to see justified by substantive considerations of justice.

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<sup>33</sup> Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, N.J.: Princeton University Press, 1990), chap. 9; Joshua Cohen, ‘Money, Politics and Political Equality’, in *Fact and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson*, ed. Alex Byrne, Robert C. Stalnaker, and Ralph Wedgwood (Cambridge, Mass.: MIT Press, 2001); David Estlund, ‘Political Quality’, *Social Philosophy and Policy* 17, no. 1 (2000): 127–60; Thomas Christiano, ‘Money in Politics’, in *The Oxford Handbook of Political Philosophy*, ed. David Estlund (Oxford: Oxford University Press, 2012), 241ff.

Finally, I draw on and contribute to a tradition of Marxist and socialist writing about how capitalism constrains democracy.<sup>34</sup> Erik Olin Wright summarises the debate with a classification of four mechanisms by which capitalism is stably reproduced: direct coercion, institutional rules, ideology and culture, and material interests.<sup>35</sup> My interest is in the last two, because it is only through these that markets can directly impact on democracy, without requiring the mediation of a coercive military/police establishment. By ideology and culture, Wright refers to mechanisms that shape the subjectivities of citizens: conscious beliefs (ideology), and habits that enable people to function effectively within existing structures of power (culture). My inquiry into the effects of money in politics can be read as a contribution to a theory of ideology in this sense. By material incentives, Wright refers to mechanisms that tie people's welfare to the effective functioning of the capitalist system. The capital strike, or the "structural dependence of the state on capital", is the main mechanism that has been advanced as having this effect.<sup>36</sup> My contribution here is to show why one might be concerned about capital strikes on the basis of impartial, democratic considerations rather than on the basis of a socialist conception of justice. I also set out more precisely than has been done before the conditions under which capital strikes can be genuinely influential.

Although I make these contributions to the Marxist and socialist tradition of writing about capitalism and democracy, my project nonetheless differs from this tradition in important ways. My aspiration is not to explain the obstacles to socialism, but to set out what the relationship between markets and democracy should be, in impartial, epistemic terms. Moreover, the contrast I am interested in is between democracy and the *market* rather than between democracy and capitalism. This is for two reasons. First, *capitalism* is usually considered as something more specific than the market.<sup>37</sup> By focusing on markets rather than capitalism, I thus

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<sup>34</sup> e.g. Fred Block, 'The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State', *Socialist Revolution* 33, no. 7 (1977): 6–28; Joshua Cohen and Joel Rogers, *On Democracy* (New York: Penguin Books, 1983); Samuel Bowles and Herbert Gintis, *Democracy and Capitalism* (London: Routledge & Kegan Paul, 1986).

<sup>35</sup> Erik Olin Wright, *Envisioning Real Utopias* (London; New York: Verso, 2010), 274–89.

<sup>36</sup> Block, 'The Ruling Class Does Not Rule'.

<sup>37</sup> e.g. Herzog, 'Markets', sec. 1; Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (London; New York: Routledge, 2001).

operate at a higher level of generality. Where I make arguments that apply to some more specific version of the market (particularly markets under circumstances of inequality), I will indicate this. Second, proponents of markets more commonly present their positive vision in terms of *markets*, whereas *capitalism* carries greater theoretical and political baggage. Since proponents of markets are more often than not my opponents, the principle of charity recommends presenting the comparison in the terms most favourable to them.

## Structure of the thesis

Before proceeding to explain the structure of the thesis chapter-by-chapter, it may be helpful to summarise its goals and strategy in general terms. The underlying question I am interested in is what justifies democracy and what this justification implies for democracy's relationship with the market. To shed some light on these matters, I will pursue three more distinct research aims. First, in chapters one to four I give an account of the justification of democracy. I defend an account of democracy which I call impartial instrumentalism, drawing mainly on the tradition of epistemic democracy. In the second half of the thesis, I will reflect on what this account implies for the relationship that should hold between markets and democracy. My second research goal, addressed in chapter five, considers markets as an alternative to democracy. I will ascertain whether democracy should be restricted in its capacity to intervene in the market. My final goal, addressed in chapters six and seven, considers markets as an obstacle to democracy. I will ask whether markets influence democracy, and if so, what we should do.

Chapter one sets out the basic idea of impartial instrumentalism. I situate this account within a framework of the circumstances of politics and the need for a constitutional mechanism to resolve political disagreements. According to this account, constitutional design has one goal and one side constraint. The goal is to promote the political system's tendency to produce better decisions. The side-constraint is that this goal must be pursued in a way that is impartial between the perspectives of the parties to political disagreements. In other words, in designing a system for dealing with political disagreement, we should not take as a premise anything that is itself the subject of the original disagreement.

The second chapter continues the work of the previous chapter in clarifying the basic idea of impartial instrumentalism, before considering the first major objection to it. I consider an epistemological objection to the idea that one can design a system to produce good decisions without already having determinate criteria for the goodness of decisions. To reply, I demonstrate the possibility of using empirical evidence without violating the impartiality principle. This methodology works by making inferences from features of group decision-making that lead to good outcomes in other contexts where success can be assessed non-controversially.

Having set out the basic idea of impartial instrumentalism, chapter two explores what it means in practice. I identify two principles of constitutional design that arise from the underlying commitments to impartiality and instrumentalism. Both of these design principles are supposed to contribute to better outcomes in a way that is not dependent on any particular substantive moral-political perspective. First, the design of the system should promote the relevant knowledge of decision-makers within it, whether these are voters, legislators or bureaucrats. Second, institutions should encourage decision-makers to act as though morally motivated. I tackle each principle in turn, explaining how they meet the conditions of impartial instrumentalism and how they are promoted by familiar features of liberal democracy. In the process, I deal with worries about the capacity of impartial instrumentalism to produce determinate institutional recommendations.

Where the first two chapters set out the idea and implications of impartial instrumentalism, the third defends its desirability. I give some reasons why citizens should approach constitutional choices as recommended by impartial instrumentalism, rather than as its two main alternatives. I call these alternatives moral proceduralism and direct instrumentalism. The challenge posed by direct instrumentalism is as follows: why should citizens observe the impartiality principle rather than directly aiming for the constitution likely to perform best according to their current conception of justice (or the common good etc.)? In response, I show how conditions of uncertainty and a need to persuade others can mean that instrumental goals in politics are best pursued in an impartial way. Moral proceduralist theories justify democracy by appeal to non-instrumental features of democratic procedures rather than the decisions that they produce. I distinguish between version of moral proceduralism that are compatible and even supportive of impartial instrumentalism, and those that are more difficult to accommodate.

Chapter five marks the shift to the second half of the thesis, in which I examine three challenges markets pose to the account of democracy developed in the first half. In this chapter, I ask whether impartial instrumentalism actually recommends markets rather than democracy. I do so by critiquing Somin's argument that democracy is epistemically incompetent and markets are epistemically superior. First, I offer an internal critique of this thesis. I show that even if we take our goal to be solely the promotion of economic efficiency, there are good reasons to think a recognisably democratic political system will be needed to decide between different ways in which efficiency can be promoted. Second, by privileging economic efficiency as an evaluative criterion, this line of argument overlooks the primary function of democracy, which is to adjudicate between different conceptions of what the political system should be aiming for. It thus fails the impartiality condition I argued for in chapter one: it is only persuasive for those already committed to Somin's substantive moral-political perspective.

The final two chapters consider two different ways the influence of markets can reduce democracy's (impartially assessed) instrumental value. Chapter five looks at how markets can influence decisions through the way political speech is paid for. The knowledge-promotion principle set out in chapter three implies that the political finance system should be designed to increase the range of relevant arguments and evidence voters are aware of. This is constrained by the need to avoid negative motivational side-effects. I show how arguments for a free market in political speech can be reconstructed on this basis. I then challenge this free market argument by making a case for egalitarian restrictions on the funding of political speech. Because voters have a limited attention span for politics, the speech of a wealthy minority will predictably tend to drown out the speech of the poor. This means that a more egalitarian distribution of the sources of political speech is likely to increase the diversity of perspectives to which voters are exposed.

Moving on from the special context of political finance, chapter seven asks whether markets have a more general tendency to limit the scope of democratic decision-making. Governments often abandon policies like taxes or minimum wages out of fear that markets will react negatively towards them. I question whether capital strikes of this kind limit the choices available to democracies in a way that is undesirable according to impartial instrumentalism. I argue that capital strikes are problematic only when they structurally constrain which policy goals democracies

can aim at. I show that in a closed economy, they do not. The real problem is thus with international capital *flight*, which incentivises a process of tax and regulatory competition. Capital flight can only be mitigated by either taking a substantial hit to economic prosperity, or by accepting a different kind of constraint on democratic autonomy (though international harmonisation). This makes capital flight a powerful constraint on governments' ability to pursue goals that conflict with the interests of capitalists.

Impartial instrumentalism is an account of democracy's justification that is coherent, determinate, and compares well with alternatives. The account values political systems according to their impartial tendencies to produce good decisions. This recommends political systems under which decision-makers are knowledgeable and well-motivated. Since democracy does better according to these criteria than alternative political systems, impartial instrumentalism vindicates common intuitions in favour of democracy. At the same time, it is also revisionist, pointing to ways democratic systems could be reformed to increase their value. Using this normative theory, I examine constitutional choices surrounding the relationship between democracy and the market. I rebut arguments for limiting democracy's ability to intervene in the market. I also show how the influence of markets can impede the proper functioning of democracy. In this way, I support the idea that democracy should be able to influence the market, but that markets should be restricted in their ability to influence democracy.

# Chapter 1 The idea of impartial instrumentalism

Impartial instrumentalism is a compound of two basic principles. First, an *instrumentalism* principle: political systems should be designed so that they tend to make good decisions. Second, an *impartiality* principle: this tendency of a political system to make good decisions should not be assessed according to any particular substantive moral-political perspective. The combination of these two principles directs our attention to those elements of a political system that can be seen to promote better decisions irrespective of one's stance on first-order policy issues. This leads to two principles for constitutional design: political systems should be designed to promote the relevant knowledge of decision-makers, and to promote the tendency of decision-makers to act as though morally motivated. These principles resemble James Madison's statement that "a good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained."<sup>1</sup> The reason for my precise wording (which is so much less elegant than Madison's) will become apparent in chapter four. The two principles point to properties that can be seen to enhance the quality of decisions regardless of whether one is socialist or conservative, Aristotelian or utilitarian.

The instrumentalism principle says that government should be designed to promote justice (or the common good, or however one wishes to describe the normative criterion one uses to evaluate the substantive content of government policies). However, the nature of politics is that we disagree about what promoting justice or the common good means. So, the impartiality principle says that our system for dealing with these disagreements should not itself be designed to promote any particular conception of what the state should do. When we design the political system to promote justice or the common good, we should draw a veil over what we think we know about what the state should do. We should ask how we can structure

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<sup>1</sup> James Madison, 'The Federalist No. 62', in *The Federalist Papers*, by Alexander Hamilton, James Madison, and John Jay (London: Penguin Classics, 1987).

politics so as to improve our knowledge of what the state should do, and to motivate political decision-makers to act on this knowledge.

In this and the next three chapters, I elaborate and defend this account of the justification of democracy. Each of these four chapters performs a specific function. The present chapter sets out the basic idea of impartial instrumentalism and clarifies its meaning. Chapter two argues that impartial instrumentalism is coherent: this is a combination of ideas that makes sense, made up of component parts that are compatible with one another. Chapter three argues that the account is institutionally determinate, sketching some of its institutional implications. Chapter four argues it is desirable: that citizens should want to live under a government organised on this basis, and that impartial instrumentalism compares favourably to alternative accounts of the justification of democracy. To assist the reader, I will break from this general structure at certain points where it is helpful to preview aspects of the institutional implications and make comparisons with other accounts.

This chapter begins by stating the background conception of politics and political systems against which impartial instrumentalism operates. Politics is defined by disagreement, but political disagreements are confined within certain bounds. Section 1.2 then provides a more elaborate and definitive statement of impartial instrumentalism than that which I gave above. The remainder of the chapter then clarifies the impartiality principle. Basic conceptual issues are dealt with in section 1.3, while section 1.4 expands on just what it is that the impartiality principle enjoins impartiality between. Section 1.5 compares the impartiality principle with the public justification principle, while section 1.6 describes how impartiality in constitutional design is a property which can be satisfied to a greater or lesser degree.

## **1.1 Political systems as ways of dealing with disagreement**

In the Introduction, I defined politics as constituted by practical disagreements between people who can affect one another but are willing to forgo violence even if a decision goes against them. Political systems such as democracy are ways of specifying how decisions are made in the face of political disagreements. On



a basic level, political systems perform a function of dealing with political disagreement.

On this definition, disagreements in politics arise in the first place because people have different first-order policy preferences. That is, people disagree about what the state should do: should taxes be raised or lowered? Should the state sanction gay marriages, or not? These different first-order policy preferences can be traced to what I will call different substantial *moral-political perspectives*. A perspective consists firstly of a set of goals (a conception of justice, say), and secondly of a set of causal beliefs about how the world tends to work in practice (an economic theory, for example).<sup>2</sup> Together, these goals and beliefs generate a set of first-order preferences between policies or laws.

In speaking of a set of preferences, I make no assumption that these preferences (or the goals and beliefs that underlie them) are remotely complete. Indeed, the likelihood that first-order preferences will be incomplete because of normative or causal uncertainty plays an important part later in the argument (section 4.1). The goals that make up a perspective may be both self-interested and morally motivated. Insofar as goals are moral, they can also be characterised as beliefs: beliefs about what is normatively required. In positioning impartial instrumentalism against other versions of instrumentalism in this and the next three chapters, I will mainly focus on disagreements traceable to clashing beliefs rather than disagreements due to clashing interests. However, I make no assumption that people's stances in ordinary politics are the result of moral goals rather than self-interest (or some murky combination of the two). Indeed, these murky combinations will become relevant for my argument in chapter six.

To illustrate the view of politics at work here, consider the following example. A city is deciding where to build a new airport. Should it expand the existing airport in the western suburbs, or build a new airport on reclaimed marshland in the east? Each side has partisans who believe that their preferred plan will be best for the city. The reason we need systems to settle such political disagreements is because both sides, despite their differences, accept the need for a common decision. Where people disagree about what should be done, but agree that some common decision would be better than none at all, all sides will benefit from a

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<sup>2</sup> Elster, *Securities against Misrule*, 3–4, 45.

decision-making system for directing people to co-ordinate on one option rather than the other.

It might be objected that many political decisions are actually about whether or not a common decision is required in the first place. However, whether or not a common decision is required itself requires a common decision. Imagine that a political decision is made in favour of the western airport, but the eastern party say they will build their airport privately anyway. In other words, they assert that no common political decision is required, and private parties should be able to proceed as they wish. However, imagine that other political groups are adamant that the city can only cope with one airport expansion project, due to environmental concerns. They assert that a common decision is required. The important point about this case is that there is no neutral stance for the state to take between the eastern airport faction and the environmentalists. The state must decide in favour of one party or the other. If the state were to say that no common decision about airports was required, that would not be a neutral position; it would be to decide a practical disagreement in favour of the eastern faction, against the environmentalists. This issue of the non-neutrality of non-intervention will be explored in more detail when I consider market alternatives to democracy in chapter five.

Political systems such as democracy specify how decisions are made when people disagree about airport placement, and they perform the same role when it comes to more complex questions about which goals the law and the state bureaucracy should pursue. Even if people disagree strongly about the ends the law should serve, so long as they place an even higher value on continued peaceful co-operation with those whom they disagree with, they have reason to value a political system that makes decisions in the face of disagreement. The first value of a political system like democracy is the value it has as a way of dealing with political disagreements of this kind. As I mentioned in the Introduction, democracy may also be valuable for its incidental effects or non-instrumental features, but I will focus on its value as a means to make good decisions in the face of disagreement.

By focusing on the importance of political institutions in dealing with disagreement, I do not mean to suggest that perspectives are immutable, and that consensus is necessarily impossible. Beliefs can be changed by persuasion, and the

design of the political system should affect this.<sup>3</sup> However, while political systems should make room for argument and persuasion, arguing to consensus is not a viable general model for dealing with real political disputes. For one thing, we face epistemic difficulties of the kind Rawls called the “burdens of judgement”: difficulties which mean that parties may be unable to reach agreement even with infinite amounts of time.<sup>4</sup> Moreover, time itself is a critical variable. Spending an eternity trying to reach agreement in a disagreement about airports would be unwise according to the very perspectives that give rise to that disagreement. If we cannot expect to be able to deliberate until reaching a consensus, then we will require political systems like democracy to specify how decisions can be made in the absence of consensus.

That political systems are primarily valuable as ways of dealing with disagreement still leaves a great deal to be said about how exactly this should be done. One political system for making decisions in the face of disagreement would be to make decisions by interpreting the entrails of sacrificed animals.<sup>5</sup> While such a system is valuable in the sense of being preferable to civil war, there are surely better ways of making decisions. Impartial instrumentalism is a way of choosing between different political systems (including different versions of democracy), all of which perform the basic role of dealing with disagreement. Impartial instrumentalism gives some content to the basic idea that political systems should be judged by how well they deal with disagreement, giving a more institutionally determinate interpretation of what this idea means.

Understanding political systems as ways of dealing with disagreement gives my justification of democracy something of the flavour of social contract theory. However, although the structure has similarities, the content is quite different. Contractarians view government as a means by which individuals with competing

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<sup>3</sup> David Miller, ‘Deliberative Democracy and Social Choice’, *Political Studies* 40 (1 August 1992): 54–67; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000), 32.

<sup>4</sup> John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly, 2nd edition (Cambridge, Mass: Belknap Press, 2001), chap. 11.4.

<sup>5</sup> Jon Elster, ‘Introduction’, in *Deliberative Democracy*, ed. Jon Elster (Cambridge: CUP, 1998), 5.

interests can co-operate in a way that leaves each of them better off.<sup>6</sup> By contrast, the view here is that democracy is a means by which individuals with clashing beliefs about morality and society can make common decisions in the face of disagreement, in a way that makes the world better from each of their perspectives. In both cases, accepting constraints on the individual pursuit of your own goals is rational as a way to better advance those goals in the long run. This theme will be developed further in chapter four. The difference is that in social contract theory individual goals are defined solely in terms of self-interest, whereas here goals are also defined in terms of different normative beliefs. This is compatible with someone's normative goals themselves being defined by a version of social contract theory.

Before moving on to elaborate impartial instrumentalism in more detail, there is one crucially important additional caveat about the value of political systems in dealing with disagreement that needs to be looked at more closely. This is that political systems can only be expected to deal with *political* disagreements, not with all practical disagreements. In some disagreements, one or both parties are unwilling to go along with any decision that favours the other side. For example, while partisans of western and eastern airports might be expected to go along with a decision favouring the other side, partisans of the Shiite militia Hezbollah cannot be expected to go along with the decisions of a Sunni fundamentalist ISIS government. So long as ISIS regards all Shiites as apostates, and practically takes its mission to be the annihilation of all apostates, no political system, however well designed, could deal with the disagreement between ISIS and Hezbollah. For my purposes, the important distinction is between those disagreements that can be dealt with politically, and those that cannot. No account of political systems as dealing with disagreement can cover an unrestricted domain. By focusing exclusively on political disagreements, I bracket out those disagreements that are so severe they lead to the breakdown of political systems entirely. Impartial instrumentalism can only be persuasive so long as options that people find absolutely intolerable are kept off the political agenda.

This distinction between political and non-political disagreements is somewhat rough and ready. Political disagreement should be interpreted to allow

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<sup>6</sup> Albert Weale, *Democratic Justice and the Social Contract* (Oxford: Oxford University Press, 2013), 9–11.

some room for civil disobedience, but this means there are grey areas between civil disobedience and civil war. I bracket these questions, along with questions about how constitutional design can facilitate or impede political breakdown or peace-making. Instead, I focus on the context of political disagreement as defined above. Although this leaves a lot out, it leaves a lot in: the great majority of politics within contemporary mature democracies falls within this category. When partisans disagree about placement of airports, rates of taxation, laws on abortion, or policy towards foreign countries, they generally presuppose a willingness to stay within the same political system as their adversaries, even if their adversaries should win the political battle on the issue today. This definition of political disagreements will be important for what follows. Because political disagreements are defined as falling within this restricted range, in normal politics we can assume that people prefer to have a political system that makes decisions with which they sometimes disagree, rather than have no political system at all.

## **1.2 Impartial instrumentalism**

This section states the fundamental principles of impartial instrumentalism. After describing these two principles, I give a very basic example of how they can be compatible in practice. I then go on to state two principles for constitutional design that can be derived from the two fundamental principles. To clarify the meaning of impartial instrumentalism, I contrast it with two alternative accounts of the justification of democracy: proceduralism and direct instrumentalism. Proceduralism is defined as featuring an impartiality principle but no instrumentalism principle, while direct instrumentalism is the opposite. By looking at the two parts of impartial instrumentalism separately, we can see what is attractive about each of the two principles, but also why each part is insufficient in isolation. However, a more detailed argument as to why we should adopt impartial instrumentalism rather than these alternative accounts can be found in chapter four. The section finishes by considering what is epistemic about my account and what is democratic about it, and by outlining the three objections that will be dealt with in the remaining first half of the thesis.

Impartial instrumentalism consists of two principles:

1. *Instrumentalism*. Political systems should be designed so that they tend to make good decisions (according to whatever criterion of goodness for political decisions is correct).
2. *Impartiality*. The tendency of political systems to make good decisions should be assessed in a way that is impartial between substantive moral-political perspectives.

The instrumentalism principle is a teleological, consequentialist principle: it specifies what political systems should aim for, and ascribes value to them based on how well they meet this goal. The impartiality principle is a deontological side-constraint: it constrains the way the first principle should be applied.

As an example of how one might assess part of a political system in a way that is both instrumentalist and impartial, consider the following very simple example taken from Jon Elster. Jurors, legislators and voters make better decisions when they are sober. In the interests of better decisions, it seems clear that jurors and legislators should be banned from drinking while deliberating. Obvious as this might seem, “in *Tanner v. United States* the Supreme Court found that copious consumption of alcohol by jurors during a trial did not constitute grounds for overturning the verdict.”<sup>7</sup> In another case it is claimed that following some particularly heated late night debates, the French Constituent Assembly in 1789 resolved that important debates in the future should be taken fasting rather than after coming back from dinner.<sup>8</sup> The reason for forbidding alcohol during deliberations cannot be anything to do with procedural fairness. Indeed, the US Supreme Court reached such an amazing decision in *Tanner* because they could not see how consumption of alcohol constituted an “outside influence” any more than “a virus, poorly prepared food, or a lack of sleep.”<sup>9</sup> The reason to forbid alcohol must be that doing so would lead to better decisions. This is the kind of judgement that can be made within impartial instrumentalism, because it does not presuppose any particular perspective. We don’t need to know the accused is guilty or innocent in order to say that jurors would be more likely to reach a good decision if they were

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<sup>7</sup> Elster, *Securities against Misrule*, 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Tanner v. United States*, 483 US 107 (Supreme Court 1987); quoted in Elster, *Securities against Misrule*, 3.

sober. We don't need to know what ultimate moral standards should be applied to decisions in order to say that a democracy that prohibits legislators from getting drunk on the job will produce better decisions than one that allows it.

The two fundamental principles of impartial instrumentalism described above imply two downstream principles for constitutional design. Political systems impartially tend to produce better decisions to the extent that they:

1. Promote the relevant knowledge of decision-makers.
2. Promote the tendency of decision-makers to act as though morally motivated.

I will refer to these as the *knowledge* and *motivation* principles. These are desiderata for political systems that can be applied without relying on any substantive moral-political perspective. The judgement that legislators are better sober than drunk is an application of the knowledge principle. The principle can also be illustrated by examining the epistemic merits of deliberation.<sup>10</sup> A political system featuring a lively public sphere in which interlocutors provide arguments for the superiority of their positions would be preferable to a system with a washed-out public sphere in which people make little attempt to justify themselves or to consider alternative points of view. The motivation principle can be illustrated by the way regular elections make it harder for legislators to promote their own self-interest at the expense of the public good. Regular elections make the career interests of representatives depend on how constituents judge their performance. I introduce the two constitutional design principles at this point merely to give a sense of what impartial instrumentalism means in practice. The full argument for why these two principles are consistent with both instrumentalism and impartiality is given in chapter four, where I will also give more examples of what constitutional choices the two principles recommend in practice.

Having set out the basics of impartial instrumentalism, it may be helpful at this point to consider some of the alternatives. I contrast three possible ways of

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<sup>10</sup> Christiano, 'The Significance of Public Deliberation'; James D. Fearon, 'Deliberation as Discussion', in *Deliberative Democracy*, ed. Jon Elster (Cambridge: CUP, 1998), 44–68; José Luis Martí, 'The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy', in *Deliberative Democracy and Its Discontents*, ed. Samantha Besson and José Luis Martí (Aldershot: Ashgate, 2006).

thinking about the justification of democracy: direct instrumentalism, impartial instrumentalism, and proceduralism. *Direct instrumentalism* is committed to the instrumentalism principle, but not the impartiality principle. *Proceduralism* is committed to the impartiality principle, but not the instrumentalism principle. Impartial instrumentalism is thus a kind of combination of these two other views (see Table 1 below). Estlund’s Epistemic Proceduralism also attempts to combine these views. I will describe how Estlund’s method of combining them differs from my own in the following chapter.<sup>11</sup> I use the terms proceduralism and direct instrumentalism to refer to ideal-types of philosophical positions rather than views held by any particular flesh-and-blood political theorists. For ease of exposition, I will initially treat the three views as rigidly distinct. However, later in the chapter I explain how there might be a continuum of positions between fully impartial and fully direct instrumentalism.

Table 1

	Instrumentalist: Political systems should be designed to make better decisions	Not instrumentalist
Impartial: Political systems should be evaluated in a way that is impartial between different substantive moral-political perspectives	Impartial instrumentalism	Proceduralism
Not impartial	Direct instrumentalism	

The key element of direct instrumentalism is the proposition that better political systems are those that tend to produce better decisions.<sup>12</sup> To implement this idea, a directly instrumental approach takes a particular moral-political perspective

<sup>11</sup> Estlund, *Democratic Authority*, chap. 6.

<sup>12</sup> For contemporary instrumentalist accounts of democracy see Richard J. Arneson, ‘The Supposed Right to a Democratic Say’, in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Christman (Malden, MA: Wiley-Blackwell, 2009), 195–212; Jason Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2012), 15.



and simply applies that perspective to political systems. For example, a utilitarian perspective would look at a society, ask what the level of utility in that society is, and evaluate that society's political system accordingly. The attraction of the directly instrumental view, I think, is fairly obvious: whatever view of political morality one takes, the state is clearly a major instrument for either good or evil, and so it makes sense to want it to do good rather than evil (according to one's understanding of those things).

Adapting Estlund's characterisation, I define the key element of proceduralism as the proposition that political systems should be evaluated in a way that is impartial between different substantive moral-political perspectives.<sup>13</sup> There are two kinds of reasons to avoid appealing to substantive moral-political perspectives: *moral* and *pragmatic*.

A moral justification for proceduralism would say that there are higher-order moral principles that determine how we should conduct our first-order political disagreements, even when we engage in first-order disagreements to promote moral goals. More substantively, one might say that respecting and recognising others as moral equals also requires respecting the views that they hold. This, in turn, requires that the political system should be impartial between different people's views, and should not be slanted towards one's own perspective (even if this perspective is itself morally motivated). This sort of argument is common in contemporary democratic theory. A moral justification seems to underlie the procedural element in Estlund's own theory.<sup>14</sup>

A pragmatic justification for proceduralism starts from a concern about the role of the political system in dealing with disagreement. From this viewpoint, direct instrumentalism seems to miss the point of what political systems are for. If the political system is to genuinely provide a way of dealing with disagreement, the system itself must be impartial between the different parties it sets out to resolve. In order for the various parties to have a good reason to go along with democratic decisions, the political system should not be biased in favour of any particular party's perspective. Otherwise, the procedure would not offer a way of adjudicating between perspectives at all; it would just be offering another perspective. To see this

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<sup>13</sup> Estlund, *Democratic Authority*, chaps 4–5.

<sup>14</sup> *Ibid.*, 69–73, 108.

point, imagine a constitutional convention split between liberals and conservatives. The liberals propose a constitution that entrenches private property and the separation of church and state. When conservatives ask why they should approve such a constitution, the liberals reply that such a constitution would promote individual freedom and autonomy. But from the perspective of the conservatives, this is no reason at all, since the issue that divides them from liberals in the first place is precisely the relative moral importance of individual freedom and autonomy. Because the two sides disagree about what should be aimed for or what is likely to promote those aims, the only reasons for valuing one political system over another that can be persuasive for both sides are procedural reasons about the decision-making procedure itself rather than the results it will tend to produce. In chapter four, the reasons I give to favour impartial over direct instrumentalism will rely on a pragmatic rather than a moral argument for impartiality.

These are only thumbnail sketches of two basic positions that can be elaborated in many different ways. One variation that I cannot go without mentioning is “public reason liberalism” or “political liberalism”. In the terms set out above, public reason liberalism can be understood as a directly instrumental approach to constitutional design up to a certain point, reverting to a procedural approach thereafter. Thus, constitutions should be instrumentally designed to exclude certain “unreasonable” decisions. However, once the unreasonable has been excluded, constitutions should be designed only on the basis of general procedural norms of fairness, and should not be designed to favour any one “reasonable” perspective over others. Public reason liberalism can thus be seen as a certain way of combining directly instrumental and procedural accounts of the value of political systems, by applying them in different domains of disagreement.

Impartial instrumentalism also combines instrumentalism and proceduralism, but it does so in a different way, combining their constituent principles directly. In so doing, impartial instrumentalism seeks to combine the features that have attracted people to proceduralism and direct instrumentalism. In chapter four, I give reasons why a combination of the instrumentalism and impartiality should be preferred to directly instrumental or procedural accounts that only include one or the other.

Impartial instrumentalism is a *democratic* account because it explains why democracy is justified. Impartial instrumentalism is a way of making constitutional

choices, and by extension, a way of evaluating different political systems, including democracy. However, impartial instrumentalism is also a democratic account in the more specific sense that out of all types of political system, it judges democracy to be the best. This thesis will not be able to fully substantiate this claim, which would require comparing democracy with authoritarian alternatives.<sup>15</sup> However, what I will do is compare democracy with a kind of market-based alternative (chapter five). Since this alternative is in my view the strongest challenger to democracy, showing the superiority of democracy over this alternative is a significant step towards justifying democracy more generally.<sup>16</sup>

In its two principles of constitutional design, impartial instrumentalism also incorporates the two main traditions of instrumentally justifying democracy. The knowledge principle corresponds to an epistemic justification for democracy that has been present in European political thought as far back as Aristotle's speculations about the "wisdom of the multitude".<sup>17</sup> The motivation principle corresponds to a "protective" justification for democracy that has exerted an even stronger influence on European political thought.<sup>18</sup> In the hands of James Madison and James Mill, the protective case for democracy starts from the importance of property rights, and points out that making rulers accountable to electors reduces their tendency to violate citizens' property rights.<sup>19</sup> The motivation principle represents those aspects of the protective tradition that are compatible with the principle of impartiality.

Impartial instrumentalism is an *epistemic* conception of democracy in two senses. First, epistemic accounts of democracy are necessarily instrumentalist in some way, because they focus on the substantive content of democratic decisions and not merely their procedural fairness. Second, in putting forward the knowledge principle and asserting that it points in the direction of democracy, I follow those

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<sup>15</sup> For an idealised comparison see Landemore, *Democratic Reason*.

<sup>16</sup> cf. Weale's discussion of 'judicialized government' *Democracy*, 56–62.

<sup>17</sup> Aristotle, 'Politics', bk. 3, chap. 11.

<sup>18</sup> Weale, *Democracy*, 51–56; David Held, *Models of Democracy*, 1st Edition (Stanford, California: Stanford University Press, 1987), chap. 2.

<sup>19</sup> Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (London: Penguin Classics, 1987); James Mill, 'Essay on Government', in *Utilitarian Logic and Politics: James Mill's 'Essay on Government', Macaulay's Critique and the Ensuing Debate*, ed. J Lively and J Rees (Oxford: Clarendon Press, 1978).

who think that epistemic merits of political systems are important and that democracy is a good form of government in epistemic terms. Even the motivation principle has its analogue in theories of epistemic democracy, since these theories always require some kind of condition that people deliberate sincerely or vote their judgements about the common good. By making the motivation principle explicit, I am simply bringing out a motivational element that was implicit in previous theories of epistemic democracy (I return to this theme in section 3.2 below).

In the next three chapters, I consider three major objections to impartial instrumentalism as stated above. First is what I call the *epistemological* objection. According to this objection, the epistemic approach is incoherent, because the instrumentalism and impartiality principles are incompatible. The objection claims it is simply not possible to say which institutions will tend to produce better decisions without relying on some substantive moral political perspective. In chapter three I consider an *indeterminacy* objection. This is the objection that the epistemic approach is only able to provide guidance on a minority of obvious cases, like drunken legislators, and will be indeterminate on most other constitutional choices. I will tackle this objection in the process of setting out the two constitutional design principles and some of their concrete implications. In chapter four, I address a *desirability* objection. I will give some reasons for why we should evaluate democracy using impartial instrumentalism rather than the alternatives of proceduralism and direct instrumentalism.

### 1.3 The concept of impartiality

Before turning to these objections, the remainder of this chapter will clarify in greater detail the meaning of the two fundamental principles of impartial instrumentalism, in particular the principle of impartiality. This section distinguishes the conception of impartiality at work in the impartiality principle from other conceptions of impartiality. I start by analysing the concept of impartiality on its most general level, before distinguishing between the two conceptions of impartiality to which I refer in this thesis: *minimal moral impartiality* and *impartiality in constitutional design*. The impartiality principle refers to the latter. It refers only to constitutional choices (not first-order policy choices), and only to impartiality of justification, (not neutrality of treatment).

Troy Jollimore writes that “impartiality is sometimes treated by philosophers as if it were equivalent to moral impartiality... This is misleading, since impartiality in its broadest sense is best understood as a formal notion, while moral impartiality in particular is a substantive concept.”<sup>20</sup> Arguing along similar lines, Bernard Gert proposes the following analysis of “the basic concept of impartiality”: “A is impartial in respect R with regard to group G if and only if A’s actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions.”<sup>21</sup> However, we can abstract a further level even from Gert’s basic analysis, by dropping the assumption that impartiality is always concerned with the distribution of benefits and harms between people. Jollimore takes a step in this direction when he defines an impartial choice in the most general sense as “simply one in which a certain sort of consideration (i.e. some property of the individuals being chosen between) has no influence.”<sup>22</sup>

I will understand impartiality in its most formal sense as a relation between a chooser, a set of possible choices, and the properties of the members of the choice set. Choosing impartially consists in not being influenced by a certain type of property. On this analysis, impartiality is always a negative property: it is a constraint on the choice process, not a determinant of it.<sup>23</sup> Impartiality only specifies considerations which should have no influence in a choice. It does not specify what considerations should positively determine the choice. This will depend on the other rules or goals which one believes should apply to the choice in question. This formal analysis of impartiality already draws a clear line between the concept of impartiality and ostensibly similar notions of equality of treatment (or effects). As I have analysed it, impartiality is a property of a choice process, of the justification for a decision. It is not a property of the outcomes of decisions themselves. The general, formal notion of impartiality leaves entirely unspecified which properties of the members of the choice set should be excluded from consideration.

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<sup>20</sup> Troy Jollimore, ‘Impartiality’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2017 (Metaphysics Research Lab, Stanford University, 2017), sec. 1, <https://plato.stanford.edu/archives/spr2017/entries/impartiality/>.

<sup>21</sup> Bernard Gert, ‘Moral Impartiality’, *Midwest Studies In Philosophy* 20, no. 1 (1 September 1995): 104.

<sup>22</sup> Jollimore, ‘Impartiality’, sec. 1.

<sup>23</sup> Brian Barry, *Justice As Impartiality* (Oxford: Clarendon Press, 1995), 19.

From this very general notion of impartiality I move to a slightly more determinate definition which (for lack of a better term) I call *preference-impartiality*. On this definition, the property which should be excluded from consideration is how the items of the choice set rank in one's own *private preferences*. To be impartial in this sense means to give no special weight to one's own private preferences. This definition is not intended to cover all cases of impartiality. Preference-impartiality merely describes a subset of cases falling under the more general definition of impartiality given in the previous paragraph. Moreover, it is not claimed that preference-impartiality is always appropriate; only that it will be appropriate in certain specific circumstances, described in greater detail below. The definition of preference-impartiality begs the question of what constitutes a set of *private preferences* in the relevant sense. Defining this variable more precisely gives rise to two more determinate conceptions of impartiality: minimal moral impartiality and impartiality in constitutional design. These are two different conceptions of preference-impartiality, which itself is but one conception of impartiality in its most general sense.

Minimal moral impartiality is one of the most common notions of impartiality. Elster describes this sort of impartiality as a “minimal condition for normative validity”.<sup>24</sup> Describing this conception as one of “first order” impartiality, Brian Barry defines it as “not being motivated by private considerations,” using the behaviour expected of judges and bureaucrats as archetypal examples.<sup>25</sup> “Private preferences” are here defined by self-interest (allowing for an extended conception of self-interest which also includes the interests of one's familiars). Minimal moral impartiality can be applied to choices in personal morality, or to first-order policy choices. Either way, the choice process of an individual exhibits minimal moral impartiality insofar as the property “how far this action/policy promotes my self-interest” is given no influence over one's choice. This notion of moral impartiality is minimal precisely because it is a condition which can be met by multiple moral theories – for example, by many versions of both consequentialism and

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<sup>24</sup> Jon Elster, ‘Strategic Uses of Argument’, in *Barriers to Conflict Resolution*, ed. Kenneth Arrow et al. (New York: Norton, 1995), 245.

<sup>25</sup> Barry, *Justice As Impartiality*, 11.

deontology.<sup>26</sup> The conception is still highly indeterminate, because it does not specify the set of choices for which minimal moral impartiality is appropriate. While act-consequentialism requires minimal moral impartiality for all choices, most moral theories only require it in specific circumstances, licencing partiality in other situations.<sup>27</sup> In a different context, I will return to the conception of minimal moral impartiality in section 3.2.

Impartiality in constitutional design is not such a familiar idea. This is the version of impartiality referred to in the impartiality principle. In this case, the members of the choice set are different constitutional choices: rules of the political system, second-order choices about how first-order policy choices should be decided. Impartiality in constitutional design only applies to decisions of this kind. In this conception, the private preferences which should be excluded from consideration are one's preferences over first-order policies. These first-order policy preferences may themselves have been arrived at in a minimally morally impartial way. Nonetheless, when it comes to impartiality in constitutional design, one's first-order policy preferences are to be excluded from consideration. This is equivalent to saying that constitutional choices should not be made in a directly instrumental way. Only in the specific context of constitutional design does it make any sense to describe first-order policy preferences as "private", because here we are seeking to create a decision-making structure which can adjudicate disagreements over first-order policies. A choice process exhibits impartiality in constitutional design if and only if "how far this constitutional choice promotes my first-order policy preferences" is given no influence over one's choice.

As I intend it here, the impartiality principle only constrains second-order constitutional choices. It does not apply to first-order policy choices. In saying that constitutional politics should be conducted impartially, there is no implied denigration of vigorous partisanship when it comes to first-order policy choices. Indeed, the whole framework of impartial instrumentalism presupposes the existence of partisans competing to promote contradictory first-order policy goals

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<sup>26</sup> Jollimore, 'Impartiality', secs 3-4.

<sup>27</sup> Ibid., sec. 3.1; Gert, 'Moral Impartiality', 106, 108–12; Barry, *Justice As Impartiality*, 12, 15; Susan Mendus, *Impartiality in Moral and Political Philosophy* (Oxford: Oxford University Press, 2002), chaps 2–3.

on the basis of their different moral-political perspectives. As an approach to dealing with political disagreement, impartial instrumentalism is in no way hostile to political disagreement itself. There would be no point in organising a race if there was no-one to run it.

As I remarked above, the impartiality principle only refers to impartiality of justification, not to equality of treatment (or effects). Impartiality in constitutional design is a concept which applies to the justifications for constitutional choices, requiring that these choices be made without reference to the advantages they confer on different moral-political perspectives. By contrast, equality of treatment is a substantive concept which can be used to assess the outcomes of political decisions according to how well they satisfy different groups. Equal treatment of different moral-political perspectives would not be a sensible idea to apply to constitutional design generally. Political disagreement is about precisely those things where there has to be a winner - some decision has to be made for either x or y which will leave the other side unhappy. Equal treatment is not possible where in the end a decision has to be reached which will favour one side over the other. Not all political disagreements are like religious toleration, where both sides can co-exist on an equal footing. Some political disagreements are like fiscal policy, where one has to lose for the time being – a government cannot simultaneously run a tight fiscal policy for those who want a tight fiscal policy, a loose fiscal policy for those who want a loose fiscal policy and something in between for those who want something in between. Instead, the point of the impartiality principle is that the justification of constitutional choices is impartial between different perspectives. Thus, when one side gets their way in some particular first-order policy disagreement, there may be various reasons for their victory. The impartiality principle just means that one of the reasons for their victory cannot be that the decision-making system itself was designed in advance to secure their victory.

As a conception of impartiality applying specifically to second-order choices, the impartiality principle may sound similar to Barry's conception of "second-order impartiality" or "justice as impartiality".<sup>28</sup> The motivation for the two ideas is also somewhat similar, Barry's motivation being a fear that the mutual pursuit of moral conception of the good is self-defeating because it leads to a great deal of conflict, up

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<sup>28</sup> Barry, *Justice As Impartiality*, 11.



to and including “civil war”.<sup>29</sup> However, justice as impartiality has a very different objective to the impartiality principle. As its name suggests, Barry’s account is conceived as a conception of justice – a substantive moral criterion which can be used to evaluate first-order policies as well as second-order constitutional choices.<sup>30</sup> By contrast, impartial instrumentalism is less ambitious. It does not aim to offer an account of justice. It only aims to provide guidance on constitutional choices, not on matters of first-order policy. Although Barry claims neutrality between conceptions of the good, justice as impartiality is itself a conception of justice, and as such makes no attempt at impartiality between rival conceptions of justice.<sup>31</sup> Impartial instrumentalism, by contrast, does aim to be impartial between different conceptions of justice, as the next section explains. Barry’s view is complex, and it approaches constitutional design in a spirit which combines the constitutional entrenchment of some first-order policies with a moral procedural argument for democracy on other less important matters.<sup>32</sup> In this respect, it is similar to some versions of public reason liberalism, as I discuss in the introduction to chapter four. The general structure of the pragmatic argument for impartial instrumentalism against public reason liberalism given in chapter four will accordingly also apply to Barry’s view.

This section has described the basic conception of impartiality which is used in the impartiality principle, and distinguished it from related ideas. It made it clear that the impartiality envisioned is one of impartiality in justification, and that this impartiality is only supposed to apply to constitutional choices (not first-order policies). Impartiality in constitutional design means that the instrumental effects of a constitutional proposal according to any individual moral-political perspective are to have no influence over the constitutional choice in question. However, what I have not yet done is to explain in detail how the moral-political perspectives between which constitutional choices should be impartial are defined.

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<sup>29</sup> Ibid., 26–27.

<sup>30</sup> Ibid., secs 13, 15-16.

<sup>31</sup> Ibid., sec. 12, especially p. 72. See also p. 69. cf. Waldron, *Law and Disagreement*, chap. 7.1-7.2, 7.6.

<sup>32</sup> Barry, *Justice As Impartiality*, secs 13, 15-16.

## 1.4 Impartiality between what?

Earlier in the chapter, I defined political disagreement as being driven by different moral-political perspectives. Moral-political perspectives are constituted by a set of preferences over policy decisions, and by the moral and causal beliefs grounding those preferences. The impartiality principle enjoins impartiality between moral-political perspectives in this sense. In making constitutional choices, we should exclude from consideration how far these choices will promote our own particular moral-political perspectives. This section distinguishes between issues arising out of impartiality over the moral beliefs and over the causal beliefs which ground first-order policy preferences. It concludes by distinguishing the three different ideas of disagreement which are present in impartial instrumentalism.

As I mentioned above, the impartiality principle can never apply between all perspectives, because some disagreements are ruled out by the very requirement of *political* disagreement. Attempting to design a political system which would be impartial between the views of Hezbollah and ISIS would be ridiculous because those two groups (on their current self-understandings) would never consent to live peacefully together anyway. Thus, the impartiality principle should be understood as recommending only that constitutional designers be as impartial as it is possible to be given the boundaries of political disagreement.

When it comes to moral beliefs, the most important point to bear in mind is that the impartiality principle applies not only between different conceptions of the good, but also between different conceptions of justice. In Rawls' theory, citizens have both a conception of the good, and a conception of justice.<sup>33</sup> A conception of the good denotes what citizens think a good life consists of, while a conception of justice denotes how they think different people's competing conceptions of the good should be regulated so as to prevent them from clashing with one another. Although the terminology of conceptions of the good and of justice is specific to Rawlsianism, a variety of moral views also make a similar two-level distinction. For example, preference-utilitarianism also distinguishes between one's personal preferences (one's own utility function) and the general moral imperative to maximise the aggregate satisfaction of people's preferences. Rawls' theory requires that first-order

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<sup>33</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), chap. I.5.

policy decisions (and certainly second-order constitutional choices) should be neutral between different conceptions of the good. However, it is not compatible with neutrality between different conceptions of justice.<sup>34</sup>

By contrast, the impartiality principle does require impartiality (or neutrality) between different conceptions of justice, within the specific context of constitutional choices. Thus, constitutional choices should not be made on the basis that they will tend to promote the difference principle, or preference-utilitarianism, or any other set of moral beliefs. For those whose moral-political perspectives contain a two-stage distinction like that between conceptions of justice and of the good, it is their conception of justice which grounds their first-order policy preferences (or at least the core thereof). Impartiality between conceptions of justice (and not merely conception of the good) is thus essential to the whole project of impartial instrumentalism.

I now turn to impartiality over the causal beliefs which are also required to generate a set of first-order policy preferences. For example, consider causal beliefs about threats to national security, and about the best ways to counter these threats – causal beliefs which ground different foreign policy proposals. Alternatively, consider causal beliefs about the efficiency of markets for goods such as healthcare or university education – causal beliefs which ground different proposals for the regulation of these industries. The impartiality principle requires that causal beliefs such as these should play no part in justifying constitutional choices. The rules of the political game should be designed without appealing to beliefs about national security, the efficiency of markets, or similar things which closely affect first-order policy preferences.

However, impartiality between causal beliefs cannot be as total as that between moral beliefs. The reason for this disanalogy is that while it is possible to apply the instrumentalism principle without relying on any moral beliefs (as the next two chapters will argue), it is not possible to apply the instrumentalism principle without relying on any causal beliefs. To get any content out of the instrumentalism principle, we need to rely on beliefs about things like the epistemic efficacy of deliberation, or about what sorts of accountability mechanisms are best at deterring

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<sup>34</sup> Ibid., chap. V.5; For discussion see Waldron, *Law and Disagreement*, 153; See also Barry, *Justice As Impartiality*, sec. 6.

corruption. These are causal beliefs. Sometimes, the causal beliefs necessary to implement instrumentalism will be bound up with the causal beliefs that ground first-order policy preferences.

For example, consider the question of whether the constitution should include a balanced budget amendment, forbidding the government from incurring debt. Those from the public choice tradition are likely to favour the proposal as a form of pre-commitment, based on a belief that current generations are likely to selfishly pass on burdens to future generations in the form of government debt.<sup>35</sup> On the other hand, Keynesians are likely to oppose the idea, because they believe that governments need the flexibility to be able to employ counter-cyclical fiscal policy to shorten recessions.<sup>36</sup> Impartial instrumentalism cannot be impartial in this dispute. If a constitution avoided the issue and simply left it to legislatures to decide, this would effectively favour the Keynesian side of the argument. A constitutional choice has to be made one way or the other. Our problem is that there is no way of deciding which option fits best with the instrumentalism principle without engaging in some kind of weighing exercise between the different threats pointed to by Keynesians and public choice theorists. Yet, the different causal beliefs which motivate disagreement between Keynesians and public choice theorists on this issue also motivate some of their first-order policy preferences.

Due to such cases, impartiality between causal beliefs cannot be complete in the same way as impartiality between conceptions of justice. However, cases like the balanced budget amendment are relatively rare, and the impact of these cases can be contained. Most of the time, controversies where partisans are motivated by different causal beliefs can easily be decided at a legislative stage rather than in the constitution itself. The constitution merely needs to specify the procedures for how these disagreements will be played out in the legislature. For example, the rules of the political system do not need to take any stance on whether healthcare should be publicly provided or not; they only need to describe the legislative procedures by which such a decision will be taken. What makes the balanced budget amendment case unusual is that simply deferring the decision to a legislative stage would not be

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<sup>35</sup> Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge; New York: Cambridge University Press, 2000), 142–43.

<sup>36</sup> *Ibid.*, 163.

impartial between the two sides, as I argued above. However, cases with this element of pre-commitment are relatively rare. Most of the time, constitutional design can remain impartial between the causal beliefs motivating first-order disagreements by simply leaving these disagreements to be settled at the legislative stage.

It might be objected that a balanced-budget amendment is not so different here to a proposal to constitutionally entrench any other first-order policy, such as a prohibition on alcohol. Could we not interpret constitutional entrenchment of alcohol prohibition as a form of pre-commitment against the dangers of drink? What makes the balanced budget amendment different is that in this case, public choice theorists have a plausible pre-commitment story to tell. They can point to the self-interest of legislators in being able to displace burdens onto future generations in order to continue being re-elected. They can phrase their argument using only the knowledge and motivation principles. Prohibitionists, by contrast, can only point to the fact that legislators in the future may judge that prohibition is a bad idea. In other words, they can only repeat their first-order policy preference for alcohol prohibition, and the fact that others (now and in the future) disagree with that policy stance. From the standpoint of impartial instrumentalism, this is no reason at all. Moreover, the pre-commitment case for the balanced budget amendment could be using only causal beliefs (and the motivation principle), while the case for a prohibition amendment would necessarily also require controversial moral beliefs. Cases like the balanced budget amendment are an unusual case because plausible pre-commitment stories of this kind are rare. In this spirit Elster quotes Jens Arup Seip: “In politics, people never try to bind themselves, only to bind others”.<sup>37</sup> Although Elster goes on to show that there are some cases of genuine self-binding or pre-commitment, he argues that more often than not, Seip is correct.<sup>38</sup> I will return to the question of how impartial instrumentalism deals with these issues of constitutional pre-commitment in the Conclusion.

The previous two paragraphs argued that, although we do need to add a caveat concerning the limits of impartiality between causal beliefs, the cases to which this caveat pertains are rare. It should also be pointed out that even when impartial

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<sup>37</sup> *Ibid.*, ix.

<sup>38</sup> *Ibid.*, chap. II, especially pp. 92-93, 167-173.

instrumentalism does need to rely on controversial causal beliefs, this does not mean that the political system in general should be designed pre-supposing these beliefs. Even if it proves necessary to take a stance on certain elements of Keynesianism (for example) in order to evaluate the merits of a balanced budget amendment, this does not mean that the whole political system thereby has to become directly instrumental with respect to Keynesianism. Insofar as impartial instrumentalism does have to take stances on different causal theories, it does so as parsimoniously as possible, only committing itself where strictly necessary. Chapters five to six offer examples of how impartial instrumentalism can make use of causal beliefs where necessary, and how it can remain as impartial as possible in doing so.

A final question which is relevant here concerns the distinction between the *existing* moral-political perspectives held by people in a polity, and the *possible* moral-political perspectives they might hold.<sup>39</sup> Should the impartiality principle apply between the former or the latter? If we focus on impartial instrumentalism as a way of dealing with political disagreement all that matters is that we are impartial between existing perspectives in those disagreements. However, in section 4.1 below I will also argue that an important motive for adopting impartial instrumentalism is uncertainty about our own perspectives and what they entail. In that section I will thus take up this question again and ask whether the uncertainty argument gives us additional reasons to interpret the impartiality principle as applying to possible rather than existing views.

To conclude this discussion, it may be helpful to set out the three different ways in which the concept of disagreement figures within this account of the justification of democracy.

First, there are first-order disagreements over policy. Impartial instrumentalism is justified as a way to manage these first-order disagreements, not to do away with them. Within a political system designed along impartial instrumentalist lines, first-order disagreements will persist. The political system merely constitutes a set of rules specifying how decisions are made in the face of these disagreements.

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<sup>39</sup> cf. Samuel Freeman, 'Deliberative Democracy: A Sympathetic Comment', *Philosophy & Public Affairs* 29, no. 4 (2000): 380; Amartya Sen, *The Idea of Justice* (London: Penguin, 2010), chap. 6.

Second, there are disagreements over the *content* of impartial instrumentalism; over what impartial instrumentalism implies in practice. Even among people who agree that political systems should be impartially designed to make better decisions, there is likely to be disagreement over what institutions best accomplish this goal. For example, there might be disagreements over how epistemically beneficial diversity is, or about whether lotteries or elections for selecting representatives best promote the knowledge principle. In chapter three, I make some preliminary arguments about the content of impartial instrumentalism.

Finally, there are disagreements with the *concept* of impartial instrumentalism itself. In other words, there is disagreement over whether impartial instrumentalism is the best account of the justification of democracy. Here, the disagreement is between impartial instrumentalism and alternative accounts such as direct instrumentalism or moral proceduralism. Generally speaking, the first four chapters of this thesis advance an argument on this level, in favour of impartial instrumentalism. Chapter four takes up the choice between impartial instrumentalism and direct instrumentalism and moral proceduralism specifically.

This typology of disagreements is revisited in section 4.3, where I provide an extended practical example which might be interpreted on all three levels.

This section and the previous section have provided an analysis of the concept of impartiality at use in the impartiality principle. Using this analysis, we should be able to understand how to apply the impartiality principle to particular constitutional choices and evaluate whether it is being respected. This exercise of applying the impartiality principle has some similarities with applying a “public reason” test. Given this similarity, it may be helpful to distinguish the two in more detail, and in the process to further clarify the nature of the impartiality principle.

## **1.5 Impartiality and public justification**

This section compares the impartiality principle with the principle of public justification (PJP). The latter is a test applied to proposals within the tradition known as political or public reason liberalism. The PJP is usually considered the core

element within that tradition.<sup>40</sup> I will use Fred D’Agostino & Kevin Vallier’s formulation of the PJP: “A coercive law  $L$  is justified in a public  $P$  if and only if each member  $i$  of  $P$  has sufficient reason(s)  $R_i$  to endorse  $L$ .”<sup>41</sup> Different versions of public reason liberalism can be defined by the different values they give for the variables in this formulation. For example, the central difference between “consensus” and “convergence” accounts of public reason can be characterised by the different variables they give for sufficient reasons  $R_i$ .<sup>42</sup>

The most basic similarity between the two principles is that they are both constraints on how proposals can be justified. Applied specifically to constitutional choices, the PJP says that the justification for a proposal must not be reasonably rejectable by any party. The impartiality principle says that the justification for a constitutional choice cannot be that it advances some particular first-order moral-political perspective.

Two differences between the PJP and the impartiality principle are immediately apparent. The first concerns what kinds of proposals are included within coercive laws  $L$ . Jon Quong refers to this as the “scope” of public reason, while D’Agostino & Vallier describe this as its “granularity”.<sup>43</sup> The impartiality principle is meant to apply only to constitutional choices – to second-order choices about the rules of the political system. This makes it considerably less ambitious (in Rawls’ terminology, less “broad”) than the PJP.<sup>44</sup> In its broadest version (that of Jerry Gaus), the PJP is meant to apply to “the whole of social morality”, while even in its narrowest version (that of Rawls), it still applies not only to “constitutional essentials” but also to “basic questions of justice”.<sup>45</sup> The scope of the impartiality

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<sup>40</sup> Fred D’Agostino and Kevin Vallier, ‘Public Justification’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2014 (Metaphysics Research Lab, Stanford University, 2014), <https://plato.stanford.edu/archives/spr2014/entries/justification-public/>; Jonathan Quong, ‘Public Reason’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2013, 2013, <http://plato.stanford.edu/archives/sum2013/entries/public-reason/>.

<sup>41</sup> D’Agostino and Vallier, ‘Public Justification’, sec. 2.

<sup>42</sup> *Ibid.*, sec. 2.3; Quong, ‘Public Reason’, sec. 5.

<sup>43</sup> Quong, ‘Public Reason’, sec. 2; D’Agostino and Vallier, ‘Public Justification’, sec. 2.2.

<sup>44</sup> Rawls, *Political Liberalism*, 164.

<sup>45</sup> Quong, ‘Public Reason’, sec. 2; Rawls, *Political Liberalism*, 140.



principle is limited to what Rawls calls a “constitutional consensus”, which “establishes democratic electoral procedures for moderating political rivalry within society”, its scope “not including the basic structure but only the political procedures of democratic government.”<sup>46</sup>

The second obvious difference between the PJP and the impartiality principle is what both Quong and D’Agostino & Vallier refer to as its constituency: who is included in public *P*.<sup>47</sup> As I described above, the constituency of the impartiality principle (the perspectives between which it enjoins impartiality) are restricted only by the boundaries of political disagreement itself and by certain caveats around causal beliefs. By contrast, public reason liberals usually restrict the constituency of public reason to “reasonable” views, “normatively idealising” by restricting the category of the reasonable to views which assent to certain minimal substantive moral conditions.<sup>48</sup>

These two important differences between public reason tests and the impartiality principle can be characterised in terms of different variables in D’Agostino & Vallier’s general formulation of the PJP. Given this, one might wonder whether the impartiality principle itself could be understood as a version of the PJP on D’Agostino & Vallier’s general characterisation of public justification principles. However, even if the impartiality principle’s values for *L* and *P* could be understood as extreme points on the broad spectrum of public justification principles, its treatment of sufficient reasons  $R_i$  stretches this too far. The impartiality principle could only be read as a version of the PJP if we understood having sufficient reason(s)  $R_i$  to mean “not being able to object to a proposal based on that proposal being justified as instrumentally advancing a moral-political perspective which one does not hold.” This seems slightly tortuous shoehorning. Thus, despite the evident points of similarity between impartiality principle and the PJP, I will

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<sup>46</sup> Rawls, *Political Liberalism*, 158, 159.

<sup>47</sup> Quong, ‘Public Reason’, 3; D’Agostino and Vallier, ‘Public Justification’, sec. 2.4-2.5.

<sup>48</sup> Quong, ‘Public Reason’, 3; D’Agostino and Vallier, ‘Public Justification’, sec. 2.4-2.5; For discussion of the complexities surrounding this issue see Gabriele Badano and Alasia Nuti, ‘Under Pressure: Political Liberalism, the Rise of Unreasonableness, and the Complexity of Containment’, *Journal of Political Philosophy*, 15 August 2017.

treat the impartiality principle as something distinct rather than as an unusual version of the PJP.

If the impartiality principle is not best understood as a version of the PJP, it might nonetheless be asked whether one principle is implied by (subsumed within) the other: whether the set of cases meeting the test of one principle is a subset of cases meeting the other principle. However, on closer inspection it turns out that this is not the case. There are some proposals which meet both tests, some which meet the PJP but not the impartiality principle, and others which meet the impartiality principle but not the PJP (see Table 2 below). Because of this, it is not possible to say in general that either principle is more demanding than the other. I will consider each category in turn.

*Table 2*

	Satisfies impartiality principle	Fails impartiality principle
Satisfies PJP	Most epistemic and motivational arguments in constitutional design	Constitutional entrenchment of “reasonable” substantive goals and policies
Fails PJP	Epistocratic proposals, or lack of constitutional entrenchment for “reasonable” substantive goals and policies	“Perfectionism” in constitutional design

If we think of the PJP applied specifically to constitutional choices, there will be a great deal of overlap in what meets the two tests. Epistemic or motivational considerations in favour of constitutional arrangements seem to be a classic case of public reasons. That structuring the political process in some particular way tends to increase the knowledge of legislators, or reduce opportunities for corruption, is a reason which all can accept under the PJP.

When we consider constitutional proposals that are publicly justified but not impartial, the question we face is whether directly instrumental proposals can meet the public justification test. Here it seems clear that the very narrow scope of the impartiality principle is particularly significant. Everything which could be publicly justified beyond constitutional essentials by definition satisfies the PJP but not the

impartiality principle. Since the impartiality principle only applies to second-order constitutional choices, it would be a category mistake to apply the impartiality principle to matters of basic justice or individual policies, even if those policies could satisfy some version of the PJP. This contrast is sharpest when we consider proposals to constitutionally entrench certain substantive social goals or policies. For example, Rawls' political liberalism aims at a constitution to "establish certain substantive rights such as liberty of conscience and freedom of thought, as well as fair equal opportunity and principles covering certain essential needs."<sup>49</sup> Insofar as these substantive rights and principles of social justice are controversial, a constitution which entrenches them will not be impartial between different moral-political perspectives. Impartiality is likely to require that substantive goals and policies are left to legislatures to decide. It should be noted that this paragraph has referred solely to constitutional proposals. If we examine first-order policy proposals, some will satisfy the PJP and others will not; but in neither case is there any conflict with the impartiality principle, because the impartiality principle simply does not apply to first-order policy decisions. While the PJP can evaluate first-order policy decisions (depending on the scope or granularity of the PJP in question, as discussed above), to apply the impartiality principle to such decisions would be a category error.

Finally, consider constitutional proposals which satisfy the impartiality principle, but not the PJP. The size of this category will depend on how tightly the PJP is understood to constrain constitutional choices. This will depend in turn on how (normatively) idealised the constituency of public reason is understood to be.<sup>50</sup> If agreement on some conception of political equality is made constitutive of reasonableness, then "epistocratic" proposals to give greater political power to people with greater knowledge will run afoul of the PJP.<sup>51</sup> In section 3.3, I argue that some epistocratic proposals are consistent with the impartiality principle. I also argue that these proposals do a poor job of advancing the instrumentalism

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<sup>49</sup> Rawls, *Political Liberalism*, 164; See also John Rawls, 'The Idea of Public Reason Revisited', *The University of Chicago Law Review* 64, no. 3 (1997): 787.

<sup>50</sup> Quong, 'Public Reason', sec. 3; D'Agostino and Vallier, 'Public Justification', sec. 2.4.3.

<sup>51</sup> cf. Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Cambridge: Cambridge University Press, 1996), 107.

principle compared to political equality, and so will not be adopted by impartial instrumentalism as a whole. Nonetheless, considered in isolation the impartiality principle does licence certain kinds of epistocracy that the PJP might forbid.

In addition, the category of the reasonable could be defined even more narrowly to exclude other proposals acceptable under the impartiality principle. Reasonableness could be defined such that not only is the constitutional entrenchment of certain substantive goals and policies acceptable, but that the absence of such entrenchment would make any alternative political system unacceptable. Rawls appears to have had something along these lines in mind if we can interpret his idea of a “family of reasonable liberal political conceptions of justice” as defining the boundaries of political reasonableness. He states that

these liberalisms contain substantive principles of justice, and hence cover more than procedural justice. They are required to specify the religious liberties and freedoms of artistic expression of equal citizens, as well as substantive ideas of fairness involving fair opportunity and ensuring adequate all-purpose means, and much else.<sup>52</sup>

In a liberal political conception, these basic ideas are “taken off the political agenda”, “no longer regarded as appropriate subjects for political decision by majority” (even if questions about how to interpret and implement these ideas remain within the sphere of majoritarian politics).<sup>53</sup> For Rawls, constitutional entrenchment of certain substantive goals and policies is a required feature of any reasonable liberal political conception of justice.

This section has compared the impartiality principle with the test imposed by public reason liberalism, the PJP. This exercise has been limited in two important respects. First, I have only sought to clarify the similarities and differences between the two principles, not to argue for the impartiality principle’s superiority. Second, I have not discussed the relationship between the instrumentalism principle and the PJP. This is related to the fact that I have focused on the PJP as a constraint on acceptable political proposals, leaving aside an alternative strand in the public reason

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<sup>52</sup> Rawls, ‘The Idea of Public Reason Revisited’, 774; See also Rawls, *Political Liberalism*, xviii.

<sup>53</sup> Rawls, *Political Liberalism*, sec. IV.4.2.

tradition which sees the facilitation of public justification in ordinary politics as a telic goal to be pursued in constitutional design. Both of these topics will be taken up below in chapter four, where I give some reasons for preferring impartial instrumentalism to public reason liberalism in cases where they conflict.

## 1.6 More or less impartial instrumentalism

For reasons of exposition, I have so far described impartiality in constitutional design as a binary property, and the relationship between impartial and direct instrumentalism as a dichotomous choice. Here, I will present the contrast in a more nuanced way, with the two approaches as opposing directions along a continuum of possible positions.

Impartial instrumentalism is completely impartial between (or robust to) different substantive accounts of the meaning of “good” decisions (within the bounds of political disagreement, and with certain caveats concerning causal beliefs). However, we can also imagine versions of instrumentalism that are impartial between some substantive moral-political propositions but not others. In other words, versions of instrumentalism can vary according to how much substantive content they presuppose, and how much they are impartial about.<sup>54</sup>

The most common way this occurs in practice is for theorists to make substantive assumptions about the moral ends that government exists to serve, but allow that there is considerable uncertainty about which particular policies and laws will best advance these normative commitments in practice. Due to uncertain causal beliefs, it is impossible for a political theorist to legislate a complete set of policies for promoting their preferred normative commitments without leaving the armchair. Instead, they become drawn into arguments about how to organise institutions so that decision-makers of various kinds have the knowledge and motivation necessary to advance the theorist’s normative commitments. For example, Aristotle and Bentham clearly had very determinate moral views. However, when they came to apply these views to political matters, neither simply set out a catalogue of laws that would promote virtue or utility. Instead, they both developed political theories that assessed different constitutional designs by how well

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<sup>54</sup> Gerald Gaus, ‘On Seeking the Truth (Whatever That Is) through Democracy: Estlund’s Case for the Qualified Epistemic Claim’, *Ethics* 121, no. 2 (1 January 2011): 273.

they provided decision-makers with the motivation or knowledge necessary to legislate appropriately.

Although the combination of moral certainty and causal uncertainty is the most common way in which instrumentalist accounts of democracy work in some element of impartiality, there are many other possibilities. A more impartial version of instrumentalism might abjure any determinate set of moral goals, and only make the weak assumption that “good” decisions must at least involve avoiding truly disastrous decisions such as famines and genocides.<sup>55</sup> Alternatively, a more direct instrumentalism might argue on the basis of both moral and causal beliefs that governments should protect the rights of property, and democracy is justified insofar as it does so better than other political systems.<sup>56</sup> Even in this fairly direct form of instrumentalism, there is still some space for impartiality, insofar as our classical liberal accepts that there is some uncertainty about what the rights of property imply in particular cases, or how best to secure them. In chapter four, I will use uncertainty of this kind to argue for impartial rather than direct instrumentalism. For now, my intention is simply to clarify the conceptual terrain.

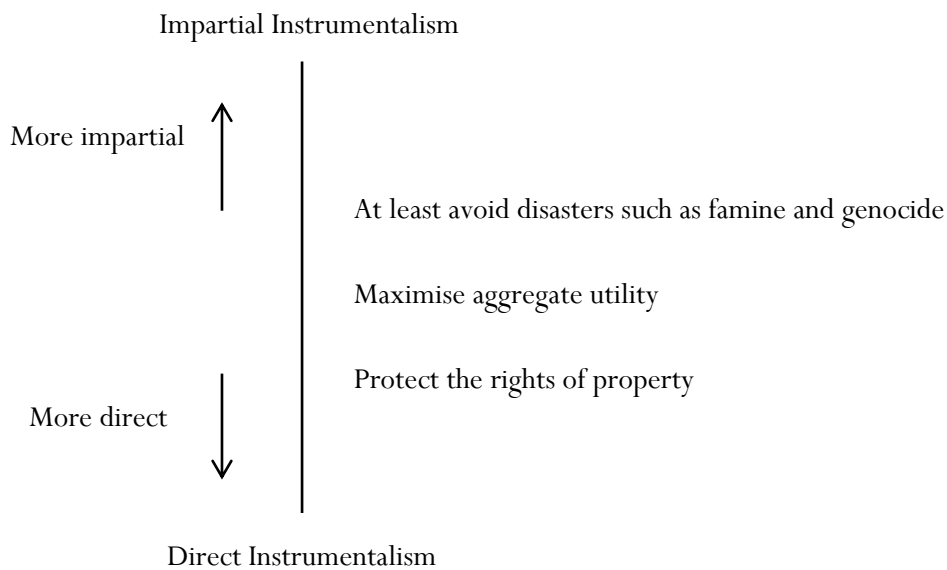
Uncertainty considerations mean that a completely direct instrumentalism is almost impossible in practice. Instead, most forms of instrumentalism fall somewhere on a continuum. At one end of the continuum is the ideal-type of direct instrumentalism, which would specify a set of first-order policy preferences in complete detail, and evaluate political systems according to their conformity with this plan of legislation. At the other end is impartial instrumentalism, which is as impartial between different perspectives as it is possible to be (see Figure 1 below). Most instrumental justifications of democracy can be classified somewhere between these two extremes.

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<sup>55</sup> cf. Estlund, *Democratic Authority*, 163.

<sup>56</sup> e.g. Mill, ‘Essay on Government’.

Figure 1



Impartial instrumentalism is as impartial as it is possible to be within the bounds of *political* disagreement. As I described above (section 1.1), the field of political disagreement is always restricted to exclude disagreements that cannot but end in violence or the dissolution of the state. As an approach to dealing with political disagreements, impartial instrumentalism can never be universally impartial, because it can only deal with disagreements between people who are, at the very least, willing to live together in the first place.

One advantage of more direct versions of instrumentalism is that they are better able to make use of empirical tests of the performance of institutions. In order to infer the superiority of one type of system over another from the decisions each type tends to produce, one must be willing to make definite assumptions about what makes decisions good or bad. Thus, empirical political scientists are only able to compare the superiority of different regime types insofar as they choose certain variables (Gross domestic product, life expectancy etc.) to represent their normative standards. The more impartial an instrumental account becomes, the more difficult it becomes to perform empirical tests of this kind. At the limit, the impartial instrumentalism I advance here is very difficult to directly test empirically, because it refuses to make any controversial assumptions about what proxies for normative quality one could use in an empirical test. This difficulty motivates the epistemological objection that I consider in the next chapter.

The impartiality principle can be applied by degrees, according to how widely one draws the circle of perspectives between which one is impartial. The implication of this is that, when we argue about the choice between impartial and direct instrumentalism, what we are really talking about is what degree of impartiality we should choose. In chapter four, my arguments for the superiority of impartial over direct instrumentalism are thus really a set of reasons why instrumentalists should adopt a greater rather than lesser degree of impartiality. For now, I continue to focus on impartial instrumentalism understood as instrumentalism with the maximum possible extent of impartiality within political disagreements. The constitutional design principles and more specific recommendations given in chapter four and beyond are tailored specifically to impartial instrumentalism in this sense. However, many of these points about constitutional design will also apply to other versions of instrumentalism that are somewhat between maximum impartiality and complete directness.

## **1.7 Conclusion**

This chapter has set out the basic idea of impartial instrumentalism and striven to make it as clear as possible. In particular, I have concentrated on the principle of impartiality. The principle of impartiality requires that constitutional choices are made such that how far a constitutional proposal instrumentally promotes any particular moral-political perspective has no influence over the choice. This is a form of impartiality of justification, not neutrality of treatment. It applies only to second-order constitutional choices, not to first-order policy decisions. The moral-political perspectives between which impartiality is required are constituted by a set of first-order policy preferences and the moral and causal beliefs which ground those preferences. Here it is necessary to add the caveat that impartial instrumentalism cannot always be impartial over all the causal beliefs which make up moral-political perspectives. However, cases where impartial instrumentalism must take a stand on such causal beliefs are relatively rare. The impartiality principle does not impose any boundaries of its own on acceptable perspectives, but some such boundaries are assumed by the background assumption that the account is only intended to deal with what I have called political disagreements.



Two questions raised in this chapter have been flagged for further discussion later in the thesis when other parts of the argument are in place to answer them. One of them concerns whether impartiality should extend to possible perspectives or only to perspectives with actual adherents. This question will be answered in section 4.1 below. The other concerns the relative attractions of impartial instrumentalism compared to public reason liberalism. This topic will be addressed in chapter four. Here, I only clarified the differences between the impartiality principle and the public justification principle, pointed to possible conflicts between the two concerning constitutional entrenchment of substantive first-order policies.

Thus far, I have concentrated solely on making sure we have a good understanding of the account which is proposed. Nothing has actually been said yet to argue for this view, or to say what it implies in practice. However, before even that task has been established, we must attend to another matter: showing that impartial instrumentalism is epistemologically coherent.

## Chapter 2 Epistemic democracy and the epistemological objection

There are three major objections to impartial instrumentalism: an epistemological objection (that the impartiality and instrumentalism principles cannot be coherently combined; an indeterminacy objection (that the approach will not produce any interesting practical results); and a desirability objection (that the approach is less attractive than alternative justifications of democracy). We now begin the process of replying to these objections, showing that impartial instrumentalism is coherent, determinate, and attractive. This chapter addresses the epistemological objection. The objection is that impartiality and instrumentalism cannot be combined because we cannot sensibly evaluate the tendency of a political system to produce good results without relying on some substantive criteria for good results.

The epistemological objection is stated and refined in section 2.3. Before arriving at that point, two further preliminaries are necessary. First, to clarify the idea of impartial instrumentalism still further, section 2.1 compares and contrasts impartial instrumentalism with two closely related accounts: a Rousseauian or Condorcetian belief-convergence conception of epistemic democracy; and Estlund's "Epistemic Proceduralism". Next, section 2.2 sets out the meta-ethical commitments implied by impartial instrumentalism, some of which are relevant for the epistemological objection. Following the statement of the epistemological objection, my basic reply to the objection (in its most plausible formulation) is given in section 2.4. Here, I describe a methodology which can be used to incorporate empirical evidence into impartial instrumentalism. This methodology is extended in the final section, where additional sources for use in this methodology are explored.

## 2.1 Alternative conceptions of epistemic democracy

This section compares impartial instrumentalism with other versions of epistemic democracy with which it is closely related, and with which it might easily be confused. First, I distinguish my approach from an alternative *belief-convergence* conception of epistemic democracy. By comparing this alternative conception with impartial instrumentalism, I will clarify more precisely the role played in my approach by concepts of epistemic value, consensus and truth. Second, I compare my account with the most prominent contemporary version of epistemic democracy, Estlund's theory of Epistemic Proceduralism.

### *The belief-convergence conception*

Like proceduralism and direct instrumentalism, the belief-convergence conception is a philosophical construct rather than a faithful reconstruction of any particular historical theorist, although passages by Joshua Cohen, Rousseau and Condorcet might be interpreted along these lines. The point of contrasting this conception with impartial instrumentalism is to clarify more precisely why it matters that democracy tends to make better decisions than alternative systems.

Within impartial instrumentalism, democracy's tendency to produce good decisions is not supposed to deal with disagreement in the deep sense of persuading everyone to agree with the decisions democracy actually makes. My argument is more limited: you have reason to want democratic government even though it will almost inevitably lead to some decisions that you will disagree with, and even though you will be forced to go along with these decisions. The reason you should want democracy even though it will force you to do things we think are wrong is not because democracy is a better guide to what the state should do than your own judgements. Instead, the reason to want democracy on this level was given in the initial set-up of the problem of political disagreement (section 1.1): within the circumstances of politics, people prefer to have some mechanism for making common decisions in the face of disagreement rather than risking anarchy or war.

Democracy here is in just the same position as any other political system that can satisfactorily deal with political disagreements. Obviously, in some situations

governments are so bad it would be preferable to have no government at all. However, these situations are ruled out by the definition of political disagreements (as opposed to more violent disagreements). Our reasons to engage in politics rather than warfare are drawn from our own substantive perspectives. However, once we are engaged in politics (as I have defined it), any co-ordination point is better than none.

If the political system has a tendency to make better decisions, this is just icing on a cake we were already planning to eat. We already have reasons to want a political decision-making system; if its decisions actually have some tendency to be good rather than merely tolerable, so much the better. Insofar as democracy tends to make good decisions, the choice of a co-ordination point will not just be arbitrary, but will actually be the result of a system designed to make good choices. Impartial instrumentalism says: among all ways of making decisions that would be better than war or anarchy, let's choose the way which we can agree actually has some tendency to produce good decisions.

To illustrate these points, it may be helpful to compare impartial instrumental with the belief-convergence conception of epistemic democracy, in which the tendency of democracy to make good decisions plays a quite different role in democracy's justification. According to the belief-convergence conception, the role of democracy's tendency to make good decisions is to resolve disagreements by promoting a convergence of beliefs. The idea here is that if democracy has a strong enough tendency to make good decisions, people should rationally defer to democratic choices, updating their prior beliefs in light of the new evidence provided by the democratic decision. Cohen seems to have something like this in mind when he describes "decision-making as a process of the adjustment of beliefs, adjustments that are undertaken in part in light of the evidence about the correct answer that is provided by the beliefs of others."<sup>57</sup>

If everyone defers to the democratic decision, this will have the effect of perfectly resolving disagreement; everyone will now hold the same beliefs, because

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<sup>57</sup> Joshua Cohen, 'An Epistemic Conception of Democracy', *Ethics*, 1986, 34; cf. Jean-Jacques Rousseau, 'The Social Contract', in *Rousseau: 'The Social Contract' and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997) bk. 4, chap. 2, para. 8.

they have all deferred to the same source. After the results of the first vote are revealed, everyone updates their beliefs in response, and they all come to an agreement. If the democratic procedure was to be run again, everyone would now vote the same way. The possibility of belief-convergence through deference suggests a role for the tendency of democracy to make good decisions that is different to the role it plays in impartial instrumentalism. In the belief-convergence conception, democracy is not conceived as ways of making decisions in spite of people's conflicting beliefs. Instead, it operates at the deeper level of modifying the beliefs that had caused the disagreement, fully resolving the disagreement and leading to an ultimately unanimous decision.

In order to be plausible, the belief-convergence conception would need some theory or model of democracy to give us reason to believe that democracy actually has a tendency to make good decisions that is as strong as the conception requires. To justify deference, people need to have more confidence in democracy's ability to make good decisions than they do in their own prior beliefs. The belief-convergence conception needs us to think democracy is so likely to make good decisions it can steamroll all prior beliefs on the matter. The basic problem with the belief-convergence conception is that a model of democracy's tendency to make good decisions that is strong enough to outweigh all prior beliefs will require implausibly stringent conditions. Because the conditions are so stringent, it will be easy for people to deny that the model applies in any particular case. When your prior beliefs conflict with the democratic judgement, you face rational pressure in one of two directions: either to revise your prior beliefs, or to deny that the conditions for the epistemic model of democracy apply in this particular case. The belief-convergence conception requires that you opt to revise your beliefs rather than question the reliability of democracy. However, this will often be unjustifiable, because there are so many plausible reasons to doubt that the necessary conditions of a strong model of epistemic democracy hold in any particular case.

To make this more concrete, it might help to use the example of a specific model of epistemic democracy, the Condorcet Jury Theorem. This theorem purports to generate predictions of epistemic reliability that are strong enough to justify deference and belief-convergence. The theorem requires the following conditions:

1. Voters choose between two options
2. One option is objectively better than the other (e.g., the accused actually is or is not guilty)
3. Voters sincerely choose the option they believe is correct
4. They are statistically independent
5. They each have a probability greater than 0.5 of choosing the correct option.

When these conditions hold, the probability of a majority choosing the right option rises dramatically as the size of the electorate increases.<sup>58</sup> Even when all voters have only a 0.51 chance of correctness, with 10,000 voters the probability of a majority being correct is 0.9997.<sup>59</sup> If they knew the conditions for the theorem held, voters in the minority should indeed defer to the majority, admit that they must have been mistaken previously, and update their beliefs accordingly.

The applicability of the theorem to a real-world case can be challenged in multiple ways.<sup>60</sup> First, when political choices appear as binary choices, this is only because of a prior agenda-setting phase, that will itself have to be scrutinised and justified. Second, it is very difficult to show that people are really voting their judgement of the common good, rather than for the decision that favours them personally. Third, one might dispute that voters are truly statistically independent, and do not exhibit patterns of bias or deference before the vote. Fourth, all these problems pale into insignificance compared with the difficulties resulting from the requirement that all voters have a greater than 0.5 probability of selecting the correct option. In general, we might hope that asking someone's judgement about something is a better guide to the truth than flipping a coin. But politics is not about just any old questions; politics is specifically about the most difficult and controversial questions a society faces. There is little general reason to think that people will be better than random on difficult questions; on the contrary, they might be vulnerable to systematic biases. When voters have a less than 0.5 probability of

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<sup>58</sup> Estlund, *Democratic Authority*, chap. 11.

<sup>59</sup> *Ibid.*, 223.

<sup>60</sup> *Ibid.*, chap. 11; Martí, 'Epistemic Conception of Deliberative Democracy Defended', 39–42; Zsuzsanna Chappell, 'Justifying Deliberative Democracy: Are Two Heads Always Wiser than One?', *Contemporary Political Theory* 10, no. 1 (February 2011): 85–87; Elster, *Securities against Misrule*, 188.

selecting the correct option, the theorem cuts in the other direction, and generates very confident predictions that a vote will select the wrong answer.

It may seem that I have unfairly saddled the belief-convergence conception with a particularly implausible model (the Jury Theorem) which is inessential to the conception itself. My point is that for any model of democracy that generates strong enough predictions to justify deference, the stringency of the model's conditions will make it easy to deny that the model holds in any particular case. The strength of the predictions and the stringency of the conditions go hand in hand. The Jury Theorem is a very simple model, which is why I use it as an illustration. There may well be more sophisticated models which can generate greater bang for your buck in the trade-off between strength of predictions and stringency of conditions. However, it seems highly unlikely that a model can be found with combination of easy applicability and strength of conclusions that the belief-convergence conception requires. This means that the belief-convergence conception faces a dilemma. On the one hand, models such as the Jury Theorem, which generate predictions strong enough to outweigh prior beliefs, are correspondingly extremely difficult to apply to real politics. On the other, a model with conditions weak enough to apply to real politics would fail to generate predictions of epistemic reliability sufficiently strong to justify regularly setting aside your prior beliefs. It may well be true that politically engaged people are over-confident in their prior beliefs and should attach more weight to the evidence provided by the disagreement of others. However, it's still very implausible that people should defer often enough to make belief-convergence a reasonable goal for democracy. In order for democracy to perform this role, it would need to have a tendency to make good decisions that would be far too strong to be plausible. No realistic democracy could be so close to infallible. Since this target is impossible to reach, this cannot be the reason why we should want political institutions to have a tendency to make good decisions, and we should not hold our institutions to this standard.

Impartial instrumentalism is a version of epistemic democracy that avoids the problems of the belief-convergence conception. According to the instrumentalism principle, the political system should be designed to have the strongest possible tendency to make good decisions. One would expect, as a side-effect, that if citizens regard their institutions as tending to make good decisions, they will defer to them to some extent. In contemporary democracies, we do

observe some limited deference. For example, it seems likely that most people in the UK take the fact that the government has allowed a certain drug to be sold without a doctor's prescription as a reason to believe that drug will act in the ways advertised without dangerous side-effects. The set of political decisions that need to be made in a complex society is like an iceberg, only the tip of which pierces the waterline of media attention. Beneath these public controversies is an icy mass of obscure and de-politicised issues on which people are much more willing to defer to the decisions of the political system. The important point for my purposes is that while there is likely to be some deference and belief-convergence on some issues, deference and belief-convergence are not an essential part of the account. They are not required to justify democracy.

### *Estlund's Epistemic Proceduralism*

The previous subsection compared impartial instrumentalism with an alternative conception of epistemic democracy that I reconstructed for the purpose of clarification. I will now compare it with the most prominent contemporary account of epistemic democracy, Estlund's Epistemic Proceduralism.

Estlund's account has two major similarities with mine. Most importantly, Estlund endorses what he calls a "formal epistemic account", which is very close to what I have called impartial instrumentalism. He distinguishes this from a "substantive epistemic account":

'Call a *substantive epistemic account* an account that, first, posits some conception of justice or common good and, second, claims that democratic procedures are likely to get things right according to that standard.'

'By contrast, consider a *formal epistemic account* according to which a democratic process is held to have a tendency to get things right from the standpoint of justice or common good *whatever the best conception of those might be*.<sup>61</sup>

My impartial/direct distinction in instrumentalism maps onto Estlund's formal/substantive distinction in epistemic accounts (although he does not seem to consider the possibility that this might be a continuum rather than a dichotomous

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<sup>61</sup> Estlund, *Democratic Authority*, 169.



choice). Estlund is the first theorist I know of to explicitly set out the idea that one can assess institutions in terms of their tendency to make good decisions without relying on some substantive conception of good decisions.

The language I use to describe this position is slightly different to Estlund's. Estlund uses the terms "instrumental" and "epistemic" interchangeably, suggesting he does not distinguish between the two in any deep way.<sup>62</sup> However, his general approach is to favour the word "epistemic" and avoid "instrumental". I find that this obscures the relationship between epistemic and instrumental justifications of democracy, a relationship that I have tried to explain above. Relatedly, where Estlund talks about democracy's tendency to track the truth, I prefer to talk about democracy's tendency to make good decisions. Talking about epistemic democracy in terms of truth-tracking and correctness can be misleading, because it seems to construct democracy as a kind of question-answering or truth-discovering technique. For example, Jerry Gaus interprets Estlund's claim that democracy is the "best epistemic strategy" as meaning that it is the strategy "most conducive to discovering normative truths relevant to politics."<sup>63</sup> This way of phrasing the debate is perhaps suggested by the very term "epistemic" democracy. But democracy is not a general question-answering machine – that would be as ridiculous as Plato supposed. It is not even a machine for answering questions (or "discovering" or "tracking" truths) restricted to the domain of politics. Rather, democracy is a technique for making political decisions. Governments do not issue pronouncements about whether it is true that taxes should be raised. Governments raise taxes. Despite these semantic differences, impartial instrumentalism agrees with Epistemic Proceduralism on the substance of these matters.

The other major similarity between impartial instrumentalism and Epistemic Proceduralism is that they share a certain view (set out in the previous subsection) of the relationship between what Estlund calls epistemic value (which I call the tendency to make good decisions) and our reasons to go along with democratic decisions. Just as I was in the previous subsection, Estlund is keen to avoid an interpretation of epistemic democracy that would imply that citizens have reasons to defer to democratic decisions: "Epistemic proceduralism avoids any such difficulties,

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<sup>62</sup> Ibid., 72, 94, 258.

<sup>63</sup> Gaus, 'On Seeking the Truth (Whatever That Is) through Democracy', 273.

since it does not say that the democratic decision is a particularly strong reason for a belief about what the correct decision would be. The reasons it gives the citizen are moral reasons to comply, not epistemic reasons to believe.”<sup>64</sup> For both Estlund and I, citizens’ basic reasons to live with democracy even when decisions go against them are already given by the procedural set-up (albeit for different reasons, as I will indicate below). The epistemic value of institutions is merely an added bonus.

These similarities bring my view closer to Estlund’s than to any other theory of democracy I know of. However, my account differs from Estlund’s in at least four substantive ways. First and most importantly, the two theories have different objects. As I defined the terms in the Introduction, Estlund’s account deals with both justification and authority, whereas impartial instrumentalism deals only with justification. Epistemic Proceduralism defines a set of conditions for a state to be justified and authoritative, and argues that democracy meets this threshold.<sup>65</sup> By contrast, impartial instrumentalism sets out desiderata for constitutional design, and argues that democracy is justified to the extent to that it meets these desiderata.

This different starting point leads to a second difference. The way Estlund elaborates the epistemic requirements of legitimacy is to say that a procedure should “perform better than a random choice from the alternatives presented.”<sup>66</sup> Estlund presents this claim as “very modest”. However, relying on a non-comparative, probabilistic measure of epistemic value exposes Estlund’s view to serious objections.<sup>67</sup> Because my approach does not rely on ascribing probabilities of correctness to procedures, it does not run into these problems. Impartial instrumentalism only requires comparative judgements of the epistemic quality of different procedures, and comparative judgements can be made without making any absolute, non-comparative judgements.<sup>68</sup> Estlund’s declaration that democracy must be better than random means that he needs to be able to put a number on things like the probability a jury has of reaching the correct decision. This may be impossible for

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<sup>64</sup> Estlund, *Democratic Authority*, 106.

<sup>65</sup> *Ibid.*, 7.

<sup>66</sup> *Ibid.*, 168.

<sup>67</sup> *Ibid.*; Gaus, ‘On Seeking the Truth (Whatever That Is) through Democracy’, 290–93; Ingham, ‘Disagreement and Epistemic Arguments for Democracy’, 137–44.

<sup>68</sup> Amartya Sen, ‘What Do We Want from a Theory of Justice?’, *The Journal of Philosophy* 103, no. 5 (1 May 2006): 215–38.

us to do. However, we do not need to be able to put a number on it in order to say that jurors will be more likely to reach a correct decision if they are sober rather than drunk. Practical questions of constitutional design only require us to make comparative judgements about relative tendencies to produce good decisions.

Third, Estlund integrates his version of epistemic democracy with public reason liberalism, a substantive moral version of proceduralism. This leads to several major differences with my approach. For Estlund, our basic reasons to go along with democratic decisions are moral in nature. Estlund's equivalent of the *impartiality* principle is motivated directly by moral considerations of fairness. "There is a moral reason to abide by its [democracy's] decisions quite apart from their substantive merits, just as there is reason to abide by a procedure that fairly adjudicates among competing interests quite apart from whether it serves your interests."<sup>69</sup> By contrast, I do not tie myself to a moral justification for proceduralism. This makes space for a pragmatic justification of the impartiality principle in terms of the nature of the role a political system is called on to play in dealing with disagreement. In chapter four, I give reasons why instrumentalists should accept the impartiality principle for pragmatic rather than moral reasons.

In keeping with his integration of epistemic democracy and public reason liberalism, Estlund's equivalent of my impartiality principle is the "Qualified Acceptability Requirement". This requires that the political system and its justification are acceptable to the subset of people with "qualified" perspectives.<sup>70</sup> My impartiality principle is formulated somewhat differently: the choice of political system should not be determined according to any particular substantive moral-political perspective (within the bounds of political disagreement). In practical terms my principle and Estlund's will often coincide. One obvious difference is that (depending on how "qualified" is defined, which Estlund never explicitly sets out) the set of qualified perspectives seems likely to be a subset of the set of perspectives within the bounds of political disagreement.<sup>71</sup> In this sense, Estlund's account is not fully impartial compared to impartial instrumentalism, because he excludes certain perspectives as "unqualified".

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<sup>69</sup> Estlund, *Democratic Authority*, 108.

<sup>70</sup> *Ibid.*, chap. 3.

<sup>71</sup> *Ibid.*, 211.

Finally, as I mentioned above, Estlund's Epistemic Proceduralism is explicitly a work of ideal theory.<sup>72</sup> It describes the optimal political institutions under conditions of full compliance, setting out what obligations individuals have when all other individuals are complying with their own obligations. In particular, Estlund assumes that political decision-makers are motivated by goals of morality (or justice etc.), rather than self-interest. Estlund does discuss how individuals should behave when others fail to behave as his theory recommend.<sup>73</sup> However, he does not consider how institutions themselves can be designed to make political decision-makers focus on the common good. When it comes to constitutional design, Estlund's question is about which political system does best according to the knowledge principle when we assume the motivation principle has already been perfectly satisfied. Impartial instrumentalism considers both principles simultaneously.

## **2.2 Meta-ethical commitments of impartial instrumentalism**

This section sets out the meta-ethical commitments impartial instrumentalism entails: what conception of goodness and truth in politics must an epistemic democrat hold? The instrumentalism principle does make some demands on how we understand concepts of goodness and truth in politics. However, these demands are quite modest.

The crucial meta-ethical commitment of the instrumentalism principle is the existence of what Estlund calls a "procedure-independent standard": a standard for judging the goodness of political decisions that is independent of the procedure used to make political decisions.<sup>74</sup> In other words, instrumentalism is committed to nothing more and nothing less than saying that whether or not a democracy actually did raise or lower taxes does not exhaust the question of whether a democracy should have raised or lowered taxes (and analogous statements for other policies).

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<sup>72</sup> Ibid., chap. 14.

<sup>73</sup> Ibid., 190–204.

<sup>74</sup> Ibid., 24–27.

Meta-ethical moral cognitivism is a sufficient condition for the existence of a procedure-independent standard, but it is not a necessary condition.<sup>75</sup> So long as one states that, for example, the state should not execute murderers, it does not matter whether one regards this statement as an emotive utterance or a statement about moral facts. Either way, the speaker is employing a procedure-independent standard to judge political decisions, and this is all that is necessary to make sense of the principle of designing institutions so as to improve the quality of decisions.

A procedure-independent standard is also compatible with cultural relativism. As Landemore puts it, “independence from the procedure does not imply independence from everything else. The standard might be dependent, for example, on a given context, history, or culture, or on the defining traits of human nature.”<sup>76</sup> Instrumentalism is thus compatible with “culturalist” views according to which standards for better or worse political decisions are dependent on the social or cultural norms of a given society.<sup>77</sup>

Some meta-ethical views might raise an objection not to the fundamental principle of instrumentalism but to the constitutional design principle of *knowledge*. For non-cognitivists who believe ends are not something that can be reasoned about, why should enhancing the knowledge of decision-makers improve decisions?<sup>78</sup> Similar problems arise for some parts of the methodology I will sketch below for incorporating empirical evidence into impartial instrumentalism. Specifically, a problem arises insofar as that methodology relies on an analogy between, on the one hand, the conditions for successful instrumental or descriptive reasoning and, on the other, the conditions for good moral decision-making. Non-cognitivists might thus object that in working out the content of impartial instrumentalism I have employed a moral epistemology that is not impartial towards them.

There are three possible responses to this objection. First, one could simply abandon the knowledge principle and the methodology for incorporating empirical evidence, on the grounds that these are incompatible with the impartiality principle.

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<sup>75</sup> Ibid., 25.

<sup>76</sup> Landemore, *Democratic Reason*, 210.

<sup>77</sup> Cf. Gaus, ‘On Seeking the Truth (Whatever That Is) through Democracy’, 275–77.

<sup>78</sup> Russell Hardin, ‘Deliberative Democracy’, in *Contemporary Debates in Political Philosophy*, ed. Thomas Christiano and John Christman (Malden, MA: John Wiley & Sons, 2009), 236.

This would leave the basic *concept* of impartial instrumentalism standing (on which see section 1.4), at the cost of making it much harder to derive concrete institutional recommendations. Eliminating the knowledge principle and the methodology for incorporating empirical evidence would greatly sharpen the indeterminacy objection (discussed further in the following chapter): that impartial instrumentalism is not a useful idea because it cannot be used to derive determinate constitutional recommendations. I will not pursue this response, and will instead focus on two other kinds of responses.

Second, one could deny that the impartiality principle applies to different views in moral epistemology. On the strict definition I gave in section 1.2, the impartiality principle only requires impartiality between moral-political perspectives. Moral political perspectives are constituted by a set of first-order policy preferences, and the moral and causal beliefs which give rise to those preferences. Even if meta-ethical non-cognitivists cannot agree to the principle of knowledge or parts of the methodology for incorporating empirical evidence, this does not necessarily violate the principle of impartiality in its strict sense. As I described above in section 1.4, impartial instrumentalism does not attempt to be impartial between views of all kinds, and does not attempt to resolve all disagreement. There is room for considerable disagreement about the *content* of impartial instrumentalism: what it implies in practice. Applying impartial instrumentalism in practice will require deciding between different views about (for example) the epistemic benefits of diversity, and making these decisions may require taking a stance on philosophical questions of epistemology. If deciding these questions also requires taking a stance on moral epistemology, this would be a nettle that impartial instrumentalists would simply have to grasp, but it would not necessarily be impartial in doing so.

In order for non-cognitivists to claim that the political system is not being impartial towards them, they would have to show something much more specific. They would need to point to moral-epistemological beliefs which are both (i) incompatible with the knowledge principle, and (ii) necessary to ground their first-order policy preferences. This is likely to be difficult for them to do, not least because the plausibility of deriving normative ethical judgements (let alone public

policy stances) from meta-ethical positions has been the subject of considerable philosophical debate.<sup>79</sup>

Even if the previous response succeeds by applying a strict interpretation of the impartiality principle, it would obviously be preferable if meta-ethical non-cognitivists could be incorporated within impartial instrumentalism. This leads to a third kind response: denying that the moral epistemology employed by impartial instrumentalism is unfavourable towards non-cognitivists. There are two reasons to think that non-cognitivists have no real reason for complaining about the knowledge principle or about aspects of the methodology for incorporating empirical evidence.

First, meta-ethical non-cognitivists can still see the value of knowledge when it comes to instrumental reasoning. Non-cognitivists will agree on the instrumental value of knowledgeable decision-makers insofar as they believe political disagreements are motivated by disagreements about facts and instrumental rationality rather than ends. Plausibly, on many issues political opponents share common goals but disagree on policy because they have different factual beliefs about the means to promote these goals (factual beliefs about the efficacy of incentives, say).<sup>80</sup> It seems hard to deny that some means to a given set of ends are better or worse than others. Famous political mistakes such as the appeasement of Hitler or the Bay of Pigs disaster clearly failed in the terms of those who prosecuted the policies.<sup>81</sup> Even for someone who thinks impartial instrumentalism cannot help groups to select a better set of goals (because they think there is no such thing), it can still help groups to advance the goals that they already share.

Second, even when it comes to non-instrumental reasoning, non-cognitivists have no real objection to the knowledge principle within the framework of impartial instrumentalism. That is, they cannot claim that the knowledge principle fails to be impartial towards them. As the next chapter explains in more detail, the knowledge principle says that we should improve the knowledge of decision-makers whenever doing so does not cause motivational problems. Non-cognitivists think attempts to

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<sup>79</sup> Tristram McPherson, 'Metaethics and the Autonomy of Morality', *Philosopher's Imprint* 8, no. 6 (17 July 2008): 1–16.

<sup>80</sup> Cf. Landemore, *Democratic Reason*, 215; Weale, *Democratic Justice and the Social Contract*, 119–23.

<sup>81</sup> Landemore, *Democratic Reason*, 212.

improve knowledge concerning non-instrumental reasoning will have no effect on the quality of decisions. However, non-cognitivists have no reason to think these attempts will actually lead to worse decisions – at least so long as knowledge-promotion attempts do not have adverse effects on motivation. Non-cognitivists thus have no real complaint against the application of the knowledge principle to non-instrumental reasoning, even if they do not see much point in it.

## 2.3 The epistemological objection

With these final clarifications dealt with, I now consider the first of three main objections to impartial instrumentalism: an *epistemological objection* to the idea that we can coherently combine impartiality and instrumentalism. The objection claims that impartial instrumentalism is incoherent because the *instrumentalism* and *impartiality* principles are fundamentally incompatible. The concern is that there is no way of assessing the propensity of political systems to make good decisions (instrumentalism) without relying on some substantive moral-political perspective (violating impartiality). I will consider stronger and weaker forms of the epistemological objection. The stronger form is potentially more damaging but easier to refute; the weaker form is less disastrous but harder to refute.

The strong form of the epistemological objection claims that the only way we can know a process tends to produce better decisions is by already knowing what better decisions consist of. How can we assess a tendency to make good decisions without some independent method of determining whether decisions are good or not? But if we have such an independent method, why bother with all these complications?<sup>82</sup> If this objection succeeds, the middle path between proceduralism and direct instrumentalism is unstable, and the epistemic approach collapses into direct instrumentalism.

The strong form of the objection is too extreme, and does not pick out a problem for impartial instrumentalism in particular. Whether we know processes are reliable because we know their results are correct, or whether we know results

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<sup>82</sup> Alvin Goldman, 'Social Epistemology', in *The Stanford Encyclopedia of Philosophy*, ed.

Edward N. Zalta, Summer 2010, 2010,

<http://plato.stanford.edu/archives/sum2010/entries/epistemology-social/>; Estlund,

*Democratic Authority*, 170; Peter, 'The Epistemic Circumstances of Democracy'.



are correct because we know that the processes that produce them are reliable, is a general problem for epistemology. Impartial instrumentalism can simply employ whatever answer epistemologists make to this question in general. Moreover, we can be confident that however the theory of knowledge is ultimately best articulated, it must allow for the kind of inference impartial instrumentalism requires. Impartial instrumentalism makes inferences about the quality of decisions based on the epistemic and motivational capacities of the institutions that produced them. The method of establishing new facts based on the reliability of epistemic processes is so familiar that it would be extremely surprising if it turned out to be invalid.<sup>83</sup> For example, I am warranted in believing that the temperature is 18 degrees based on my knowledge that the thermometer is an accurate guide to the temperature. I am warranted in believing that a bus is in motion based on my knowledge that my eyes are a reliable guide to the motions of large objects in similar conditions. In a similar way, we are warranted in thinking that the policies decided by a democracy are likely to be better than those decided by a dictatorship, based on our knowledge that decision-makers in democracies tend to be more knowledgeable and better motivated than decision-makers in dictatorships.

The strong form of the epistemological objection leads to a much more radical form of epistemological scepticism than it initially appears to be. It would rule out many of our common epistemic practices, and does not pick out a problem for impartial instrumentalism in particular. However, there is also a weaker form of the objection that deserves serious consideration. Although science often relies on processes and instruments (such as thermometers), scientific hypotheses make predictions that can be tested in a way that impartiality does not seem to allow for when it comes to the tendency of political systems to make good decisions. The weaker form of the objection does not raise a general epistemological issue about inferring propositions from reliable processes, but a specific problem that the recommendations of impartial instrumentalism are not amenable to empirical testing. To directly test the comparative quality of political systems, it would be necessary to agree on some kind of proxy for good decisions (GDP, life expectancy etc.). Doing this in a way that would yield interesting conclusions would require taking a stance on controversial moral questions about how different goods such as

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<sup>83</sup> Estlund, *Democratic Authority*, 170.

prosperity and equality should be balanced against one another. Yet this would violate the requirement of impartiality between different substantive perspectives. The impartiality principle seems to commit the epistemic approach to *a priori* theorising without any prospect of ever testing its conclusions against empirical evidence.

Unlike its stronger form, the weaker form of the epistemology objection is not an all-or-nothing rejection of impartial instrumentalism's coherence. If successful, the objection would not be fatal to impartial instrumentalism, but would limit its scope by forcing it onto one of two horns of a dilemma. One way of responding to the objection would be to reduce the impartiality of the account, incorporating more substantive propositions into our version of instrumentalism so that we could identify empirical variables to represent morally desirable decisions. This option would remove much of what is distinctive about impartial instrumentalism, and I will set it aside. The alternative is to retain the impartiality principle in full force, but admit that in the absence of empirical testing, impartial instrumentalism is more indeterminate in its institutional implications. Viewed this way, the epistemological objection is really an argument about how determinate impartial instrumentalism is. Can it only generate relatively obvious and trivial recommendations, like the injunction that jurors and legislators should stay sober? Without empirical testing, can we say very much about how the quality of decisions will be affected by more complicated and controversial matters, such as how legislative representatives should be selected?

In order to deal with this weaker form of the epistemological objection, we need to demonstrate the possibility of incorporating empirical evidence into impartial instrumentalism without violating the impartiality principle.

## **2.4 A methodology for incorporating empirical evidence**

This section develops sets out the possibility of just such a methodology. The impartiality principle does not cut us off from empirical evidence as completely one might initially think. I sketch the outlines of a methodology by which impartial instrumentalism can make use of empirical evidence in recommending some constitutional choices above others. It can do so by observing the decision-making

performance of procedures in cases where performance is relatively uncontroversial, and generalising to performance in areas where we cannot impartially assess performance directly. There are at least four non-controversial competence standards that such a methodology might rely on: success in instrumental goals, verifiable factual predictions, accepted scientific knowledge, and non-controversial moral judgements. While the impartiality principle rules out direct appeal to politically controversial propositions about the quality of decisions, these other ways of measuring decision-making performance in other contexts are not ruled out. This section describes the methodology using one particular non-controversial competence standards: success in instrumental goals. The following section then describes the other three standards and any particular issues they might raise.

I begin by setting out the basics of the methodology along with two examples of how it might be pursued. I then distinguish between two kinds of reasons we have for using non-controversial competence standards. With this in place, I consider several objections: first, a meta-ethical objection along the lines discussed above in section 2.2; second, an epistemological objection to the leaps of generalisation the methodology employs; third, an objection to perceived partiality.

The basic methodology can be illustrated with the example of a relatively pure “laboratory” test. First, groups are asked to perform a cognitive task for which relative success is easy to assess: finding a way out of a maze, building a tall structure out of limited materials, or solving a crossword. By observing a sample of different groups, we can assess which features of groups enable them to perform better on these tasks. How far does average IQ or diversity of experiences contribute to the success of a group? Do groups work better with tight chains of command, or spontaneous interaction? What effect do financial incentives have on performance? In this way, we can generate data about how institutional features of groups contribute to their performance in the laboratory. Impartial instrumentalism can then use this body of data to generalise lessons about institutional design from measurable laboratory contexts into the messier realm of political decision-making where performance cannot be directly assessed.

In addition to laboratory experiments, success in instrumental goals might also be assessed retrospectively through natural experiments. This involves interpreting the goals of political decision-makers and then assessing how far political

arrangements contributed to the success of those goals. George Orwell gives a dramatic example of this kind of reasoning:

The immediate cause of the German defeat was the unheard-of folly of attacking the USSR while Britain was still undefeated and America was manifestly getting ready to fight. Mistakes of this magnitude can only be made, or at any rate they are most likely to be made, in countries where public opinion has no power. So long as the common man can get a hearing, such elementary rules as not fighting all your enemies simultaneously are less likely to be violated.<sup>84</sup>

Orwell here uses an observation (German defeat in world war two) to support a theory (the influence of public opinion improves political decision-making). War is a good site for making observations of this kind, because the goals of decision-makers are often quite clear, allowing us to compare the competence of different decision-making processes faced with similar military situations.

The point of this methodology is not to evaluate political decisions or political systems directly by their ability to succeed in instrumental goals (or any of the other three non-controversial competence standards). Instead, the methodology is more indirect. It comprises three stages: data collection, analysis, and application. First, we collect a body of data by assessing how well groups perform according to the standard in question (here, success in instrumental goals). Second, we analyse this data to identify causal contributors to better or worse performance according to that standard. Third, we apply the lessons learned by designing political systems to incorporate the positive contributors and minimise the negative contributors identified at stage two.

When we come to the third stage of the methodology (application), we should distinguish between two different reasons we might have for wanting political systems to incorporate features which led to success in instrumental goals (or any of the other non-controversial competence standards). On the one hand, we might think that the ability to succeed in instrumental goals is an important contributor to the quality of decision-making in general. It is not controversial that one of the things that governments need to do is achieve instrumental goals, and so

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<sup>84</sup> George Orwell, 'Second Thoughts on James Burnham', *Polemic* 3 (1946): 169–170.

we have good reason to want political systems to promote their ability to do so. I refer to this as the *direct* reason we have for wanting political systems to incorporate features which lead to success in instrumental goals.

However, we also have an *indirect* reason for wanting political systems to incorporate these features. This is because the activity of making good decisions in general is similar to the activity of succeeding in instrumental goals. To the extent that the one activity is like the other, if we want to succeed in one activity (good decision-making generally) we have reason to recreate the conditions which lead to success in the other (success in instrumental goals). Taking Orwell's example, our direct reason for wanting public opinion to influence decision-making is that one of the things we want political system to do is to make good decisions in wartime, whereas our indirect reason is that we want political systems to make good decisions generally, and we take its ability to make good decisions in wartime of its ability to do so more generally. If we can make this leap of generalisation, we have reason to promote the conditions for instrumental success in politics not merely for their own sake, but because they also resemble the conditions for good decision-making generally. While both types of reasons will often apply, the focus of this methodology will generally be on indirect rather than direct reasons. This is because the direct reasons are naturally quite limited in the lessons we can derive from them, whereas the indirect reasons can tell us about the conditions of good decision-making much more generally.

I will now reply to three objections to this methodology of using success in instrumental goals as a non-controversial competence standard.

First, I entertain a meta-ethical objection. When setting out the meta-ethical commitments of impartial instrumentalism above, I described how meta-ethical non-cognitivists might not be able to endorse parts of the methodology for incorporating empirical evidence. The part of the methodology which might conflict with non-cognitivism concerns the indirect reasons we have to promote the conditions for success in instrumental goals. (The same holds for verifiable predictions and accepted scientific knowledge, discussed below). Non-cognitivists are likely to reject the leap of generalisation between instrumental reasoning and moral choices. Our indirect reasons rely on an analogy between the favourable conditions for instrumental or descriptive reasoning and favourable conditions for moral choices. This analogy rests on the idea that both kinds of task are complex cognitive activities which can be

characterised as inquiries – inquiry into what actions are needed to meet a pre-defined goal, or inquiry into what action should (normatively) be taken. Insofar as non-cognitivists would reject this analogy, they will not share indirect reasons to make political systems conform to the conditions of good instrumental or descriptive reasoning.

As I indicated above, impartial instrumentalism has several responses to non-cognitivists at this point. Unless non-cognitivists can show a plausible connection between their first-order policy preferences and a moral epistemology contrary to the one implied by this methodology, the impartiality principle is not violated. Moreover, even if non-cognitivists reject the indirect reasons, they still possess direct reasons for wanting political systems to incorporate the conditions for success in instrumental goals. Finally, even with respect to the indirect reasons, non-cognitivists have no reason to think that incorporating the conditions for good instrumental reasoning will lead to worse moral outcomes, even if they deny that outcomes will be improved.

The second objection is an epistemological one. The methodology I have described requires two major steps of generalisation, and one might have doubts about the epistemological validity of these generalisations. The first step of generalisation applies specifically to our indirect reasons for mimicking the conditions of instrumental success. In order for the indirect reason to obtain, we need to generalise from the particular non-controversial competence standard we are using to the thing we really care about, which is all-things considered quality of decisions. Second, we need to work out how we can take the lessons learned in the contexts where success is observable (such as the laboratory context I began with), and apply these lessons to the often quite different context of politics.

Impartial instrumentalism is not embarrassed by the need to make these leaps of generalisation. Any empirical inquiry involves generalising from a smaller set of observable evidence to make predictions about a larger category of cases we are interested in. For example, a quantitative political scientist might draw on a public attitudes survey to assess attitudes towards redistribution. This would involve generalising in two ways: firstly from a smaller survey group to a larger population, and secondly from the specific questions asked in the survey to the more nebulous concepts of solidarity and individualism that the political scientist really wants to get at. In this respect, impartial instrumentalism is not fundamentally different, and the

epistemological objection reflects standard methodological concerns in social science.

With this said, it remains true that impartial instrumentalism does require larger leaps of generalisation than are commonly found in social science. In my first example, it requires generalising from small-scale laboratory conditions to the large-scale messiness of real politics. A more historical approach, as with the Orwell example, reduces some of the distance of generalisation by focusing already on mass politics; however, it raises additional problems of the difficulty of comparing national case-studies, and of interpreting the goals of decision-makers. Furthermore, as I have already described, three of the non-controversial competence standards require generalising across the fact/value divide. With all these standards, lessons about decision-making quality cannot be directly applied to politics. Instead, the data will always have to be used sensitively and supplemented with rational argument. It will be necessary to hypothesise about what causal factors lie behind the observed patterns of decision-making quality, and whether these same causes are likely to apply in the different and varied contexts of political decision-making.

Because of the generalisations which this methodology requires, we can expect that incorporating empirical evidence into impartial instrumentalism in this way will be at least as controversial as empirical social science. However, this controversy should not be seen as a decisive blow against impartial instrumentalism, because I have never claimed that impartial instrumentalism is free from controversy. Using the typology of disagreement set out in section 1.4, the kind of controversy in question here can be classed among disagreements over the content of impartial instrumentalism: over what impartial instrumentalism implies in practice. I discuss this type of disagreement further in section 4.3 below.

The third objection asks whether success in instrumental goals can really be used as a competence standard in a way consistent with the impartiality principle. Impartial instrumentalism is not embarrassed by controversy over its content, because it does not require unanimity. However, it does require impartiality, and it might be asked whether this methodology for incorporating empirical evidence can be practised without violating the impartiality principle. For example, even if it is relatively uncontroversial that competent self-defence is a desideratum of a good political system, optimising a political system around the goal of military success would contravene the impartiality principle. It would be a form of direct

instrumentalism which favoured perspectives attaching paramount importance to military success. In order to avoid this partiality problem, we have to take steps to ensure that our evidence bears on the general concept of success in instrumental goals (the importance of which is not controversial), and not merely success in some particular goal (the relative importance of which will always be controversial, even if the goal itself is not).

To follow the methodology impartially correctly, we need to identify the causal factors behind success in instrumental goals generally, rather than just identifying variables which correlate with success in some particular goal. One way of ensuring that we are doing the former rather than the latter is to consider a bundle of different measures of instrumental success. In order to avoid being overly sensitive to considerations peculiar to one specific domain, we test our theories about what contributes to instrumental success in general across a variety of domains. Using success in instrumental goals as a competence standard is fully consistent with impartiality, so long as we really are focusing on causal contributors to success in instrumental goals in the widest and most general sense. In practice, remaining impartial means bearing in mind the danger that we are instead focusing on some particular instrumental goal which we find important from within our own moral-political perspectives.

Although this methodology can be described relatively simply in the abstract, there is nothing easy about using it in practice. It may often be difficult to discern the contributors to success even in a relatively controlled context, and it may often be difficult to work out how to apply these lessons to political systems. This difficulty should not surprise us. We should expect constitutional design to be difficult, and we should be suspicious of any theory which purports to make it easy.

## **2.5 Other non-controversial competence standards**

Having set out the general idea of a methodology for using empirical evidence in impartial instrumentalism, I will now describe three further non-controversial competence standards which can be plugged into this methodology.



## *Verifiable predictions of future events*

Verifiable predictions of future events can be used as a non-controversial competence standard by examining the social conditions under which people are able to make more accurate predictions. People make predictions about important political or economic events, the veracity of which can be assessed in the future. Part of the attraction of using predictive accuracy as a competence standard is precisely that it can be impartially assessed relatively clearly and easily if we carefully select for verifiable events. Conditions which causally contribute to success in this task are identified, and we seek to create similar conditions in the political system.

To a significant degree, the first part of this inquiry has been carried out in Phillip Tetlock's work on forecasting.<sup>85</sup> Tetlock conducted a large-scale empirical test, scoring forecasters on how well they predicted a variety of events over a period of several years. He then analysed this data to identify contributors to forecasting success. For example, he found that "foxes", who used a variety of different cognitive tools and sources of information to analyse a question, performed much better than "hedgehogs" who specialised in one particular tool or information source. Tetlock's work focuses on individuals, whereas impartial instrumentalism is concerned with institutions. However, his methodology could also be applied to group decision-making. Moreover, we can apply his findings about individuals by considering which institutional contexts foster the individual habits he identifies as advantageous.

As was the case with success in instrumental goals, conditions leading to predictive success can be applied to political systems in two ways, direct and indirect. We have direct reasons to apply conditions leading to predictive success because it is not controversial that an ability to correctly predict future events positively contributes to political decision-making quality in general. Designing the political system to improve decision-makers' ability to predict future events is directly useful according to the instrumentalism principle. However, lessons learned about what contributes to success in making verifiable predictions of future events can also be applied to politics more generally in an indirect way. This is true to the extent that the activity of making good predictions is similar to (and not simply part of) the activity of making good decisions generally. If we can make this leap of

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<sup>85</sup> Philip Tetlock and Dan Gardner, *Superforecasting: The Art and Science of Prediction* (London: Random House Books, 2016).

generalisation, we have reason to promote the conditions for good predictions in politics not merely for their own sake, but because they also resemble the conditions for good decision-making generally. This requires generalising from the activity of predicting the future to the activity of adequately responding to those predictions with action. As I described above in the case of success in instrumental goals, this involves generalising from descriptive to normative success.

### *Accepted scientific knowledge*

Accepted scientific knowledge can be used as a non-controversial competence standard by looking at how well groups perform on questions for which the answers are already known through prior scientific investigation. Accepted scientific knowledge could be used as a standard of success in a laboratory-style test of the kind I described initially: groups are given a set of evidence and asked to provide an answer to a scientific question. Their answers are then assessed by how well they match with the pre-established scientific consensus on that topic, which is taken to be correct. The decision-making processes of the groups are then analysed to discern features of their processes which contributed to their reaching the correct answer. These features are then incorporated into the design of the political system.

While such a laboratory-style application is possible, perhaps a more practical way of using accepted scientific knowledge as a non-controversial competence standard is to apply the methodology to the history of science itself. Within the history of science, we can use non-controversial scientific conclusions of the present day as a metric by which to assess the effectiveness of different institutional models of scientific research in the past.<sup>86</sup> Some of these lessons can then be applied to politics.

Using the accepted scientific knowledge of the present day as a competence standard might raise worries about how secure current scientific knowledge really is. After all, ordinary science is continually being modified with new advances. Moreover, there have been particularly notorious cases, such as eugenics and lobotomy, where we now believe that the previous scientific consensus was grievously mistaken. However, from the perspective of the methodology I am

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<sup>86</sup> cf. Goldman, 'Social Epistemology'.

sketching, the fact that science has gone wrong in the past is precisely the thing which can help us to understanding the conditions for good scientific reasoning.

A striking illustration of this is provided by the career of Soviet agrobiologist Trofim Lysenko.<sup>87</sup> Lysenko's principal doctrine was the heritability of acquired characteristics. Lysenko denied the existence of genes and rejected Medelian genetics. His work won the support of Joseph Stalin, who lent his political weight to Lysenko's ideas. Many of Lysenko's scientific critics were arrested, including his most eminent opponent Nikolai Vavilov in 1940. In 1948 Lysenkoism was declared the official doctrine of the Soviet Union, and the teaching of conventional genetics was outlawed. Lysenko's dictatorial power over Soviet biology was finally overthrown in 1965, although it had already declined somewhat before this point. Philosophers and historians of science have explained the Lysenko affair in a number of ways and drawn a variety of lessons from it for scientific practice. For impartial instrumentalism, the most relevant lesson is also the most obvious: that the use of political power to silence scientific discussion leads to bad science. This lesson can be applied to constitutional design as an empirical test of the hypothesis that freedom of speech is conducive to good political decision-making.

Still, one might nonetheless question whether the accepted scientific knowledge of today is not the pseudoscience of tomorrow. This possibility can never be excluded, which is precisely why the methodology sketched here is fully compatible with fallibilism. There is no suggestion that this methodology provides certain knowledge about constitutional design. It is merely intended to increase the evidence we have available to us in designing political systems. For this purpose, the accepted scientific knowledge today is the best source we have. This is not to say that it will not be replaced by superior knowledge in the future. In general, impartial instrumentalism works by judging the quality of outcomes (political decisions) by the reliability of the processes which produced them (a political system guided by the knowledge and motivation principles). The epistemological objection I began with in section 2.3 is precisely that this approach is too deductive and insufficiently empirical. The methodology sketched in this and the previous sections is therefore a way of responding to this epistemological worry by showing that there are ways in

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<sup>87</sup> Loren Graham, 'Lysenko Affair', in *The Oxford Companion to the History of Modern Science*, ed. John L. Heilbron (Oxford; New York: OUP USA, 2003).

which the reliability of processes themselves can be tested by looking at the outcomes they produce. However, this methodology is only proposed as a supplement to impartial instrumentalism, not as the principle way in which it should be carried out. Worries about whether we are justified in using currently accepted scientific knowledge as a standard by which to assess processes should therefore be set against the background of the general thrust of impartial instrumentalism, which is rather to assess outcomes by the processes which produced them.

The impartiality of accepted scientific knowledge is implied by the qualification *accepted*. Scientific knowledge is only to be used as a non-controversial competence standard where it really is non-controversial – where it is not implicated in the causal beliefs grounding first-order policy preferences. This may mean that some branches of science – the science of climate change, for example – might not be suitable for use as a competence standard. However, the inadmissibility of climate science in this methodology does not raise the same problems that the admissibility or not of esoteric science might in public reason liberalism.<sup>88</sup> This is because the issue is not whether controversial science should play a part in public policy, but merely of what standards of correctness we use for assessing the conditions of good scientific reasoning. Have to abstain from using climate science (for example) as a resource for this purpose is no great loss, because there are so many other branches of science from which similar lessons can be drawn. We can examine the institutional contexts of good scientific reasoning using many different areas of science without having to worry about whether controversial areas of science would breach the impartiality principle.

Our direct reasons to promote the conditions for good scientific reasoning in politics are weaker than our direct reasons to promote the conditions for good reasoning in the case of the two previous non-controversial competence standards. Even if it is not controversial that some scientific knowledge is useful for legislators, many people may regard this desideratum as holding a relatively low priority. Indirect reasons to promote the conditions for good scientific reasoning in politics depend, on being able to generalise between the activity of discern some scientific fact and the activity of making a good normative choice. Since our direct reasons are

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<sup>88</sup> Karin Jønch-Clausen and Klemens Kappel, ‘Scientific Facts and Methods in Public Reason’, *Res Publica* 22, no. 2 (1 May 2016): 117–33.

relatively weak in this case, the case for using accepted scientific knowledge as a non-controversial competence standards has to fall more heavily on this type of generalisation. Non-cognitivist complaints about this methodology are thus at their most potent when it comes to this particular non-controversial competence standards.

The use of accepted scientific knowledge might raise worries for some about epistocracy. If scientific knowledge is an important criterion by which to judge political decisions, doesn't this mean we should give power to scientists, who know the most about science? This objection misunderstands the way the methodology operates. The point of the methodology is not to use these four non-controversial competence standards as criteria by which to judge political decisions. Rather, the point is to learn lessons about what features of institutional design enable groups to do better according to these four standards in a variety of contexts. Where it seems like the explanations for success developed in these contexts might also apply in politics, we seek to incorporate these lessons into constitutional design.

Another way of viewing the objection is through the categories of direct and indirect reasons to promote the conditions for good scientific reasoning in politics. We have direct reasons to promote these conditions insofar as we have reasons to want office-holders to possess scientific knowledge. However, while this does seem to be a good thing, other things being equal, its relative importance is minimal. Politics involves many competencies and considerations, of which scientific expertise is only a minor (though welcome) part. Because of this, our reasons for using accepted scientific knowledge as a non-controversial competence standard are largely indirect. The case for using accepted scientific knowledge as a non-controversial competence standard is not that politicians should be better scientists. It is that by looking at the conditions of good scientific reasoning we learn something about good reasoning in general, and good reasoning in general is what we want from political decision-makers. I will return the subject of epistocracy in section 3.3 below.

### *Non-controversial moral judgements*

The final competence standard is non-controversial moral judgements. This is the standard used in the methodology advocated by Estlund, when he writes that one could construct a list of "primary bads" that we can all agree should be avoided

(“war, famine, economic collapse, political collapse, epidemic, and genocide”), and empirically test how well various political systems avoid them.<sup>89</sup> Using this data, we identify institutional features which tend to lead to the avoidance of the primary bads. We then have reason to incorporate these features into our own political system.

Non-controversial moral judgements satisfy the impartiality principle simply because they are non-controversial. Although political disagreement extends over a great many objects, there will usually be some moral judgements on which all parties agree. The impartiality principle only requires impartiality in cases where people disagree on first-order policy judgements, not on cases where they agree. Because people agree on these judgements, we can use these judgements as a non-controversial competence standard while remaining impartial between their disagreements.

Our direct reasons for wanting political systems to contain the features causally connected to avoiding primary bads are fairly obvious: we also want our own political system to avoid primary bads such as famine and epidemics. This can be understood as a certain sort of direct instrumentalism, because we are designing the political system with the specific goal of avoiding primary bads. However, this does not violate the impartiality principle precisely because (by assumption) all are agreed on the importance of avoiding primary bads.

However, Estlund’s methodology is not focused on our direct reasons for wanting political systems to contain the features leading to the avoidance of primary bads, but on our indirect reasons. Estlund aims “to support the conjecture that a proper democracy will tend to perform better than random across the wide range of issues it would face by arguing that with respect to the primary bads it would perform *far better than random*.”<sup>90</sup> Thus, Estlund’s real goal is to generalise from the conditions leading to avoiding the primary bads to the conditions leading to good decisions generally. With the previous three non-controversial competence standards, we faced a problem of generalising from descriptive or instrumental reasoning to moral decision-making. Here, we avoid generalising across the fact/value divide, but need to generalise from clear or easy moral questions (like

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<sup>89</sup> Estlund, *Democratic Authority*, 163.

<sup>90</sup> *Ibid.*, 160.

avoiding famine) to obscure or difficult ones (like the permissibility of immigration restrictions).

It might be helpful here to focus on one particular version of the epistemological objection, Sean Ingham's objection to Estlund's methodology of inference from primary bads. Ingham's concern is that Estlund's methodology fails to make the jump between democracy's performance on easy questions and its performance on hard questions. For example, what makes the badness of famine obvious and the badness of immigration restrictions obscure shouldn't also influence how good democracies are at avoiding famines compared to how good they are at getting immigration policy right. Yet, it's quite plausible that this is indeed the case. For example, it might be that famine is easy compared to immigration policy because the badness of famine is cognitively undemanding and has practical consequences for most people, whereas the opposite is true for immigration policy. It might also be that democracies are good at cognitively undemanding issues affecting most people and bad at complicated issues affecting only a minority. Stated generally, Ingham's objection concern is that the reason why we don't have independent access to truth on hard questions shouldn't also be a determinant of the strength of the relationship between performance on easy questions and performance on hard questions.<sup>91</sup>

Ingham shows that Estlund's argument is not necessarily right, and gives some theoretical reasons to doubt it. However, he does not show that Estlund is necessarily wrong. Estlund's argument retains some strength of its own, particularly because he does not claim that democracy will be reliable on obvious and difficult questions to the same extent. Instead, as we saw above, he aims "to support the conjecture that a proper democracy will tend to perform better than random across the wide range of issues it would face by arguing that with respect to the primary bads it would perform *far better than random*."<sup>92</sup> The dispute between Ingham and Estlund thus becomes a dispute about whose theoretical explanation better fits the limited available evidence.

It is worth remembering here that Estlund's account of epistemic democracy is particularly vulnerable to Ingham's objection, since his theory is committed to showing that democracy has a 0.5 probability of correctness in absolute terms.

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<sup>91</sup> Ingham, 'Disagreement and Epistemic Arguments for Democracy', 147–49.

<sup>92</sup> Estlund, *Democratic Authority*, 160.

Impartial instrumentalism, on the other hand, only needs to be able to make claims about the comparative epistemic merits of different procedures. Still, one might object that it is still difficult to prove even comparative claims about the tendencies of political systems to produce good decisions in the same way that scientific claims can be proven. This is true, but impartial instrumentalism does not aim for the levels of confidence we see in science. Most disputes over claims made within impartial instrumentalism will be like the dispute between Estlund and Ingham. They will be disputes about how well different theories plausibly proceed from relatively uncontroversial starting points and account for the limited empirical evidence we have available. The ultimate arbiter of many of these disputes about plausibility may well be intuition, but this does not render the disputes meaningless or intractable.

Although each of the four non-controversial competence standards may appear to be a slim foundation from which to derive empirical evidence, by combining all four standards we can increase our confidence in the conclusions derived. We can use the other three standards to cross-check conclusions reached using one type of standard.

In concluding this section, it should be stressed that the methodology sketched here should not be taken as the single or even central methodology of impartial instrumentalism. This methodology is a supplement. It gives us some ability to empirically test different hypotheses about the content or implications of impartial instrumentalism. It is designed to assuage worries that impartial instrumentalism is not amenable to empirical testing. Having this methodology available does not mean that working out the implications of impartial instrumentalism should necessarily proceed in an inductive manner by first collecting data using all four standards described above, and then looking for patterns in this data. It may well be more effective to develop hypotheses about the content of impartial instrumentalism in a relatively aprioristic way using the two principles of knowledge and motivation, and then only bring in the methodology sketched here at a later stage to empirically test these hypotheses.

Epistemological objections to impartial instrumentalism should not be taken as an all-or-nothing philosophical challenge that must be refuted in order for the approach to make any sense at all. Impartial instrumentalism is not entirely cut off



from empirical evidence, because it can make use of evidence about what contributes to good decisions in contexts where standards of success are less controversial. The epistemological objection should instead be taken as a standing injunction to modesty and caution about what we can confidently say, impartially, about how institutions contribute to good decisions. While there may certainly be warranted doubt about arguments produced in favour of one constitutional choice over others, it would be unwarranted scepticism to say that impartial instrumentalism leaves us nothing whatsoever to go on in making these choices.

It is difficult to do more to address the epistemological objection in the abstract. Instead, it will be more profitable to consider objections against the epistemic and motivational arguments advanced for specific constitutional choices. The next chapter will begin to provide these arguments, and I hope that giving some examples of what can be said within impartial instrumentalism will help to assuage epistemological worries. In setting out the knowledge and motivation principles as two things that generally tend to promote good decisions, I will use the methodology set out above in an informal way: taking insights about what contributes to good decision-making from other contexts, and asking whether the same factors are likely to apply to politics. Chapter three will only do this in a preliminary way, setting out some basic general principles.

## **Conclusion**

So far, I have set out the basic idea of impartial instrumentalism, distinguished it from some alternatives in the same conceptual region, and argued for its basic epistemological coherence. However, saying that this approach to justifying democracy is minimally coherent is not the same thing as saying that we should adopt this approach. This chapter has attempted to show that impartial instrumentalism is a coherent justification of democracy. But coherence is not the same as desirability. In chapter four, I provide arguments for why we should understand the justification of democracy in terms of impartial instrumentalism, rather than in procedural or directly instrumental terms.

Before we can sensibly undertake that task, we still need to know a little more about the content of impartial instrumentalism itself. So far, I have concentrated on the two fundamental principles of instrumentalism and impartiality,

along with how they interact with one another and with the conception of politics that lies behind the whole account. I briefly introduced the knowledge and motivation principles as rules for applying impartial instrumentalism in practice. However, I have not yet explained what these principles mean, how they are consistent with impartiality and instrumentalism, and what constitutional choices they imply in practice. This is the task of the next chapter. In the process, I will also deal with worries about indeterminacy that were already evident in the previous section. Even if the instrumentalism and impartiality principles can be combined in theory, can they be combined in practice to produce determinate institutional recommendations?

# Chapter 3 Principles of constitutional design

The previous two chapters set out the basic idea of impartial instrumentalism, which is composed of two elements. First, the *instrumentalism* principle says political systems should be designed so that they tend to make good decisions. Second, the *impartiality* principle says that the instrumental principle should only be applied in a way which is impartial between substantive moral-political perspectives. This chapter sets out a basic framework for applying impartial instrumentalism in practice. In so doing, it will address the indeterminacy objection: that the approach can only generate trivial conclusions (like the desirability of sober politicians), and is indeterminate for more important constitutional choices. The only way to deal with this objection (and associated epistemological concerns) is to actually show how impartial instrumentalism can be put to work, drawing out some of its practical implications. This chapter begins that process, although it still operates at a relatively general and abstract level. Applying the approach to particular constitutional choices will require a more contextually focused investigation. In chapters six and seven, I investigate two case studies of the market's influence of democracy in this way (money in politics, and capital strikes). In addition to the function they play in my argument about the relationship between markets and democracy, these chapters thus also work as exemplars of how impartial instrumentalism can be applied to constitutional choices in practice.

Here, I set out two general principles for constitutional design. Together, these constitutional design principles operationalize the more fundamental principle of instrumentalism, within the constraints of the principle of impartiality. The two principles of constitutional design state that we should seek improvements along two dimensions:

1. The relevant knowledge of decision-makers
2. How far decision-makers act as though morally motivated

I refer to these as the *knowledge* and *motivation* principles. The point of these principles is that they are things that people can agree will tend to improve political

decisions in the long run, even though the same people disagree about first-order policy questions. The value of a political system can be assessed by its position along these two dimensions. Stated precisely, my claim is that, if we hold one dimension constant, the quality of decisions in the long run is a monotonic function of the other dimension. In other words, if we hold levels of knowledge constant, constitutional choices that improve motivation have a positive or (at worst) neutral impact on the quality of decisions. The same is true for knowledge if we hold motivation constant.

An analogy can be drawn between these two principles and Rawls' notion of primary goods.<sup>1</sup> Primary goods are things like income and wealth, which are useful to someone no matter how they conceive of the good life (within certain reasonable limits). Similarly, the two dimensions of constitutional design are things that someone will judge to be useful in a political system no matter what their substantive moral-political perspective. Just as Rawls does not say how we should evaluate choices where someone would gain one primary good but lose another, I will not provide any formal guidance on what we should do when the two principles of constitutional design clash. Instead, trade-offs between the two dimensions have to be resolved in a more intuitive way. This topic will be tackled under the heading of indeterminacy in section 3.7 below.

Both principles make essential reference to political *decision-makers*. This refers simply to whoever is granted decision-making power in the political system under examination. Decision-makers may be individually decisive, or their personal decision may be about how to exercise a vote that will decide some issue in combination with the votes of others. Decision-making power most obviously includes direct decisions about law and policy. However, it also includes choosing who will make other decisions in the system, and deciding how to implement or interpret more general decisions made by others. Different political systems distribute and organise these decision-making powers in different ways. According to the instrumentalism principle, what we should ultimately care about is the quality of first-order policy decisions that the system as a whole produces. The argument of this chapter is that the instrumentally best political system (consistent with impartiality) is that which distributes and organises decision-making powers such that they are exercised with the greatest possible combination of knowledge and good

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<sup>1</sup> Rawls, *Justice as Fairness*, chap. 17.

motivation. This points in a recognisably democratic direction. In what follows, the decision-makers I will primarily concentrate on are those who are most important in current democratic systems: voters and legislators.

I begin by laying out the two principles in more detail, elaborating their terms more precisely and providing some examples of how contemporary democratic practices can be seen as promoting the principles in practice. Since the two principles are supposed to work together, it is important to explain both of them in detail before I consider objections to each of them in sections 3.3 and 3.4. The knowledge principle which I defend focuses on how political systems can affect the knowledge of decision-makers considered as individuals. In the fifth section, I consider an alternative, aggregative tradition of epistemic democracy (exemplified by the Condorcet Jury Theorem) according to which certain procedures lead to wiser decisions even if they do not alter the relevant knowledge of any identifiable individual. I explain why these aggregative models are incompatible with impartial instrumentalism. Section 2.6 considers epistemic and motivational considerations for and against a proposal to replace elections with lotteries as a means to select representatives. It does so to provide an example of how the two principles can work together in practice to produce recommendations on controversial constitutional choices. Finally, I explicitly consider the question of indeterminacy, especially that resulting from clashes between the two principles.

### **3.1 Knowledge**

It is almost a truism to say that decisions will be better if decision-makers know what they should do to make decisions better. I first clarify what it means to say that a constitution should promote the relevant knowledge of decision-makers, before looking at some practical applications.

The first question faced in unpacking the principle is what kind of knowledge it is we want the political system to promote: knowledge of what? Ultimately, the kind of knowledge we want to promote in political decision-makers is knowledge about what they should do. But this seems to lead us right back to the epistemological objection we considered in the previous chapter. How can we assess whether people know what to do, if impartial instrumentalism is constrained to avoid directly appealing to judgements about what should be done? Although we

can't directly identify knowledge about what should be done while being formally impartial between different perspectives, we can identify things that contribute to the formation of such knowledge. As I explained above (sections 2.4-2.5), we do so by drawing on our experience of what contributes to relevant knowledge in contexts where standards of success are less controversial. Specifically, without prejudice to any particular first-order moral-political perspective, we can say that knowledge about what should be done tends to increase as a function of:

1. Exposure to a variety of relevant arguments and evidence offered by different perspectives
2. Time and effort thinking

These are two mechanisms for increasing relevant knowledge, and their presence or absence can be used as a proxy for assessing relevant knowledge itself. For example, members of a monetary policy committee will tend to be more knowledgeable about what that committee should do if they (1) are familiar with various schools of economic thought, and (2) can devote significant time to thinking about these questions. As I explain below, the epistemic benefits of deliberation and diversity are comprehended within these two mechanisms, but they also cover more solitary forms of knowledge-acquisition. Subsequently, when I say that something improves *relevant knowledge*, I mean that it improves one of these two contributors to relevant knowledge. In other words, I take exposure and thinking time as observable proxies for (unobservable) relevant knowledge.

The qualification of *relevance* opens up some room for controversy. To preserve impartiality, I interpret it in a very wide way: so long as some perspectives think that (for example) poststructuralist sociology is relevant to monetary policy, this is enough to say that exposure to poststructuralist sociology (other things being equal) will tend to contribute positively to the committee's knowledge about what should be done. The relevance qualification only rules out things that are uncontroversially less relevant to the decision in question (e.g., for monetary policy, the science of human embryology). It does not rule out bodies of knowledge that some perspectives judge to be less epistemically respectable than others.

Both the knowledge and motivation principles recommend that decision-makers act in a certain way, and there are two basic strategies for designing institutions to ensure this. The first is to change who makes the decisions, so as to

select decision-makers with a pre-existing tendency to act in the preferred (moral or knowledgeable) way. Second, whoever the decision-makers are, we could change the environment and incentives they face to encourage them to act in the preferred way.<sup>2</sup> I will briefly sketch how these strategies can be applied to the epistemic democracy debate and to existing institutions, with regard to deliberation, time-wasting, and diversity.

Insofar as deliberation is understood as a way of making better decisions rather than being intrinsically valuable, the benefits of deliberation can be understood with reference to the knowledge principle.<sup>3</sup> Deliberation may have certain beneficial motivational side-effects, such as the “civilising force of hypocrisy”, that I discuss in the next chapter. However, insofar as deliberation produces better decisions, the core reason it does so is because it improves the relevant knowledge of the individuals who will eventually have to make a decision. This is true whether the ultimate decision-maker is a prince acting on the advice of his counsellors or a voter making a decision after participating in public debate. Thus, although deliberation is a property of interactions in a collective, its benefits are, in the first instance, individual. When deliberation improves knowledge, it does so firstly because justifying one’s position to others is a good stimulus to spend time and effort thinking. Second, listening to the objections or alternative suggestions of others is a good way to acquire new information or new ways of seeing a problem.<sup>4</sup>

The clearest example of how contemporary democratic institutions promote relevant knowledge through facilitating deliberation is the protection of freedom of speech. By exposing people to a greater variety of arguments and evidence, free speech improves the relevant knowledge that citizens can draw on when they participate in politics. Freedom of speech protections may also be justified for other reasons, such as the personal interests of speakers in expressing themselves, or the interests of hearers in acquiring information for use in their private lives.<sup>5</sup>

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<sup>2</sup> Elster, *Securities against Misrule*, 5–6.

<sup>3</sup> Christiano, ‘The Significance of Public Deliberation’; Fearon, ‘Deliberation as Discussion’; Martí, ‘Epistemic Conception of Deliberative Democracy Defended’.

<sup>4</sup> Fearon, ‘Deliberation as Discussion’, 45–52.

<sup>5</sup> Joshua Cohen, ‘Democracy and Liberty’, in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Mass; London: Harvard University Press, 2009), 249–50.

The epistemic benefits of diversity can also be understood within the terms of the knowledge principle. In practice, attempts to capture the epistemic benefits of diversity in institutional design blur the distinction between selecting decision-makers for knowledge and improving the knowledge of given decision-makers. Promoting the epistemic benefits of diversity certainly requires selecting the right group of people. Nonetheless, it does not recommend that we individually select decision-makers for their relevant knowledge. Instead, it offers advice about how we should select the group as a whole, because diversity can only be a property of groups, not of individuals.

Like deliberation, although diversity is a property of collectives, the mechanism by which it produces better decisions is by improving the relevant knowledge of individual decision-makers. Some work on the epistemic benefits of diversity focuses on aggregative contexts, in which one can extract knowledge from voting results as an emergent property of the group, without the knowledge of any individual group member necessarily having been improved (in a way similar to Condorcet's Jury Theorem).<sup>6</sup> However, most literature on the epistemic benefits of diversity has focused on deliberative rather than voting contexts.<sup>7</sup> Scott Page and Lu Hong's "diversity trumps ability" theorem, for example, is about how a diverse group of individuals can share a wider pool of knowledge with one another so that they all become better informed about what they should do.<sup>8</sup> A decision will need to be made in the end, whether by some aggregative procedure or by consensus. Diversity improves decisions because it improves the relevant knowledge of those whose inputs go into that decision. The epistemic benefits of diversity are clearly an example of the benefits of exposure to a variety of arguments and evidence. A classic example of an existing institution that makes use of the epistemic benefits of diversity is the practice of choosing juries by random selection.<sup>9</sup>

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<sup>6</sup> Landemore, *Democratic Reason*, chap. 6.3.

<sup>7</sup> *Ibid.*, chap. 4.2, 4.3; Elster, *Securities against Misrule*, 12, 279–81; Elizabeth Anderson, 'The Epistemology of Democracy', *Episteme* 3, no. 1–2 (2006): 12–13.

<sup>8</sup> Lu Hong and Scott E. Page, 'Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers', *Proceedings of the National Academy of Sciences of the United States of America* 101, no. 46 (16 November 2004): 16385–89.

<sup>9</sup> Elster, *Securities against Misrule*, 279.



Facilitating informative deliberation (including through diversity) is not the only way of following the knowledge principle. Promoting time and effort spent thinking can involve aspects of institutional design distant from the traditional concerns of deliberative democracy. The incentive structures faced by decision-makers influence the amount of time they are prepared to devote to coming to reasoned judgements on the merits of the decisions they face. As an example of how regular elections can produce bad decisions in this regard, Joseph Heath points to an accelerating race to the bottom faced by legislators:

In 2013, many Americans were shocked by the contents of a leaked presentation, put together by the Democratic Congressional Campaign Committee. It had been used to give incoming legislators guidelines for organizing their workday. It recommended spending the largest block of time, at least four hours per day, on “call time” – speaking to donors on the phone – and another hour doing “strategic outreach,” including fundraisers and press interviews. Another one or two hours were to be spent meeting constituents, leaving only two hours per day for the actual work of Congress, such as attending committee hearings or legislative sessions.<sup>10</sup>

That the structure of incentives faced by US Congress members encourages this behaviour is best thought of as a negative effect of the political system on the relevant knowledge of legislators. By spending so much time thinking about how to get re-elected, legislators have less and less time to consider which policies would actually be for the best. Setting aside worries about responsiveness to donors (which I discuss in chapter six), the reason Congress members’ inattention to the business of congress is a bad thing is ultimately because decisions are generally better made when they are more informed, and they become more informed when they are thought about more.

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<sup>10</sup> Joseph Heath, ‘The Forever Campaign: Have Our Politicians Killed Democracy by Being Too Good at Politics?’, *Ottawa Citizen*, 7 August 2015, <http://ottawacitizen.com/news/politics/the-forever-campaign-have-our-politicians-killed-democracy-by-being-too-good-at-politics>.

## 3.2 Motivation

Knowing what should be done is worthless without the motivation to act on that knowledge. Often, epistemic theories of democracy incorporate this necessary reference to motivation in the form of a sincerity condition on the claim that democratic procedures produce good answers. For deliberation or voting to produce good answers, participants must sincerely state their beliefs or vote for what they judge to be in the common good, rather than saying or voting whatever they think will profit them personally. Rather than asking how political systems might make it more likely that this condition will be fulfilled, contemporary epistemic democrats such as Estlund and Landmore make an idealising assumption that the condition is fully satisfied.<sup>11</sup> Their work then shows which political system would be best according to the knowledge principle if we did not need to worry about the motivation principle. Since my goal here is to set out those features of political decisions that impartially tend to promote good decisions, I will not bracket motivational concerns in this way. Instead, I treat knowledge and motivation side-by-side as co-equal parts of good constitutional design.

The intuition behind the motivation principle is that the public good is more likely to be advanced if people actively seek to promote it. A political system should encourage political decision-makers to act out of moral motivation. More precisely (for reasons I explain below), the system should promote the extent to which decision-makers act *as though* morally motivated. Especially in a representative system, in the long-run no-one except politicians will be well-served by a system in which people make political decisions on the basis of their own self-interest. I will first explain the various elements of the principle in more detail, before using the practice of regular elections as an example of how the principle can be pursued in practice.

The concept of *morality* at work in the motivation principle cannot refer to any particular substantive conception of morality: this would violate the impartiality principle. The motivation principle cannot ask that people should be motivated by the true conception of morality rather than false conceptions. Instead, it asks that decision-makers should be motivated by some conception of morality rather than by

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<sup>11</sup> Estlund, *Democratic Authority*, 14, 206; Landmore, *Democratic Reason*, 11–12.

non-moral considerations (principally, self-interest). In asking that people be morally motivated, we are thus imposing a relatively minimal condition on their motives. R.M. Hare describes this condition as one of “universalisability”.<sup>12</sup> For Hare, in order for a statement to be a moral statement, it has to be possible to formulate the statement on the basis of universal principles that do not refer to anyone’s proper names. At face value, “I did it because it was good for me” is not a moral statement, and nor is “I did it because she is my mother.” Both these statements might be expanded and specified more precisely to make them conform to the requirements of universalisability: thus, “I did it because anyone should do the same for their mother” is a moral statement. “I did it because we should help the needy” and “I did it because we should punish the weak” are both moral statements in this minimal sense, although they are in conflict. The motivation principle does not merely ask that decision-makers can rephrase a justification of their actions in moral terms. Instead, it asks that the most plausible interpretation of a decision-maker’s actions will make significant use of universalisable moral statements.

The implied contrast here is between moral motivation and self-interest or self-dealing. The most obvious case of self-dealing is financial corruption, but non-moral motivations in politics might also include nepotism, self-aggrandizement, and private passions such as jealousy or revenge. For practical purposes, the injunction to promote moral motivation is equivalent to an injunction to minimise self-interested motivation. This negative programme of minimising opportunities for self-interest is very close to Elster’s “Benthamite” approach to institutional design.<sup>13</sup>

In saying that the quality of political decisions is (other things being equal) a monotonic function of moral motivation, I do not deny that there is an ineliminable place for non-moral preferences and desires in political decisions.<sup>14</sup> Many perspectives value the satisfaction of people’s desires, preferences and projects. Because those who hold such perspectives have desires themselves, they will sometimes be able to say, as a moral statement, that we should do X because X will be good for me. Nonetheless, there remains an important distinction here. It’s the

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<sup>12</sup> Richard Mervyn Hare, *Freedom and Reason* (London: Oxford University Press, 1977), chaps 1–3.

<sup>13</sup> Elster, *Securities against Misrule*.

<sup>14</sup> *Ibid.*, 89.

distinction between saying “I’ll decide what we’re having for dinner because I want to” and “I’ll decide what we’re having for dinner because it’s my turn to decide”. Interests can still play a part in political decisions, but the part they should play is as data for moral judgements, not as direct motives.

As with the knowledge principle, we can promote the extent to which decision-makers act as though morally motivated either by selecting decision-makers with a tendency to act in the preferred way or by incentivising decision-makers to act in the preferred way. Allowing for the second strategy is what lies behind the somewhat clumsy formulation of the principle in terms of acting *as though* morally motivated. Particular moral perspectives may value good intentions for their own sake. For impartial instrumentalism, however, we only care about moral motivation instrumentally for its effect on the quality of decisions. What affects the quality of decisions is not so much whether people are sincerely morally motivated, but whether they act as though they are morally motivated. A judge who does not care deeply about seeing justice done may nonetheless make a good decision if their reputation depends on their acting like someone directly motivated by considerations of justice. This is important for constitutional design, because it is very difficult for institutions to affect the way that individuals would weigh the claims of morality and self-interest were they free to do so. Instead, a more realistic way institutions can have purchase on motivation is by removing opportunities for self-interest, or by making someone’s self-interest coincide with either their own or someone else’s conception of morality.

To illustrate these points in practice, I will briefly consider why legislative representatives should be chosen by election. For the sake of this argument, I assume that some kind of representation is necessary. Why should we have representatives chosen by election, than rather (for example) a self-perpetuating aristocracy that selects its own successors? Elections might be interpreted as a way of selecting decision-makers with a tendency to act on the basis of moral motivations. However, I think it is more plausible to see elections as a way of incentivising decision-makers to act as though morally motivated. Devices of accountability such as elections bring the selfish interests of politicians in line with the judgements of their constituents. This motivates politicians to act more morally, insofar as the judgements of a constituency are more likely to track morality than the interests of a single politician. Even if politicians would like to vote themselves a large pay increase, they are

deterred from doing so by a visceral fear of the shame to which they will be publically subject, and a prudential fear of losing office. In despotisms or poorly functioning democracies, we often observe politicians pursuing goals of personal enrichment, security or aggrandizement. What distinguishes well-functioning democracies is not necessarily that their politicians have more tender consciences, but that the institutional context reduces the opportunities for pursuing self-interested goals in public office.

Other core features of contemporary liberal democracy can also be explained as devices to make decision-makers act as though morally motivated, by removing opportunities for self-interest. The secret ballot is a way of discouraging one form of self-interest in the polling booth, by making it impossible for electors to sell their votes.<sup>15</sup> By removing the opportunity to use one's vote for direct personal gain, secrecy makes it more likely that electors will vote on the basis of moral judgements. Of course, an elector might still vote secretly for the candidate they think will advance the elector's personal interests, rather than the candidate they think will advance the common good. However, Geoffrey Brennan and others have shown that the small impact a single vote has on an election outcome means that it is instrumentally irrational to vote to advance one's self-interest, but not instrumentally irrational to vote for moral reasons.<sup>16</sup> There is much more to say on this subject, and I return to the question of the rationality of voting in section 5.1.

### 3.3 Objections to the knowledge principle

I now consider two objections to the idea that individual knowledge (interpreted in terms of exposure to a variety of arguments and evidence, and time and effort spent thinking) tends to have a positive or at least neutral impact on the quality of decisions. These objections are, first, that a little knowledge can be a dangerous thing, and second, that the knowledge principle authorises elitism.

The first objection is encapsulated by the proverb "a little knowledge is a dangerous thing." This proverb contains an important truth, but not one that

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<sup>15</sup> Ibid., 8–9.

<sup>16</sup> Geoffrey Brennan, 'Politics with Romance: Towards a Theory of Democratic Socialism', in *The Good Polity: Normative Analysis of the State*, ed. Alan Hamlin and Philip Pettit (Oxford: Wiley-Blackwell, 1989).

presents an obstacle for the basic idea behind the knowledge principle. The proverb is best interpreted as pointing to the special significance of a particular kind of knowledge: knowledge of one's own ignorance. In practice, greater knowledge often comes with greater confidence, and often with excessive confidence. When this happens, someone with more first-order knowledge but a diminished understanding of their own ignorance may often make worse decisions than someone with less first-order knowledge but a better understanding of their own limitations. The general claim that the quality of decisions is a monotonic function of relevant knowledge (other things being equal) is not challenged by this possibility, because we cannot say that someone who gains first-order knowledge at the expense of self-knowledge is, on balance, more knowledgeable (they have gained in one respect but lost in another). However, it does introduce additional practical complexity. It means, for example, that we cannot simply take years of education as a proxy for relevant knowledge, because the additional information acquired might come at an unacceptable cost in terms of overconfidence. Overconfidence is also the root cause in many of the observable cases in which deliberation ends up reducing rather than increasing people's knowledge.<sup>17</sup> Nonetheless, the importance of confidence does not imply that institutions should not or cannot try to select more knowledgeable decision-makers or try to educate decision-makers. If we're worried that voters, jurors and other decision-makers might be deceived by overconfident experts, then we can design institutions to help them to prize humility and distinguish warranted confidence from overconfidence. Norms of deliberation, free speech, accountability and cognitive diversity can all be directed to this end.

The second objection to the knowledge principle is the one that has received the most attention in the epistemic democracy debate. The objection runs as follows: promoting the relevant knowledge of decision-makers entails elitism (or as Estlund puts it, "epistocracy"); elitism is wrong; therefore, we should not aim to promote the relevant knowledge of decision-makers.<sup>18</sup> To flesh out this objection, I concentrate on the most obvious form of political elitism, *franchise inequalities* - inequalities of voting power among the general electorate. I show that impartial

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<sup>17</sup> Lynn Sanders, 'Against Deliberation', *Political Theory* 25, no. 3 (1 June 1997): 347–76; Landemore, *Democratic Reason*, chap. 5.

<sup>18</sup> Estlund, *Democratic Authority*, chap. 11.

instrumentalism is much more hostile to franchise inequalities than it might initially appear.

Most arguments for franchise inequalities are ruled out by the requirement of formal impartiality between different perspectives. Most arguments for franchise inequalities assume some particular conception of justice, and disenfranchise voters likely to disagree with that conception. For example, property qualifications were historically often justified on the basis that they made sure all voters had a “stake” in the community. However, this presumed that it was desirable to maintain the status quo within the community. Those who wished to see redistribution of property would have denied this, and so denied that an interest in the maintenance of the status quo was in any way an epistemic benefit for decision-makers. The way in which many franchise inequality arguments are ruled out by the impartiality principle is similar to the way Estlund’s objection to elitism ultimately depends on his (non-epistemic) “qualified acceptability” requirement.<sup>19</sup> Estlund’s framework allows him to refute franchise inequalities more easily than mine, because he helps himself to universal suffrage as a default position (presumably justified by directly moral considerations). He then takes any departures from this default to be defeated merely if they are subject to reasonable doubt.<sup>20</sup> Impartial instrumentalism, however, does not privilege universal suffrage as a starting point to the same extent. Instead, universal suffrage is a starting point only because it is a clear and simple rule that does not depend on any particular moral-political perspective.

While many arguments for franchise inequalities violate the impartiality principle, others can be framed to avoid doing so. This is particularly the case for franchise inequalities based on education, such as those advocated by John Stuart Mill.<sup>21</sup> Proposals of this kind have to be addressed directly on their epistemic merits. The main problem with proposals for selecting decision-makers according to their education levels is that it is difficult to say, impartially, that the more educated are more knowledgeable in the relevant respects. Limited education is highly correlated with other disadvantaged social characteristics, including poverty, female gender,

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid., 219–21.

<sup>21</sup> Mill, ‘Considerations on Representative Government’, chap. 8; John Stuart Mill, *Autobiography*, ed. John M. Robson (London: Penguin Classics, 1990), chap. 7.

and membership of an ethnic minority. As a consequence, the politically relevant knowledge of the least educated is not lesser but different to that of more educated groups.<sup>22</sup> The less educated do not have less politically relevant knowledge than the more educated, because they know things about the interests of the disadvantaged and about the practical effects of government policy that the more educated do not.

In response to these concerns, one might formulate a more subtle version of franchise inequality. Estlund considers the possibility that if we are worried about undesirable biases that travel with education, we could statistically sample a pool of more educated voters who are also demographically representative of the broader population in whatever ways we think are relevant (class, race, sex etc.).<sup>23</sup> In other words, we first restrict our sample to the better educated, and then we randomly eject members of over-represented demographics from our sample until we are left with a group of electors that is demographically representative as well as better-educated. However, this demographically representative franchise inequality is still vulnerable to epistemic objections. Estlund's objection is that it will be too difficult to say with confidence that our resulting pool does not still contain any residual biases – or to put it another way, we can't say it would be unreasonable to think that there is still epistemic value in the perspectives of the disenfranchised.<sup>24</sup> Estlund does not mention why this might be the case, but I can think of two very plausible reasons. One is that a group of people united only by their greater education will be disposed to exaggerate the importance of education, with potentially important consequences for education and other policy areas. Another is that the system will put too much emphasis on the set of people who are both well-educated and members of disadvantaged groups. These people cannot really represent the perspectives of the disadvantaged, precisely because the fact that they are highly educated suggests that their own life stories will be quite different to that of other members of the disadvantaged groups. For example, the sampled group might be more likely to be upwardly-mobile than the rest of their disadvantaged groups, leaving the electorate with a tendency to over-estimate social mobility.

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<sup>22</sup> cf. Estlund, *Democratic Authority*, 215.

<sup>23</sup> *Ibid.*, 216.

<sup>24</sup> *Ibid.*, 216, 219.



In addition to this objection from the knowledge principle, impartial instrumentalism can also appeal to the motivation principle. Impartial instrumentalism is only committed to institutional reforms that would improve individual knowledge without harming motivation. The complexity of demographically representative franchise inequality makes it vulnerable to manipulation for partisan political gain. The main reason franchise inequalities are so disreputable today is that the history of allegedly impartial franchise inequalities is replete with blatantly and repulsively partisan manipulation, most famously the use of literacy tests in the southern United States as a proxy for race. Brian Caplan is willing to say the chequered history of franchise restrictions is no reason to write off the idea completely in the future.<sup>25</sup> However, it remains common for even relatively simple electoral laws to be extensively manipulated for partisan advantage, as with the practice of gerrymandering. Politicians will have an incentive to design the system to favour their own voters. Moreover, making political power conditional on education will also tend to corrupt the education system, which will become in part an institution for accrediting voters rather than educating people. By staying within a perfect-compliance ideal-theoretic framework, philosophers such as Estlund and Landmore deprive themselves of some of the most potent objections to unequal suffrage, which are not based on directly epistemic concerns. Arguing for equal suffrage without appealing to the motivational concerns that drove many democrats of the past is to fight with one hand tied behind your back.

Finally, franchise inequalities might be rejected by stepping outside impartial instrumentalism itself. The approach is intended only to apply to the instrumental value of political systems in dealing with political disagreement. However, to the extent that political systems should also perform other roles (such as educating citizens or promoting a culture of mutual respect), we might object to franchise inequalities on other grounds.

Impartial instrumentalism is more hostile to elitism than one might initially suspect. Nonetheless, its rejection of franchise inequality is not absolute, and relies on various contingencies. Insofar as the approach could licence franchise inequalities, it does so in a way that is intuitively plausible. For example, we cannot take the substantive content of someone's perspective as evidence that they are relevantly less

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<sup>25</sup> Caplan, *The Myth of the Rational Voter*, 197.

knowledgeable than other voters. But we could say that someone whose substantive perspective is completely disconnected from the actual candidate they vote for is relevantly less knowledgeable than other voters. This implies that if it were possible, without triggering motivational worries, to impartially exclude voters who were unable to identify what candidates stood for in even a vague way, then impartial instrumentalism would recommend this.<sup>26</sup> In practice, I do not think this would be possible to do in an impartial way that was not subject to manipulation. Nonetheless, the proposal I discuss in section 3.6 to select representatives by lottery rather than election is, in a certain sense, an epistemically motivated proposal to exclude some people from a share in political decisions.

### 3.4 Objections to the motivation principle

I now consider two objections to the motivation principle: first, that self-interest can lead to better decisions than aiming for good decisions directly; second, a problem of mixed motivation.

In the case of individuals, it is quite clear that good intentions are not necessary or sufficient for good decisions, and they can sometimes be actively counterproductive: “god save us from people who mean well.”<sup>27</sup> In a political context, we might imagine a committed socialist who claims that Margaret Thatcher would have done less harm to Britain had she been motivated by personal corruption rather than her vision of a better society. But this statement is manifestly at odds with the impartiality principle. If we constrain ourselves to be impartial between different perspectives, the question is not whether we would prefer some specific category of opponents to be self-interested or morally motivated, but whether we would prefer political decision-makers in general to be self-interested or morally motivated. To be relevant for constitutional design, our anti-Thatcherite would have to be willing to say the same thing about their own side.

A successful objection to the motivation principle must not focus on individual counter-examples motivated by first-order moral judgements. Instead, an objection would have to advance a more general framework in which self-interest leads to good decisions. Here we might point to deliberately adversarial “invisible

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<sup>26</sup> Brennan, ‘How Smart Is Democracy?’, 12.

<sup>27</sup> Vikram Seth, *A Suitable Boy* (London: Phoenix, 2013), chap. 5.8.

hand” institutions such as sports and market competition, in which the pursuit of individual self-interest is supposed to lead (in aggregate) to the common good.<sup>28</sup> Chapter four tackles this argument in detail, considering market alternatives that have been proposed as epistemically superior to democratic politics. For now, I will briefly set out the central problem with “invisible hand” mechanisms in politics. I will illustrate this with an example of voting on a solely self-interested basis. Markets will be tackled in more detail later.

The case for self-interested voting can be represented by Bentham, who believed that representatives should vote solely to promote the interest of their constituents: they “should not try to second-guess the general interest, but rely on its realization by the aggregation of group interest through majority voting.”<sup>29</sup> Setting aside issues of interpersonal variations in preference intensity, logrolling, and Condorcet cycles, let us grant for the sake of argument that if legislators vote solely on the basis of what will advance their constituents’ interests, this will promote aggregate utility.<sup>30</sup> The fundamental problem that remains is that Bentham’s suggestion is incompatible with the impartiality principle: it is addressed specifically to a utilitarian conception of morality. Once we admit the possibility of other moral considerations such as rights or distributive concerns, there is no impartial reason to believe self-interested voting will lead to good decisions according to the correct conception of justice. Libertarians have no reason to think self-interested voting will generally tend to the good, because this will often involve rights-violations; egalitarians have no reason to think self-interested voting will tend to the good, because it will not place any extra weight on the demands of the worse-off. Once we admit that politics is partly about epistemic disagreements over which ends we should pursue and which are the best policies for pursuing those ends, the appeal of solely self-interested voting evaporates.

This is a general problem for market-like invisible-hand mechanisms in politics. Invisible-hand mechanisms necessarily lack robustness, in two ways. First, in order to operate, they generally require demanding restrictions on the structure of

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<sup>28</sup> Joseph Heath, ‘An Adversarial Ethic for Business: Or When Sun-Tzu Met the Stakeholder’, *Journal of Business Ethics* 72, no. 4 (24 November 2006): 359–74.

<sup>29</sup> Elster, *Securities against Misrule*, 170.

<sup>30</sup> *Ibid.*; cf. Weale, *Democracy*, 144.

the interaction and the strategies agents may employ.<sup>31</sup> To take just two examples, markets can only be guaranteed to be efficient when negative externalities like pollution are absent, and self-interested voting can only be guaranteed to be efficient when everyone has an equal stake in the decision. More importantly for my purposes, market-like mechanisms are not robust to different understandings of morality, but are tailored to specific conceptions of good decisions (usually Pareto-optimality or aggregate welfare). I return to this argument in more detail in chapter five.

This is not to deny that there is an ineliminable place for interests in politics. Communicating the interests of one's constituents is an important part of the job of an elected representative. I am merely saying that voting cannot only be about interests, and that when interests are raised in politics they should be mediated (if only implicitly) by some conception of morality that explains their importance.

The second objection to the motivation principle is not that self-interest is generally superior, but that the principle is vulnerable to the problem of mixed motivations.<sup>32</sup> The concern is that although it would be better if everyone acted as though morally motivated, a combination of some moral and some selfish people is worse than everyone being selfish. As Jo Wolff points out, "it can easily be demonstrated that, if part of the electorate vote in pursuit of their own interests, and part for common good, then it is possible to arrive at a majority decision which is neither in the majority interest, nor believed by the majority to be for the common good."<sup>33</sup> An example of the mixed motivation problem in practice is suggested by David Graeber. He suggests democracy is biased towards the interests of the rich because the rich tend to only look after their own interests, whereas the working class tend to look towards the interests of both rich and poor.<sup>34</sup>

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<sup>31</sup> Weale, *Democratic Justice and the Social Contract*, 31.

<sup>32</sup> Elster, 'The Market and the Forum', 116; Jonathan Wolff, 'Democratic Voting and the Mixed-Motivation Problem', *Analysis* 54, no. 4 (1994): 193–96.

<sup>33</sup> Wolff, 'Democratic Voting and the Mixed-Motivation Problem', 194.

<sup>34</sup> David Graeber, 'Caring Too Much. That's the Curse of the Working Classes', *The Guardian*, 26 March 2014, sec. Comment is free, <http://www.theguardian.com/commentisfree/2014/mar/26/caring-curse-working-class-austerity-solidarity-scourge>.

The first question for impartial instrumentalism is whether the mixed motivation objection can be formulated in a way that is consistent with the impartiality principle. Graeber's view seems to rely on a substantive moral idea of fairness that might not be common to all perspectives. However, it is hard to escape the idea that in mixed motivation cases something is going wrong with the process of decision-making, in a way that anyone can recognise is problematic. If the mixed motivation objection can be stated in an impartial way, it constitutes a serious challenge to the motivation principle as I have formulated it so far. It would be necessary to amend the motivation principle to take account of it. This could be done by placing an additional *symmetry condition* on the claim that good decisions are (other things being equal) a monotonic function of moral motivation. Thus, increasing the extent to which decisions are taken as though morally motivated only tends to improve decisions *when it applies symmetrically to all parties in a dispute*, and not only to one side. It's unclear to me how strong this symmetry condition would need to be; the simple strict condition that moral motivation must be enhanced to exactly the same extent in all parties in order to guarantee a positive impact seems too strong. A more subtle condition would run into thorny issues about comparative judgements concerning the extent to which different agents are acting as though morally motivated.

In most circumstances, it seems to me that this additional qualification is unnecessary. Since the motivation principle is to be applied impartially, it recommends increasing the moral motivation of decision-makers generally, not only the motivation of specific classes or parties. Devices like regular elections and secret ballots, impartially applied, seem very likely to be symmetrical in their effects. Moreover, on closer inspection, arguments like Graeber's point not so much to a mixed motivation problem as to an epistemic problem. The issue is not with the extent to which the rich or poor are morally motivated, but with the specific conceptions of morality they tend to favour. On Graeber's account, rich come to believe in moral-political perspectives that favour the interests of the rich, and the poor also come to believe in moral-political perspectives that favour the interests of the rich. The issue is an epistemic one about how people's moral-political perspectives are shaped in different ways by their life experiences and the sources of information to which they are exposed in the public sphere. In chapter six I explore

some institutional mechanisms for increasing the diversity of moral-political perspectives to which citizens are exposed.

### 3.5 Aggregation of knowledge

In section 3.1 I showed that the deliberative tradition of epistemic democracy can be incorporated into impartial instrumentalism under the principle of promoting individual knowledge. However, there is also an alternative, aggregative tradition of epistemic democracy, exemplified by the Condorcet Jury Theorem. I will briefly explain why I have not included this aspect of epistemic democracy within impartial instrumentalism's principles for constitutional design. In the previous chapter (section 2.1), I argued that the Jury Theorem could not justify deference and belief-convergence in real politics. Here, I am not asking aggregative models of epistemic democracy to do so much: I am merely asking whether they can play a part in explaining the relative merits of some institutional designs over others. However, even when directed to this more modest purpose, aggregative models ultimately face a similar problem.

First, we should note that aggregation models cannot be incorporated into the knowledge principle as it currently stands. Fundamentally, statistical aggregation models of epistemic democracy all work by using the law of large numbers to iron out arbitrary random variations in the judgements of individuals.<sup>35</sup> They describe how an observer can extract accurate information by aggregating the judgements of a large pool of voters. (This is also consistent with the voters themselves being observers). The important point is that in statistical aggregation models, voters are not sharing new arguments or evidence with one another, as in the case of deliberation (exemplified by the story of the blind men and their differing accounts of an elephant). Instead, voters are relying on their numbers to remove the impact of random individual errors (exemplified by a crowd guessing how many beans are in a jar).<sup>36</sup> Statistical aggregation explains how to design institutions to make better group decisions (primarily by increasing the number of voters) without necessarily

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<sup>35</sup> Adrian Vermeule, 'Collective Wisdom and Institutional Design', in *Collective Wisdom: Principles and Mechanisms*, ed. Hélène Landemore and Jon Elster (Cambridge: Cambridge University Press, 2013), 344.

<sup>36</sup> *Ibid.*, 345.

increasing the relevant knowledge held by the individual voters themselves. These models thus cannot be incorporated under the principle of promoting the relevant knowledge of individual decision-makers.

If aggregative models cannot be incorporated under the individual knowledge principle, should we include an additional principle to say that political systems should promote the aggregation of knowledge? Unfortunately, the aggregative models on which such a principle would be based run afoul of the fundamental principle of impartiality. Aggregative models explain how we can screen out the noise of random errors and hone in on the signal provided by the central tendency of the voting population. However, in order for this to work, we need to have some prior reason to believe that the central tendency is actually correct. In the Jury Theorem, this is captured by the requirement that voters have a greater than 0.5 probability of choosing the correct option. The problem is that we can only know that voters have a greater than 0.5 chance of getting the right answer if we have already presupposed what the right answer is.<sup>37</sup> And this type of presupposition is exactly what is ruled out by the impartiality principle.

To see this, consider two medical ethics committees making a decision about whether to fund homeopathy. The first committee is made up of seven doctors and three homeopaths; the second of three doctors and seven homeopaths. I believe we can use Condorcetian models to say that the first committee would make better decisions by using majority voting rather than by picking one member at random to make the decision. This is because the models tell us that aggregation increases the chance that the decision will resemble the central tendency of the group. In this case I believe the central tendency of the group is correct, because I already believe that homeopathy should not be funded. However, I believe the same models tell us equally strongly that the second committee would be better off selecting one member at random to make the decision, because in this case I believe the central tendency of the group is incorrect. When we apply statistical aggregation models to politics, how can we be sure that any group of voters is like the first committee, and not like the second? We can only do so by relying on prior beliefs about what the best decision would be, as I did in the homeopathy case. This would violate the requirement of impartiality between substantive moral-political perspectives. As

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<sup>37</sup> Valentini, 'Justice, Disagreement and Democracy', 191.

usual, the Jury Theorem makes this particularly stark, but the same conclusion applies to all statistical aggregation models of epistemic democracy. These models always require some kind of condition that the central tendency of the voting population is reliable. We cannot assess whether this condition holds while remaining impartial between different substantive perspectives.

One might worry that leaving out aggregative models renders impartial instrumentalism more indeterminate, particularly concerning crucial questions about the choice of voting procedures. However, it is possible to make determinate choices of this kind using only the principles of motivation and individual knowledge. Impartial instrumentalism invites us to make choices about voting rules based on consideration of the following kind: what opportunities will this procedure open or close for political decision-makers to act in a self-serving way? What opportunities and incentives will the procedure give to other parties to punish the self-interested behaviour of those who are accountable to them? What incentives will the procedure give to decision-makers to acquire relevant knowledge about the merits of the case? How will this procedure facilitate or retard the generation of new knowledge, by making it easier or harder to experiment with new policies? This approach is illustrated by the following example.

### **3.6 An example: lotteries for selecting representatives**

In this section, I bring the two principles together to provide an example of how they might be applied in practice. I argue that elections should be replaced with lotteries as a means of selecting representatives. However, the reasons I offer in this brief discussion are far from conclusive. The purpose of this discussion is not to advance the lottery argument for its own sake, but to use it to illustrate how impartial instrumentalism can generate determinate constitutional recommendations on core democratic issues. Further illustrations of the approach are provided in chapters six and seven, where I undertake much more detailed case studies of constitutional choices surrounding money in politics and capital strikes.

The basic proposal I consider here is to select legislators by a simple lottery of adult citizens, the way common-law countries currently select jurors. In the simple version of the proposal, this lottery fills a unicameral legislature. I will also



touch on two ways of varying the proposal. First, the legislature might be divided between two chambers, with lotteries used to fill the upper house and elections (as normal) used to fill the lower house. Second, the lottery might be instituted in the two-stage process suggested by Claudio López-Guerra.<sup>38</sup> In his proposal, an initial lottery filters the electorate to (say) 10,000 voters, who go through a day- or week-long session of deliberation, after which they elect legislators as normal. For reasons of space, I will not go into further details of the proposal, such as tenure of office, whether the sample will be stratified, or relations with other branches of government.

The case for the proposal is based on the knowledge principle. In my view, the most persuasive argument is that it would improve the incentives for political decision makers to spend time and effort thinking about their decisions. In particular, lotteries avoid two deficiencies of elections in this regard. The first problem arises for elected officials, and was noted above (section 3.1) in the quote from Heath: elections incentivise legislators to spend all their time campaigning and soliciting donations, rather than legislating. The second problem arises for voters, under the heading of “rational ignorance”: given the minimal causal impact an individual vote makes on the decision, voters have very little incentive to think hard about their decisions.<sup>39</sup> (I discuss rational ignorance in more detail in chapter five). López-Guerra and Alexander Guerrero both note that lotteries avoid triggering the rational ignorance problem for voters; they do not mention that lotteries also provide a solution to Heath’s problem of poor epistemic incentives for legislators.<sup>40</sup>

The lottery proposal is also recommended as a way of increasing decision-makers’ exposure to different arguments and evidence. Landemore argues for lotteries on the basis that they increase the diversity of legislators, with the attendant epistemic benefits of diversity.<sup>41</sup> Lotteries are also likely to stimulate deliberation in legislatures. The open plenary debate of nineteenth-century parliaments has arguably

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<sup>38</sup> Claudio López-Guerra, ‘The Enfranchisement Lottery’, *Politics, Philosophy & Economics* 10, no. 2 (1 May 2011): 211–33.

<sup>39</sup> Caplan, *The Myth of the Rational Voter*; Somin, *Democracy and Political Ignorance*.

<sup>40</sup> López-Guerra, ‘The Enfranchisement Lottery’; Alexander A. Guerrero, ‘Against Elections: The Lottocratic Alternative’, *Philosophy & Public Affairs* 42, no. 2 (2014): 135–78.

<sup>41</sup> Landemore, *Democratic Reason*, chap. 4.5.

been an important inspiration behind the idea of deliberative democracy. However, such debates have long since died out in legislatures themselves, under the pressure of organised mass parties. What discussion remains (at least in plenary sessions) is generally grandstanding for audiences out of doors rather than a genuine attempt to persuade fellow legislators.<sup>42</sup> An assembly chosen by lottery, whose members are not beholden to party organisations, would be much more likely to engage in genuine deliberation.

Counterarguments can also be made on the basis of the knowledge principle. It might be objected that the lottery proposal would destroy the useful function of elections in selecting legislators with more relevant knowledge than ordinary people. One way of responding to this concern is to point out that just as voters can entrust legislative power to those who they regard as wiser, lottery-selected legislators can defer to experts whom they regard as wiser on individual legislative decisions. Nonetheless, there is an important difference. Regular elections give rise to an infrastructure of political parties and a profession of full-time politicians. While lottery-selected legislators can defer to those they perceive as experts on particular issues, there will not be institutionalised political parties and career politicians to whom they can defer to in general.<sup>43</sup> A related issue is the concern that legislators build up important relevant knowledge in the form on-the-job experience, and this knowledge will disappear as legislators are replaced in each new lottery cycle. Some of these worries could perhaps be diffused by adjusting the details of the proposal. For example, worries about the destruction of on-the-job experience could be diffused by lengthening the tenure of office. More drastically, the infrastructure of political parties and professional politicians could be maintained by retreating to López-Guerra's two-stage variant of the proposal rather than the more radical one-stage version.

Good performance according to the knowledge principle alone would not be enough to recommend the lottery proposal. We also need to consider its impact according to the motivation principle. In this regard, the proposed reform seems neutral in its impact. As a representative cross-section of society, representatives

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<sup>42</sup> Elster, *Securities against Misrule*, 13.

<sup>43</sup> Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (New York: Oxford University Press, 2003), 195.

will be unable to enact measures to benefit themselves personally unless they explicitly vote to increase benefits for representatives. This would be such an act of naked self-interest that it would almost certainly be deterred by common decency and shame. To the extent that such a prospect is seriously feared, this would be a reason to favour an upper-house-only version of the proposal, so that another branch of government could determine such matters. If anything, lotteries come out ahead of elections in this respect, because the fact that elected representatives disproportionately come from certain professional, class, regional and ethnic backgrounds means they can pursue their self-interest in less conspicuous ways. When it comes to bribery, eliminating elections removes the prospect for corruption opened up by campaign donations (discussed below in chapter six). On the other hand, by removing the possibility of re-election, lotteries eliminate one sanction for personal corruption among representatives. It would be interesting to test some of these predictions empirically; overall, the impact on motivation seems likely to be neutral.

Probably the most important objection to lotteries falls outside the scope of impartial instrumentalism. This objection is that the lottery legislature will be afflicted with a lack of subjective legitimacy: citizens will not feel bound to obey its decisions if they feel they have played no part in authorizing them, or if they find the lottery process suspiciously opaque.<sup>44</sup> These are empirical suppositions, which seem to me to be open to question. In any case, they fall outside the scope of impartial instrumentalism, which is focused solely on cases of political disagreement, and on the instrumental value of political systems in dealing with such disagreements. However, this does not make impartial instrumentalism redundant as a normative account. Whether or not people will in fact accept the lottery system as legitimate, impartial instrumentalism is still useful as a guide to whether they should accept the lottery system as legitimate. This is not to say that subjective legitimacy considerations are unimportant for constitutional design, but they fall outside the scope of impartial instrumentalism as I have defined it here. In the Conclusion, I will return to the argument for lotteries, as well as to the issue of subjective legitimacy more generally.

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<sup>44</sup> Weale, *Democracy*, 138–40; López-Guerra, ‘The Enfranchisement Lottery’, 13–16.

In using lotteries as an example of how impartial instrumentalism, I hope I have not given the impression that impartial instrumentalism is somehow anti-partisan. As I stated above (section 1.3), in saying that constitutional politics should be conducted impartially, there is no implied denigration of vigorous partisanship when it comes to first-order policy choices (the first type of disagreement identified in section 1.4). Indeed, the whole framework of impartial instrumentalism presupposes the existence of partisans competing to promote contradictory first-order policy goals on the basis of their different moral-political perspectives. Impartial instrumentalism is motivated by the idea that political disagreements need to be managed, not overcome.

In addition, impartial instrumentalism should not be interpreted as necessarily anti-partisan in the sense of being opposed to political parties of the sort which dominate politics in contemporary mature democracies. Questions about the proper role of political parties in a political system fall under what I called disagreements about the *content* of impartial instrumentalism, the second of the two types of disagreement discussed above in section 1.4. The value of political parties has recently been the subject of a spate of work in political theory.<sup>45</sup> There are good reasons to think political parties have beneficial effects in terms of the knowledge and motivation principles. For example, ideologically-based political parties play a useful epistemic role in mediating between technical experts, elected officials, and citizens. This role relies on citizens and elected officials being able to trust that a party promotes their basic values. If they can, then party workers can translate the input of technical experts into recommendations for specific legislative or executive actions for elected officials, and citizens can take the positions of their party as indicating the positions they themselves would choose given more time and access to technical

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<sup>45</sup> See for example Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton: Princeton University Press, 2008); Russell Muirhead, *The Promise of Party in a Polarized Age* (Cambridge, Massachusetts: Harvard University Press, 2014); Jonathan White and Lea Ypi, *The Meaning of Partisanship* (Oxford, New York: Oxford University Press, 2016); Matteo Bonotti, *Partisanship and Political Liberalism in Diverse Societies* (New York, NY: OUP Oxford, 2017).

knowledge.<sup>46</sup> Disciplined parties also facilitate accountability, allowing citizens to have a rough idea of what kind of positions candidates would take in office without needing to spend time examining the history of each candidate in detail.

These considerations are merely a short sketch to indicate that, where representatives are chosen by election, there are clear advantages to having disciplined, ideologically-based parties as opposed to a multiplicity of independent candidates or weak or non-ideologically-based parties. Despite these advantages, this section has provided at least some reasons to think that a system based on lotteries could prove even better than one based on elections and political parties. Nonetheless, it was also the case that the most serious objection I considered to the lottery proposal (within impartial instrumentalism) was that lotteries might destroy the infrastructure of political parties and professional politicians.

This has only been a sketch of an argument that could be pursued much more rigorously, and there are many other potential objections which have not been considered. However, I hope I have given an example of how impartial instrumentalism might be implemented in practice, starting from seemingly uncontroversial principles of knowledge and motivation to make ambitious proposals for constitutional reform.

### 3.7 Indeterminacy

Through examples like the lottery, I have sought to alleviate worries about indeterminacy: worries that the approach can only generate trivial recommendations, and will have nothing to say about more serious choices. Before concluding, I will address the question of indeterminacy directly, setting out the limits of the approach.

Indeterminacy about which political systems lead to high-quality decisions (consistent with impartiality) comes in two kinds. First, there may be epistemic uncertainty about what impact a particular constitutional choice has on either of the two principles. This might be because different mechanisms seem to operate in different directions. For example, deliberation in a larger representative assembly

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<sup>46</sup> Thomas Christiano, 'Rational Deliberation among Experts and Citizens', in *Deliberative Systems: Deliberative Democracy at the Large Scale*, ed. John Parkinson and Jane Mansbridge (Cambridge: Cambridge University Press, 2012), 27–51.

will incorporate more perspectives (increasing the impact of deliberation on individual knowledge), but will also be more unwieldy and offer fewer opportunities to engage with the concerns of each individual representative (reducing the impact of deliberation on individual knowledge). The knowledge principle is particularly likely to be subject to competing interpretations insofar as its two components (exposure to arguments, and thinking time), are liable to clash. The complexity of the subject matter and the scarcity of empirical evidence (as discussed in the context of the epistemological objection in chapter two) leave a wide scope for reasonable disagreements.

Second, it is difficult to judge overall impact on decisions when the two principles of constitutional design conflict with one another. Often, constitutional choices offer an improvement along one dimension but a setback along another. Consider the frequency of elections. More frequent elections make representatives more accountable to their constituents, shortening their “slack” that they could direct to self-interested projects. This is an improvement according to the motivation principle. However, shortening the slack would also reduce representatives’ ability to take policy stances at variance with their constituents’.<sup>47</sup> This might be unfortunate according to the knowledge principle, insofar as the purpose of having representatives is partially to allow full-time legislators to develop more relevant political knowledge than ordinary citizens. More frequent elections might also reduce the relevant knowledge of representatives by increasing their turnover. As far as I can see, no abstract statements can be made about how to make the trade-off between knowledge and motivation. However, it would be implausible to suggest that nothing can be said within impartial instrumentalism when the two principles clash. Sometimes, we can use intuition. The relative merits of four or five-year terms may be almost impossible to judge. However, the relative superiority of five year terms over twenty year terms is clear enough, even if it cannot be formally demonstrated.<sup>48</sup>

The shape of the interaction between the dependent variable of the quality of decisions and the independent variables of motivation and knowledge is generally obscure. However, some basic comments about how they interact can be ventured.

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<sup>47</sup> Weale, *Democracy*, 143.

<sup>48</sup> cf Elster, *Securities against Misrule*, 13, 285–86.

It seems likely that improving either knowledge or motivation, while keeping the other one constant, will tend to have diminishing marginal returns with respect to the quality of decisions. Motivation and knowledge act as limiting factors on the contributions made by one another to the quality of decisions. If someone is completely selfish, increasing their knowledge about what should be done will not improve the quality of their decision-making. Conversely, if someone is completely ignorant about what should be done, increasing the extent to which they will act on their beliefs about what should be done (rather than self-interest) will not improve the quality of their decision-making.

When impartial instrumentalism is indeterminate, people may still have reasons to favour one constitutional choice over another that are drawn from their substantive moral-political perspectives. To the extent that decisions about four- or five-year term limits are indeterminate within impartial instrumentalism, we can expect politicians to argue for the option that favours their own party. Moreover, if these choices are indeterminate according to impartial instrumentalism, there is no reason from within the account to be critical of politicians who do so. From the standpoint of impartial instrumentalism, in choices where the options are incomparable, there is nothing wrong with the choice being determined by the relative political bargaining power of interested parties. Direct instrumentalism can thus fill in any of the gaps that impartial instrumentalism leaves.

However, we should not be too quick to assume that direct instrumentalism will offer more determinate constitutional recommendations in any case. Indeterminacy is a general problem for any approach to justifying democracy and making normative constitutional recommendations. It is not a specific problem for impartial instrumentalism, and impartial instrumentalism compares favourably with alternative accounts in this respect. In the next chapter I argue that direct instrumentalism is highly indeterminate. Because politics is subject to so much uncertainty, it is often very difficult to say whether or not a constitutional choice will favour one's substantive perspective in the long run. Impartial considerations of knowledge and motivation can sometimes be a more reliable guide to assessing the instrumental impact of a particular constitutional choice, even according to a specific moral-political perspective, than trying to work out the direct impact of the measure on policy. On other occasions, impartial instrumentalism will be less determinate than direct instrumentalism. However, the overall comparison between the two is

far from obvious. Moreover, sometimes moral proceduralism, impartial instrumentalism and direct instrumentalism will all be indeterminate. Perhaps the choice of four or five year term limits is such a case. When this happens, the important thing is not which option we choose, but just that we choose an option to co-ordinate around with a minimum of fuss.

Impartial instrumentalism is proposed as a way of thinking about the value of different political systems, not a calculus for demonstrating a uniquely correct answer. While impartial instrumentalism should clarify constitutional debates, it should not make them easy. Any account that purports to make constitutional choices easy should be an object of suspicion. Nonetheless, the implications of impartial instrumentalism are far from trivial. Moreover, in the next chapter I will argue that they are also relatively determinate compared to alternative accounts.

## **Conclusion**

I have provided some general principles through which impartial instrumentalism can be applied to any aspect of constitutional design. What I have not provided is a detailed constitutional plan derived from these principles. As the example of lotteries and elections shows, applying the constitutional design principles in practice requires attending to the details of institutional design and taking account of empirical evidence about how different political systems function in practice. This also goes to support my argument from sections 2.4-2.5 that impartial instrumentalism is not cut off from empirical evidence. Impartial instrumentalism is not a simple recipe to follow. It enjoins a careful contextual analysis of the mechanisms at play with each constitutional choice.

Nonetheless, the political system recommended by impartial instrumentalism is a recognisably democratic one. As I suggested in chapter one, the knowledge and motivation principles can be seen as impartial ways of operationalizing the two traditional instrumental arguments for democracy, the epistemic and the protective. The knowledge principle points to the importance of deliberation and free speech between a diverse group of people, and shows how difficult it is to justify franchise inequalities based on epistemic qualifications. The motivation principle further demonstrates the problems of unequal political power, by showing how elections with a wide suffrage limit the opportunities for self-



dealing that would otherwise accrue to a select group of political decision-makers. Clearly, much more could be said about which particular version of democracy is optimal according to impartial instrumentalism. However, this account should be comprehensive enough that I can use it to answer my primary research question about what the relationship should be between markets and democracy. Chapters four, five and six use the framework of impartial instrumentalism to evaluate constitutional choices around this relationship.

Before then, I will look at how impartial instrumentalism compares with two other accounts of democracy: moral proceduralism and direct instrumentalism. Now that we have a better idea of what impartial instrumentalism entails, it should be easier to say whether we should actually adopt it as our account of the justification of democracy.

# Chapter 4 The rational appeal of impartial instrumentalism for individual citizens

So far, I have argued that impartial instrumentalism provides a justification for democracy that is coherent and determinate. However, this does not yet add up to a case for why we should actually adopt impartial instrumentalism as our account of the justification of democracy. In order to do this, we need to compare the desirability of this account with its principal alternatives, direct instrumentalism and moral proceduralism. I argue that those already committed to instrumentalism (direct instrumentalists) should move towards the impartiality principle, and that those already committed to impartiality (moral proceduralists) should also adopt the instrumentalism principle. My conclusions are modest. In relation to instrumentalism, I claim only that instrumentalists have pragmatic reasons to move some way towards impartiality, not necessarily all the way to a maximally impartial instrumentalism. In relation to moral proceduralism, I claim that versions of moral proceduralism which are limited to a deontic commitment to political equality are compatible with impartial instrumentalism. For other, more institutionally determinate versions of moral proceduralism, I offer some pragmatic reasons to move in the direction of impartial instrumentalism.

Despite their differences, moral proceduralism, impartial instrumentalism and direct instrumentalism are all similar insofar as they focus on the role of political systems in making decisions in the face of disagreement. As I mentioned in the Introduction, political systems might also create value through incidental effects (such as educating citizens), but I will not enter into the question of how impartial instrumentalism compares to justifications of democracy focused on these incidental effects.

The reasons in favour of impartial instrumentalism that I offer in this chapter are *pragmatic* in nature rather than *moral* (or philosophical). For example, a moral argument for why direct instrumentalists should accept the impartiality principle

might be that impartiality between different perspectives in constitutional design is a basic requirement of fairness or respect for others as moral equals. A moral argument for why moral proceduralists should accept the instrumentalism principle (in cases where the two conflict) might depend on critiquing the internal coherence of those versions of moral proceduralism, or their consistency with common moral intuitions. Particularly in the case of moral proceduralism, moral or philosophical objections would require an intimate knowledge of the view in question, and indeed of the various different moral procedural views which might conflict with impartial instrumentalism, each with their own complexities. An adequate critique of the most plausible versions of moral proceduralism and direct instrumentalism would require a book in itself, and divert us considerably from the primary research questions of this thesis.

Pragmatic arguments, by contrast, do not deny that the view in question (whether direct instrumentalist or moral proceduralist) is morally or philosophically correct. They do not deny, in other words, that the ideal situation would be for the political system to be designed according to the preferred direct instrumentalist or moral proceduralist principles. Instead, pragmatic arguments give reasons why, in the circumstances of politics as we find them, direct instrumentalists or moral proceduralists have reasons to abide by impartial instrumentalism rather than insisting on their own preferred view. These are arguments in non-ideal theory – how we should act when faced with a lack of perfect information, or when faced with other people who do not comply with our own preferred (direct instrumentalist or moral proceduralist) view.<sup>1</sup> These might also be characterised as what Rawls calls *modus vivendi* arguments, or *stability* arguments of a certain (non-moralised) kind.<sup>2</sup> By focusing on pragmatic rather than moral arguments, I can concentrate on the positive virtues of impartial instrumentalism as a way of dealing with political disagreement, rather than becoming absorbed in the defects of

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<sup>1</sup> Waldron, *Law and Disagreement*, 158; On non-ideal theory as non-compliance theory see Zofia Stemplowska and Adam Swift, 'Ideal and Nonideal Theory', in *The Oxford Handbook of Political Philosophy*, ed. David Estlund (Oxford: OUP, 2012), 373–389; On non-ideal theory as concerned with imperfect information see Mark Pennington, 'Robust Political Economy Revisited: Response to Critics', *Critical Review* 28, no. 3–4 (1 October 2016): 517–43.

<sup>2</sup> Rawls, *Political Liberalism*, sec. IV.3.2-4.

alternative views. However, it should be stressed that in offering pragmatic rather than moral arguments for impartial instrumentalism in this chapter, I do not deny that there may also be powerful moral reasons in favour of impartial instrumentalism. This is a topic for future research.

Before beginning, two further clarifications may be helpful. First, I should be clear on why it is important that impartial instrumentalism is justified to individual citizens. Impartial instrumentalism is a way of evaluating what I have called the justification of democracy - the relative merits of democracy compared to other regimes (and the relative merits of different kinds of democracy). As Talisse points out, “this query often proceeds from the perspective of an as-yet apolitical deliberator, someone wondering what kind of state to establish or join”.<sup>3</sup> Because I regard democracy primarily as a way of dealing with disagreement, it is important for me to avoid this trope. Impartial instrumentalism should be justified from the perspective of an individual citizen. It should be justified to the actual parties involved in political disagreements, and not to some neutral observer.

Although I will adopt the standpoint of an individual citizen, I will be sticking to the question of constitutional choice rather than the related question of authority and political obligation. I argue that individual citizens should want to be ruled by coercive democratic institutions of the kind recommended by impartial instrumentalism. I will not argue (as Estlund does) for the more demanding proposition that citizens have obligations to obey such a regime. Finally, as the title indicates, the most I can do is argue for the *rational* appeal of impartial instrumentalism to individual citizens: why they should adopt such a view. I will not argue that citizens will in fact adopt the view (I return to this issue in section 4.3).

The final clarification to be made before beginning concerns the relationship between impartial instrumentalism and public reason liberalism. Public reason liberalism is one of the most important competitors to impartial instrumentalism, and no account of impartial instrumentalism’s desirability would be complete without some comparison with public reason liberalism. However, as both views are complex and contain several elements, arguing that one is preferable to the other is not simple. This is particularly the case because, from the perspective of impartial instrumentalism, public reason liberalism does not fit cleanly into the categories of

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<sup>3</sup> Talisse, ‘Sustaining Democracy’, 502–3.

direct instrumentalism or moral proceduralism, but contains some elements of both. It should be borne in mind throughout that the extent to which impartial instrumentalism and public reason liberalism conflict with one another will depend on the precise version of public reason liberalism under consideration, of which there are many. I merely set out a framework for thinking about the general structure of the relationship between the two views. Before we can actually evaluate which view is preferable, we need to distinguish between those elements of public reason liberalism which are in conflict with the impartiality principle, and those elements which are in conflict with the instrumentalism principle.

In section 1.5 above, I analysed the conflict between the impartiality principle and public reason liberalism's PJP. I argued that the chief point of conflict between the principles is likely to be the constitutional entrenchment of substantive goals or first-order policies (such as religious toleration or equality of opportunity). Insofar as commitment to such entrenchment is understood to be constitutive of reasonableness under public reason liberalism, entrenchment is both acceptable and even required under the PJP, whereas the impartiality principle would forbid it. These are cases where public reason liberalism endorses constitutional proposals which impartial instrumentalism forbids. Although public reason liberals are accustomed to thinking of themselves as proceduralists rather than instrumentalists, from the standpoint of impartial instrumentalism, such demands for constitutional entrenchment of preferred policies or social goals are a form of direct instrumentalism. From the standpoint of impartial instrumentalism, these are demands to shape the political system in a particular way in order to promote first-order goals, motivated by what most public reason liberals accept are moral considerations.<sup>4</sup> Accordingly, my pragmatic arguments for why direct instrumentalists should move in the direction of impartiality will also apply against these aspects of public reason liberalism.

Public reason liberalism might also conflict with impartial instrumentalism in a different way, by opposing exercises of the instrumentalism principle. Here, the thought is that just as public reason liberalism might licence or require constitutional entrenchment of substantive policies, so it might also licence or require a form of moral proceduralism. If public reason liberalism requires a moral procedural

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<sup>4</sup> Rawls, *Political Liberalism*, xlv; Quong, 'Public Reason', sec. 1.

commitment to political equality (as is the case with Rawls' political liberalism), this is (as I will argue) compatible with impartial instrumentalism.<sup>5</sup> Public reason liberals will require this commitment insofar as they understand it as constitutive of reasonableness (or as necessarily implied by more foundational elements of reasonableness, such as the idea of persons as free and equal).<sup>6</sup> However, I also consider a form of moral proceduralism which is incompatible with instrumentalism, which I call justificatory deliberative democracy. Public reason liberalism will be incompatible with impartial instrumentalism as a form of moral proceduralism insofar as it is understood to require a commitment to justificatory deliberative democracy. Accordingly, pragmatic arguments given below for why justificatory deliberative democrats should move in the direction of instrumentalism will also apply against these aspects of public reason liberalism.

Taken together, these two kinds of arguments constitute a pragmatic argument for why impartial instrumentalism is preferable to public reason liberalism as a way of dealing with political disagreement. Arguments against direct instrumentalism cover one set of potential conflicts between impartial instrumentalism and public reason liberalism, and arguments against moral proceduralism cover the other set of potential conflicts between the two.

The first and longest section of this chapter deals with direct instrumentalism. As I explained above (section 1.7), although the dichotomy between direct and impartial instrumentalism is initially helpful for expository purposes, most versions of instrumentalism are situated somewhere between the two. My case against direct instrumentalism is thus more accurately described as a set of reasons why instrumentalists should show a greater degree of impartiality than they otherwise would. The second section deals with proceduralism.. For those attracted to proceduralism for pragmatic reasons, there is no particular reason not to also adopt the instrumentalism principle – so long as the combination of instrumentalism and impartiality is coherent, as I argued above (1.4). I thus focus on the harder case of why moral proceduralists should also adopt the instrumentalism principle, bringing them closer to impartial instrumentalism. In the third section, I attempt to gather these threads and show how they weave together when applied to

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<sup>5</sup> Rawls, *Political Liberalism*, li, 155; cf. Rawls, 'The Idea of Public Reason Revisited', 771.

<sup>6</sup> Rawls, *Political Liberalism*, 19.

a real political case. I clarify the difference between disagreements with the idea of impartial instrumentalism itself, and the disagreements that impartial instrumentalism is supposed to deal with.

## 4.1 Direct instrumentalism

More direct forms of instrumentalism represent a serious challenge for impartial instrumentalism. According to impartial instrumentalism, political systems should be designed to produce good decisions according to the set of moral and causal beliefs that turn out to be correct. However, the impartiality principle imposes a major handicap on attempts to do this. The impartiality principle requires that, when talking about constitutional design, we set aside much of the knowledge we think we have about morality and social processes and instead focus on the claims we can make about decision-making quality that do not rely on controversial premises. This is a demanding self-denying ordinance, and one that stands in need of justification. Once we admit that political systems are instruments for achieving human goods, why shouldn't we design constitutions to promote these goods to the fullest extent of our beliefs about them?

In section 1.2, I gave a brief sketch of a pragmatic argument for proceduralism. The argument was that if the political system is supposed to deal with disagreements between different parties, it cannot simply be designed to favour the preferences of one party. This might make sense from the standpoint of a neutral bystander, but those who are already committed to political disagreements are entitled to ask why. In practical terms, if we are within the bounds of political disagreement where everyone would prefer some political system rather than none, why not push to make the political system as amenable as possible to one's own policy stances? The main advantage of impartial instrumentalism is that it can serve as a focal point of agreement between people with very different perspectives. However, such an agreement is vulnerable to those who are willing to be hard-headed about pursuing what they believe to be right even when others disagree. This section will show why even those who are single-minded in following their own moral-political perspective will still be pulled in the direction of impartial instrumentalism. I will attempt to give reasons drawn from within people's own

substantive perspectives for why they should be more impartial when it comes to constitutional design.

Direct instrumentalism makes the following argument:

1. If you are confident in your moral and causal beliefs, and the policies they entail, and which constitutional choices will tend to promote those policies, and
2. You have the power to implement these constitutional choices, regardless of the support of others,

Then

3. You should implement these constitutional choices.

I do not challenge the logical validity of this argument; I do not dispute that the conclusion logically follows from the premises. Instead, I dispute the premises. I argue that because politics is characterised by uncertainty and the need to persuade others, an instrumental attitude towards politics itself recommends some degree of impartiality. In the first subsection, I tackle the first premise of the argument above. I argue that widespread uncertainty in politics makes it difficult to engage in direct instrumentalism, and that impartial instrumentalism can serve as a kind of heuristic under these conditions. The second subsection tackles the second premise. Constitutional choice often takes place in a pluralistic environment where no one party has control. Under these conditions pursuing your own goals requires winning the support of others, and this pushes you towards offering impartial arguments that do not depend on the content of your own substantive perspective.

My two arguments have the same structure as two arguments associated with Elster: first, the idea that long-term self-interest under a veil of ignorance tends to coincide with morality; second, the idea that arguing for one's position in public rules out naked appeals to self-interest (the "civilising force of hypocrisy").<sup>7</sup> Both these arguments purport to show that that, under certain conditions, the best way to pursue your preferences is actually to be impartial between your own preferences and those of others. In Elster's version, preferences are defined by self-interest, and

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<sup>7</sup> Jon Elster, 'Mimicking Impartiality', in *Justice and Democracy: Essays for Brian Barry*, ed. Keith Dowding, Robert E. Goodin, and Carole Pateman (Cambridge: Cambridge University Press, 2004); Elster, 'The Market and the Forum'.



the kind of impartiality that is generated is impartiality between your own interests and those of others. (In the previous chapter, I described this sort of impartiality as a minimal condition of morality, using the term *universalisability*). By contrast, in my version here, preferences are determined by substantive moral-political perspectives (which may already be moral), and the impartiality that is generated is between your perspective and the perspective of others. In other words, the impartiality is not between different interests, but between different visions of what the state should do. This is the kind of impartiality that the impartiality principle refers to. When the conditions for these mechanisms hold, an instrumental attitude towards political systems itself leads to some degree of constitutional impartiality.

There is also a third pragmatic argument for impartiality. According to this argument, committing to the impartiality principle is the best way to ensure that disagreements remain *political*, and the political system does not collapse into civil strife. For reasons I explain below, I will not develop this argument in detail, but will briefly explain its main points. At the root of this line of thought is a concern that direct instrumentalism leads to instability. If everyone adopts a directly instrumentalist view, then once attempts at persuasion are exhausted, parties based around different moral-political perspectives will attempt to use their political power to impose the constitution that they believe will perform best according to their own substantive criteria. When parties based on different perspectives clash with one another then, to the extent that they are rational, they will avoid bloodshed by coming to some sort of settlement with one another. As with any bargain, the way to secure concessions in constitutional bargaining is to stress your willingness to walk away from the table if you don't get what you want. However, in constitutional bargaining, walking away from the table ultimately means the breakdown of the political system itself. Parties can win concessions to the extent that they can credibly show willingness to successfully resort to violence. Constitutional bargaining thus always takes place against a background of potential civil war. As long as parties maintain a directly instrumental attitude towards the constitution, the spectre of political collapse can never be exorcised entirely, because it is constitutive of the very activity of bargaining. By contrast, if people are committed to impartiality, constitutional politics will not be menaced by the spectre of civil war. Instead, constitutional politics will proceed as a debate between those favouring different accounts of procedural fairness (in the case of moral proceduralism), or

between those with different beliefs about the motivational and epistemic effects of institutions (in the case of impartial instrumentalism).

This line of argument could be developed further, and there are several potential objections to it. However, for my purposes, I will simply set it aside as going beyond the scope of my inquiry. My inquiry is restricted to cases of political disagreement, in which all parties prefer some political system rather than none. I am thus focusing on how on-going political systems should be reformed, rather than how political systems should be created out of conflict or prevented from returning to them. The instability argument would take us beyond this territory and into a much broader domain. In practical terms, we can think of setting aside the instability argument as making an assumption that if everyone adopts direct instrumentalism, constitutional bargains will still always be struck to avoid a breakdown of the system. This assumption is a concession that favours direct instrumentalism at the expense of impartial instrumentalism. I limit myself to problems that direct instrumentalism faces even in a fully stable polity.

### *Uncertainty*

The argument of this subsection was prefigured in the discussion of more or less impartial instrumentalism in section 1.7, where I briefly discussed some common reasons for political theorists to admit some degree of impartiality. This section argues more systematically that uncertainty of various kinds push instrumentalists towards greater impartiality.

Fully direct instrumentalism requires that people have clear constitutional preferences. However, more often than not, people lack clear constitutional preferences due to several kinds of ignorance and uncertainty. First, there is uncertainty within substantive moral-political perspectives themselves. This in turn comes in two kinds, normative and causal. Normatively, people are often uncertain about what ultimate criteria should be applied to actions and decisions – what, in the deepest sense, they should be aiming for when they engage in politics. Causally, people are also often uncertain about what (first-order) policies promote these normative goals. Thus, even if one is sure that economic justice is defined by Rawls's second principle, knowing what sort of economic policy this implies requires further causal theories about the impact of incentives on economic behaviour. Together, normative and causal uncertainty induces a substantial amount of uncertainty about

the first-order policy preferences that characterise your substantive perspective. Second, there is uncertainty about the relationship between perspectives and constitutions: between first-order policy preferences and second-order constitutional preferences. Even if you had a clear idea of what you wanted government to do, knowing what kind of government would be likely to do those things would require a further step. Fully direct instrumentalism thus places epistemic demands on people that they cannot be reasonably expected to meet.

The nature of my claim about uncertainty should be clarified in two ways. First, the claim is one about subjective uncertainty, not objective indeterminacy. I am not claiming that there is not an answer to the question of which political system best promotes (for example) Rawls' second principle. My claim is that it is extremely difficult to know. Second, the claim is primarily a normative one that people should be uncertain about their constitutional preferences, not an empirical one that they actually are. Here, it is necessary to tread a fine line. On the one hand, my claim cannot be only an empirical one, since the most political theory can be expected to do is argue that impartial instrumentalism is *rationally* appealing, not that it is pre-reflectively appealing. On the other hand, impartial instrumentalism is supposed to be impartial, and it should not cast doubt on people's substantive perspectives themselves. When it comes to people's underlying normative and causal beliefs, I restrict myself to the empirical claim that people are uncertain to a significant extent. I thus avoid suggesting that people's underlying beliefs are unsupported by evidence (that would be equivalent to challenging the content of those beliefs). However, when it comes to the relationship between underlying beliefs and policy stances, and especially that between policy stances and constitutional preferences, I do make the normative claim that people should be uncertain about these things, whether or not they actually are.

Given the epistemic difficulties of direct instrumentalism, impartial instrumentalism can come in as a heuristic for making decisions under uncertainty. If instrumentalists cannot directly identify which institutions would be best, they can do so indirectly by choosing the institutions which promote the relevant knowledge of decision-makers and promote their tendency to act as though morally motivated.

As an example of how instrumentalists are driven towards impartiality by uncertainty, consider the political thought of Jeremy Bentham. If anyone was confident about their moral beliefs, surely Bentham was. He was also sufficiently

confident about his causal beliefs to recommend the reform of many specific laws and policies. Moreover, his utilitarianism recommended a straightforwardly instrumental attitude towards political systems. Yet, when it came to constitutional theory, in practice Bentham's instrumentalism was substantially impartial. He did not try to proceed by a kind of backwards induction from the kinds of laws he favoured to the kinds of institutions likely to legislate those laws. Aware of his own limitations, he instead thought the object of institutional design was to "avoid the inconveniences, to prevent the difficulties, which must result from a large assembly of men being called to deliberate in common. *The art of the legislator* [institutional designer] is limited to the prevention of everything which might prevent the development of their liberty and their intelligence."<sup>8</sup> Bentham's constitutional thought was a little more directly instrumental than this quote suggests, but even his belief that majority rule would tend to track aggregate welfare was based on propositions about the distribution of relevant knowledge and motivation in the population.<sup>9</sup>

The hardest case for the uncertainty argument that I am advancing is that of constitutional protections for substantive policies. With something like a constitutionally guaranteed prohibition on alcohol, it's usually quite obvious whether or not a constitutional provision will be good or not from one's own perspective. If prohibitionists can entrench the prohibition of alcohol in the constitution, it seems quite obvious that this is a good idea from their own perspective. If constitutions entrench substantive policies, instrumentalism straightforwardly recommends attempting to get constitutional protection for your own preferred policies and deny constitutional protection for policies you disagree with. However, the reason impartial instrumentalism seems toothless here is that in a sense we are no longer talking about constitutional disagreement. We have reverted to first-order policy disagreements. The difference is merely that these first-order policy debates are taking place at the constitutional convention or supreme court rather than in the legislature or the election campaign. Impartial instrumentalism is not supposed to

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<sup>8</sup> Jeremy Bentham, *The Collected Works of Jeremy Bentham: Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Oxford University Press, 1999), 15; quoted in Elster, *Securities against Misrule*, 1.

<sup>9</sup> Elster, *Securities against Misrule*, 17, 86.

bring about agreement on first-order policy questions, and so it should not be surprising that it cannot do so here

The function of impartial instrumentalism is different. If there is to be constitutional entrenchment of substantive policies, there may be nothing we can say impartially about which first-order policies should be entrenched. However, impartial instrumentalism can offer guidance on the constitutional question of whether substantive policies should be given constitutional protection in the first place. If everyone is seeking constitutional protection for their favoured policies then it will make sense to get in on the game, but is this a good game to be playing in the first place? This question can be addressed by impartial instrumentalism. Moreover, it is a question which will be difficult to answer in a directly instrumental way, because there will be a lot of uncertainty about whether the general existence of substantive constitutional protections will tend to promote any particular perspective.

In the short run, instrumentalists may be tempted to base their endorsement of substantive constitutional protections on the degree of bargaining power their party is likely to command in fixing the list of constitutional protections. However, in the long run, this kind of thinking can easily backfire. Constitutions always require interpretation. If we could be sure that the constitutional court will always be staffed by people with similar perspectives to our own, then it will seem wise to increase the decision-making powers of courts relative to legislatures. However, it seems much more likely that control of the constitutional court in the future will alternate between parties favouring different moral-political perspectives. The idea that we can act now to fix the content of public policy for all time is a chimera. Under the circumstances of politics over the long run, constitutionalising substantive policies is not likely to settle political disagreements once and for all. Instead, it will simply channel political disagreements into a judicial political of constitutional interpretation, as we see in the United States of America. If political disagreements cannot be permanently settled in your favour, the choice you face is where these disagreements should be fought – in the courtroom, or in the assembly. To answer questions like these, we have to fall back on impartial instrumentalism, and ask about the relative epistemic and motivational merits of courts and legislatures. The point of this discussion of constitutional entrenchment has not been that strict judicial review is necessarily a bad idea according to impartial instrumentalism. That would be a

further question that would require a more detailed analysis. Instead, my argument is that, given the cloud of uncertainty that hangs over whether substantive policies should be constitutionally entrenched, impartial instrumentalism can deal with this question better than direct instrumentalism.

The argument of this subsection might appear similar to the belief-convergence conception, which I previously rejected (section 2.1). The belief-convergence conception held that people have (or should have) sufficiently low confidence in their prior beliefs so that their beliefs will converge as they are updated in response to the directives of an epistemically good political system. My argument here is different. Whereas the belief-convergence conception requires that people be uncertain about first-order policy decisions, the uncertainty argument in this subsection is more about the long-run relations between higher-order constitutional choices and first-order policy decisions. The uncertainty argument here is consistent with continuing to think the government has made a poor decision; it does not require that people defer to the political system on policy questions. Instead, it only requires that people be uncertain enough about policy stances and constitutional consequences so that they are unable to say directly what shape of political system would promote their underlying goals.

This argument from uncertainty is limited. It is not supposed to be a solvent that completely dissolves the web of inferential connections needed to sustain a directly instrumental approach to constitutional choice. It is a weaker acid, one that hopefully smudges the connections enough to give impartial instrumentalism some traction. For some issues, from certain perspectives, a directly instrumental approach will be attractive. Sometimes, people will be sure enough about the consequences of constitutional choices that it will be impossible to persuade them to remain impartial using only this argument. The uncertainty argument has most purchase when considering institutional rules that are expected to endure for a long time. Longer time horizons increase uncertainty about the effects of the choice, making a directly instrumental evaluation more difficult to make. On more immediate, short-run issues, impartial instrumentalism will tend to have less purchase, and the temptation to take a more directly instrumental approach is more likely to win out. To illustrate this, at the end of the following sub-section I examine a case where my pragmatic arguments against direct instrumentalism fail.

In section 1.4 above, I flagged a question about whether the impartiality principle should be interpreted as applying to existing perspectives, or also to possible perspectives which do not have any adherents at the time. The answer to this question was delayed until now, since it depends in part on uncertainty as a motivation for the impartiality principle. It should be borne in mind when discussing the inclusion of possible perspectives within impartiality that a large number of possible perspectives will be excluded by the requirement that disagreements remain political. However, within this envelope, there is still a question of whether constitutional design should avoid taking as a premise the desirability of first-order policies which all citizens agree on, but for which we can imagine other moral-political perspectives that would disagree.

Insofar as we consider impartial instrumentalism simply as a way of dealing with political disagreement, all that matters is that we are impartial between existing perspectives in those disagreements. However, the uncertainty argument endorsed in this section implies that we will also want impartiality to encompass other possible perspectives which we might come to hold. Part of what it means to be uncertain about one's moral-political perspective is to accept that your perspective might change over time. To allow room for our perspectives to change, we therefore have reason to want the design of the political system to be impartial with respect to possible perspectives which we may come to hold in the future. In this small way, the uncertainty argument would actually change the content of impartial instrumentalism.

However, we have reason to expect that the addition of possible perspectives will not, in practice, have an effect on the content of impartial instrumentalism. This is because that there is already enough diversity within the pool of existing perspectives to ensure that impartiality requires restricting our constitutional justifications to epistemic or motivational considerations – considerations of a kind that will also be impartial between other possible perspectives as well. In a pluralistic society with a multitude of different moral-political perspectives, the only way of impartially following the instrumentalism principle is by focusing on epistemic or motivational considerations which make no reference to first-order policy preferences. This means that extending the impartiality principle to also include possible perspectives will not disrupt or change the content of impartial instrumentalism. The impartial instrumentalist principles of

constitutional design described in chapter three will already be impartial with respect to such possible perspectives. The knowledge and motivation principles are impartial between possible perspectives in exactly the same way they are impartial between existing perspectives.

The idea that including possible perspectives would change the content of impartial instrumentalism seems to presume that the content of impartial instrumentalism is worked out in a very different manner to that which I deployed in the previous chapter. In the previous chapter, the knowledge and motivation principles were not developed by surveying all the existing perspectives in a society and finding the points of overlapping agreement between them. If that had been how the content of impartial instrumentalism was determined, then we might have expected that adding additional possible perspectives would change the shape of the overlapping agreement. However, this was not the way the principles of constitutional design were developed. Instead, these principles were developed in a free-standing way by asking what features of political systems could be judged as valuable without relying on any particular moral-political perspective. Given that the content of impartial instrumentalism was determined in this way, there is no reason to think that this content will be disrupted if we extend impartiality to also cover possible perspectives. The only reason to think that the content of impartial instrumentalism might be disrupted by extending impartiality to possible perspectives would be if the possible perspectives in question were incompatible with the knowledge or motivation principles. However, as I argued in the previous chapter, it is difficult to make out a plausible objection to these principles from the basis of moral-political perspectives which might be sincerely held, within the boundaries of political disagreement.

Where the inclusion of possible perspectives might make a difference is in applying the methodology for incorporating empirical evidence which I described above in chapter two. Including possible perspectives could disrupt this methodology by making it harder to find non-controversial competence standards in any context, making it harder to incorporate empirical evidence into constitutional design. However, even here it seems likely that any effect of this kind will be hard to discern against the impact of diversity amongst already existing perspectives.



## *The civilising force of hypocrisy*

There is a second way impartiality can be mimicked by the pursuit of individual preferences, and one that is also relevant to the pragmatic case for impartiality. This is the phenomenon Elster has called the “civilising force of hypocrisy”, adapting La Rochefoucauld’s maxim that “hypocrisy is the homage that vice pays to virtue”.<sup>10</sup> The idea is that the circumstances of politics give people reason to make arguments for their positions, and that the very act of arguing pushes one in the direction of greater impartiality. I begin by setting out Elster’s original analysis of the phenomenon for cases involving individual self-interest and moral impartiality. I then show how something similar can also apply to cases of moral-political perspectives and constitutional impartiality.

The idea of impartiality is implicit in the very idea of argument. Arguments are normative – they purport to give others reasons. As I discussed in sections 1.3 and 3.2, impartiality in the sense of universalisability is a minimal condition for normative validity; an argument that genuinely attempts to persuade must aim to be something that anyone could say and anyone else could recognise as being correct within its own terms.<sup>11</sup> With this said, it is still quite possible to make arguments for the purpose of advancing your self-interest. As Elster puts it, you might make “strategic use of normative validity claims”.<sup>12</sup> For example, a child might make an argument to their parents that their pocket money should be raised. Even if the reason people are arguing is based on self-interest, the form of the argument must always be impartial. Thus, if the child were to simply state that they wanted more money, this might be the statement of a bargaining position, but it would not be an argument. To be an argument, the child will have to frame their case in a more general and impartial way. They might say that all of the child’s friends are being given more money, and it is cruel for the parents to allow their child to fall behind their peers. Or they might say that they are being forced to do household chores for which it would be unfair for the parents not to remunerate. What makes these statements arguments is that they apply general normative principles about cruelty

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<sup>10</sup> Jon Elster, ‘Deliberation and Constitution Making’, in *Deliberative Democracy*, ed. Jon Elster (Cambridge: CUP, 1998), 111.

<sup>11</sup> Elster, ‘Strategic Uses of Argument’, 245.

<sup>12</sup> *Ibid.*, 247.

or fairness that in theory are universal. This is true even if the real motivation for offering the statements is just a desire to get more money.

Strategic uses of argument raise the question: if one's true motives are selfish, why make arguments at all? Why not just bargain? Elster has offered a list of reasons self-interested individuals might offer arguments rather than bargaining.<sup>13</sup> I pick out the two that seem most important. First, people can be motivated to argue rather than bargain by the force of social norms. To stand up in the British parliament and say that someone should be appointed to direct an agency because he is your brother would be deeply embarrassing, because there is a strong social norm against nepotism in that context. A sanction against doing so is provided directly by the visceral feeling of shame that results from being publicly observed to violate a strong social norm. As Elster points out, such social norms depend on the particular "normative hierarchy of motivations" that applies in a given culture.<sup>14</sup> For example, in a society that prizes family loyalty above all else, the same action might not trigger the same sanctions. Such norms also vary a great deal by context within cultures; nakedly self-interested bargaining is usually shameful in politics, but quite acceptable in the marketplace.

Second, people are motivated to argue rather than bargain by the prospect of persuading others.<sup>15</sup> Even if you're not moved by your own arguments, others might be, and this might be to your advantage. In order to persuade people of a particular point, one does not necessarily need to deceive people into thinking that your motives for offering the argument are sincere. You could say: "yes, I would say that, but that doesn't mean I'm wrong". However, in some contexts, people are more likely to take your arguments seriously if they believe you are offering them sincerely.<sup>16</sup> This gives people an added incentive to make use of arguments rather than bargaining: doing so helps to establish a reputation for sincerity and public-spiritedness. This reputation is a valuable resource for persuading others in the

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<sup>13</sup> Ibid., 247–48; cf. the slightly different list in Elster, 'Deliberation and Constitution Making', 102.

<sup>14</sup> Elster, *Securities against Misrule*, 90–91.

<sup>15</sup> Elster, 'Strategic Uses of Argument', 247–48.

<sup>16</sup> Elster, 'Deliberation and Constitution Making', 102.

future. In this way, incentives provided by social norms and incentives provided by the prospect of persuading others can combine.

Even selfish individuals thus have motives to offer arguments rather than bargaining. Whence comes the “civilising force” of this hypocrisy? Why does the activity of arguing push one towards impartiality? Elster mentions three mechanisms by which the normative form in which an argument is phrased constrains the content of the proposals people make. First, proposals motivated by self-interest might have to be modified because no “impartial equivalent” argument can be made for the proposals as they currently stand. Elster places little store by this constraint, arguing it is generally possible to find at least some impartial reason for almost any position.<sup>17</sup> This seems correct if parties only need to find an impartial equivalent that is logically coherent. However, if the arguments are supposed to actually persuade others, then the need to find impartial equivalents that are persuasive rather than merely coherent imposes a stronger constraint. Second is the *imperfection constraint*: if you want to avoid the appearance of partiality, you need to make sure your proposal doesn’t perfectly coincide with your partisan interests, which would be too suspicious.<sup>18</sup> Third is the *consistency constraint*: if you’re interested in building a reputation for sincerity rather than engaging in isolated acts of persuasion, once you’ve adopted an impartial argument that is useful in one setting, you can’t just discard it later.<sup>19</sup> In his first work on the subject, Elster also suggested that the civilising force of hypocrisy might actually come to shift the underlying preferences of hypocrites in a more impartial direction, as individuals tried to reduce cognitive dissonance.<sup>20</sup> However, more recently he has dismissed his earlier suggestion as being based on a misunderstanding of cognitive dissonance theory.<sup>21</sup> Even without this deeper psychological effect, the other effects still stand.

For Elster, the civilising force of hypocrisy is the observation that a deliberative setting could push individuals motivated by self-interest to make impartial moral arguments, changing the content of their proposals along the way.

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<sup>17</sup> Elster, *Securities against Misrule*, 4–5.

<sup>18</sup> Elster, ‘Deliberation and Constitution Making’, 104.

<sup>19</sup> *Ibid.*

<sup>20</sup> Elster, ‘The Market and the Forum’.

<sup>21</sup> Elster, *Securities against Misrule*, 93.

However, the lesson is actually more general than this. In an abstract form, the civilising force of hypocrisy is a relationship between individual preferences and impartiality. In Elster's examples, the content of the preferences is given by self-interest, and the type of impartiality generated is therefore impartiality between interests. However, the content of individual preferences can also be fleshed out in other ways. We could see the content of individual preferences as based not on self-interest, but on differing beliefs – on moral-political perspectives. The impartiality thus generated would be a constitutional impartiality between different moral-political perspectives, rather than a moral impartiality between different interests. The civilising force of hypocrisy can thus operate in constitutional debates. It pushes direct instrumentalists to make arguments that are impartial between different perspectives, changing the content of their proposals in the process.

As an example of how this can work, I quote at length from Elster's description of Gouverneur Morris at the US constitutional convention:

At the Convention, Morris was by far the most adamant opponent of slavery, and very much concerned with limiting the diffusion of slavery and the clout of slave-holding states in Congress. His primary strategy was to argue that for purposes of legislative apportionment, slaves should count for nothing rather than, as the Convention decided, for three fifths of a free person. When that strategy failed, he made two strategic procedural proposals motivated by the same end. Although he presented them as aiming at strengthening the existing eastern states against future western states, their main aim was to strengthen the northern non-slave-holding states against the slave states in the South.

The first proposal occurred in the context of determining the terms of access of future western states to the Union. It was widely (but incorrectly) believed that population growth would occur mainly in the Southwest rather than in the Northwest, and widely (and correctly) believed that the Northwest Ordinance banning slavery in the latter territories implicitly authorized it in the former. Reasoning from these premises, Morris proposed that future states acceding to the Union should never be able to outvote the original thirteen states. In his argument, he did not cite the threat from slavery, however, but rather the uncouth behaviour of people

from the backcountry of Pennsylvania, which, he claimed, showed that “the Busy haunts of men not the remote wilderness, was the proper school of political Talents.” Although Madison and George Mason objected that future states should not be subject to “unfavorable distinctions” or “degrading distinctions,” their argument did support the vastly more degrading distinction between free citizens and slaves...

Morris’s second procedural proposal concerned reapportionment. Randolph insisted on the need for a “permanent & precise standard” for adjusting the number of representatives as a function of demographic change, rather than leaving the adjustment up to Congress itself... Morris argued that Congress should be left free in this respect, perhaps with the aim of giving “Northern-dominated Congresses in the near future leeway to count the slaves at some ratio less than three fifth.” His argument – essentially that Congress could be trusted to do the right thing – was feeble. Madison very effectively made fun of it as inconsistent with Morris’s general view of the depravity of human nature.<sup>22</sup>

Morris was motivated by his substantive moral perspective that slavery was wrong, and he sought to alter the constitution to reflect that belief in a directly instrumental way. However, at the convention, the wrongfulness of slavery was very much a sectarian view, a premise that Southern delegates would never have accepted. Given the perspectives of the delegates, impartiality meant avoiding direct references to the rightness or wrongfulness of slavery. Morris was thus forced to use impartial epistemic and motivational arguments to advance his underlying goal. Arguments about effects of geography on epistemic competence in the first case, and about the motivations of legislators in the second, both fit within impartial instrumentalism.

The episode was deeply affected by the civilising force of hypocrisy: firstly by shaping the content of Morris’ proposals, and secondly by contributing to their failure. As means to his underlying goal of restricting slavery, proposals about future states and reapportionment were very indirect. The indirectness was necessitated by the imperfection constraint: having already lost the battle over the 3/5ths compromise, he had to avoid any appearance that he was trying to accomplish the

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<sup>22</sup> Ibid., 79–80.

same purpose by other means. Indirectness was also necessitated by the need to find impartial arguments that might actually persuade the other delegates. Morris failed mainly because he was unable to come up with a persuasive impartial equivalent for his proposal. On their face value, Morris' epistemic and motivational arguments about future states and reapportionment were weak. Moreover, because his argument about reapportionment was inconsistent with his previous arguments about human nature, Morris failed to observe the consistency constraint, further discrediting his proposals.

Morris's failure is poignant, because I assume readers today would agree that his attempts to subvert the constitutional process in the interests of opposing slavery were fully justified. The example is complicated by the fact that readers today will also (I assume) regard slavery as going beyond the boundaries of political disagreement (as it was to do in the US civil war). The civilising force of hypocrisy operated in a way that seems to us very far from "civilising" in the Morris case. However, this makes Morris an even better example for my purposes. In the constitutional case, the civilising force of hypocrisy is not supposed to push people towards the moral truth, but to push people towards impartial instrumentalism. If this effect is to have any bite, it must work against perspectives we approve of as well as against those we disapprove of. Interestingly, Morris's first proposal is also an example of how uncertainty impedes direct instrumentalism: his proposal was predicated on a prediction that population growth in the Southwest would exceed that in the Northwest, and this turned out to be incorrect.

Examples like that of Morris show that social norms against direct instrumentalism in constitutional debate do actually exist, and have some force. How these norms come about is a trickier question. Social norms against bargaining may be collectively optimal for instrumentalists, because they ensure that, even if the outcome is not the one you favour, it has at least been decided on the basis of rational argument rather than the (epistemically and morally arbitrary) bargaining power of different parties. However, even if instrumentalists benefit in the long run from the existence of reason-giving norms, it is unclear how these norms could come about in a population of instrumentalists.

Elster's own explanation for the existence of such norms suggests that impartial instrumentalism piggy-backs on moral proceduralism. He claims that the civilising force of hypocrisy depends on some people being already committed to

norms of impartiality for non-instrumental reasons: “impartiality is logically prior to the attempt to exploit it”.<sup>23</sup> Elster argues that without some genuinely impartial participants, (i) no-one would ever be persuaded or taken in by impartial equivalents, and (ii) the social norm against partiality would break down without some people prepared to enforce the norm for non-instrumental reasons. It seems clear that moral proceduralists are, at the very least, a useful catalyst for the emergence of constitutional impartiality norms. However, this does not mean that the presence of moral proceduralists is a necessary condition for the existence of the social norms that facilitate the civilising force of hypocrisy in constitutional debates. For one thing, Elster’s claim that social norms require intrinsically motivated enforcers does not seem to be a position that is universally held among specialists on the topic.<sup>24</sup> More importantly, as I argued in the previous section, a commitment to impartiality can be prompted by uncertainty rather than by a moral case for proceduralism. In any case, even without social norms in favour of sincere argument, so long as instrumentalists are open to persuasion, they have reason to listen to the impartial arguments of others, and so have reason to make impartial arguments of their own.

The civilising force of hypocrisy gives instrumentalists a reason to be less directly instrumental and more impartial in deciding which constitutional proposals to make. Their reason for doing so is that politics takes place in a discursive context in which your own underlying goals are best advanced by persuading others to support your proposals. Persuading others to support your proposals forces you to rely on impartial arguments, and this reliance necessitates changing the content of the proposals themselves.

I have given two sets of reasons why instrumentalists should move in the direction of greater impartiality. However, both uncertainty and the civilising force of hypocrisy are far from fool-proof in their capacity to rule out directly instrumental approaches to constitutional choice. The two mechanisms depend on contingent facts. The uncertainty argument depends on how uncertain you think the

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<sup>23</sup> Elster, ‘Strategic Uses of Argument’, 248.

<sup>24</sup> Knight and Johnson, *The Priority of Democracy*, 61–71.

impacts of constitutional changes will be. The circumstances of politics always include some degree of uncertainty about the impacts of constitutional changes, and usually the extent of this uncertainty is quite large in the long run. The civilizing force of hypocrisy depends on how much you need the support of others with different perspectives in order to advance your constitutional goals, and what the social norms of constitutional politics are in your particular cultural context. The circumstances of politics always include at least some need to win the support of others with different perspectives, although this may sometimes only require appealing to those with whom one has a substantial degree of agreement in the first place. Social norms of reason-giving and sincerity in constitutional politics are common, although their strength varies. How far the pragmatic case for impartiality runs depends on the precise political circumstances surrounding each constitutional choice. These considerations recommend that instrumentalists introduce a degree of impartiality into their evaluation of political systems which varies depending on circumstances. In general, these considerations will merit a substantial degree of impartiality; however, in some cases they will offer little reason not to approach constitutional choices in quite a directly instrumental way.

It thus seems appropriate to conclude with an example of a directly instrumental approach operating successfully from the perspective of those involved. This example is also from Elster, who cites Alain Peyrefitte's report of Charles de Gaulle's constitutional manoeuvres. According to Peyrefitte, de Gaulle explained why he did not seek to write his preferred procedure of majority voting into the 1958 constitution in the following way:

In '45, the communists represented one vote out of three, the other two thirds being dispersed among numerous formations. If I had adopted majority voting, the assembly would automatically have been three quarters Communist. This could be avoided only by the proportional vote. . . . There might be, one day, once again, reasons to revert to proportional voting for the sake of the national interest, as in '45.<sup>25</sup>

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<sup>25</sup> Alain Peyrefitte, *C'était De Gaulle, tome 1* (Paris: Fayard, 1994), 451–52; quoted in Elster, *Securities against Misrule*, 83.



The implication is that de Gaulle did not want voting rules entrenched in the constitution precisely so that, in extreme circumstances, he or his ideological heirs could manipulate the voting rules to deliver the decision he would want. If the Morris example shows the strength of impartial instrumentalism in resisting the temptations of direct instrumentalism, the de Gaulle examples shows its weakness. Like the epistemological objection, this prompts more modesty in claims about what impartial instrumentalism can accomplish. I return to this theme below in section 4.3.

## 4.2 Moral proceduralism

I now turn to moral proceduralist alternatives to impartial instrumentalism. I begin by explaining the relationship between proceduralism, impartiality and morality. I discuss two different versions of moral proceduralism, one of which is compatible with impartial instrumentalism (deontic political equality), and another which is not (justificatory deliberative democracy). I then give some pragmatic arguments for the superiority of impartial instrumentalism over justificatory deliberative democracy.

In section 1.2, I defined proceduralism by its commitment to the impartiality principle. The impartiality principle is a deontic side-constraint on constitutional design. It only says what constitutional design should not be: it should not be directly instrumental. The impartiality principle can be justified in two ways, pragmatically or morally. In the previous section, I gave some pragmatic arguments for moving in the direction of impartiality. A moral argument for proceduralism might be that when it comes to constitutional choices, being impartial between different perspectives is a basic requirement of fairness, or a part of what it means to respect other citizens as autonomous moral equals.

Pragmatically justified proceduralism coheres happily within impartial instrumentalism. It is also possible that morally justified proceduralism can cohere happily within impartial instrumentalism. However, it is also quite likely that moral justifications of proceduralism will pull in a different direction which creates a conflict with the instrumentalism principle. It is this possible conflict between moral proceduralism and instrumentalism which this section explores. The source of this conflict is that conceptions of morality which justify the impartiality principle are

also likely to justify other moral principles of constitutional design, principles which might conflict with the instrumentalism principle.

To look further into the compatibility or relative merits of impartial instrumentalism and moral proceduralism, we need to distinguish between different versions of moral proceduralism. Out of the many possible and actual versions of moral proceduralism, I will focus on two examples to illustrate my point: first, deontic political equality, for which I will take Albert Weale as an exemplar; second, justificatory deliberative democracy, illustrated with reference to Joshua Cohen.

Moral justifications for proceduralism tend to also include a deontic principle of political equality. For Weale, political equality is a deontological side-constraint on the more instrumentalist elements of democracy's justification.<sup>26</sup> Whatever goals the political system is designed to promote, it must do so in a way which gives citizens an equal say in political decisions. Whereas the impartiality principle requires that constitutional design be fair between different perspectives, a political equality principle requires that constitutional design be fair between individuals' votes or preferences. (For Estlund, moral considerations justify the Qualified Acceptability Requirement, a kind of moralised impartiality principle that does not directly require political equality, but slants in this direction).<sup>27</sup> In the chapter introduction, I also described how a commitment to deontic political equality might be derived from public reason liberalism as necessary implication of reasonableness.<sup>28</sup>

For versions of moral proceduralism whose only requirement is a constraint of political equality, there is no conflict with impartial instrumentalism. As I argued in section 3.3, impartial instrumentalism endorses political equality on impartiality and instrumental grounds based on knowledge and motivation. For practical purposes, impartial instrumentalism and moral proceduralism of this kind overlap and agree with one another. The two views should not be seen as rival accounts of the justification of democracy, because moral proceduralism of Weale's type is fully compatible with endorsing the instrumentalism principle as well.

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<sup>26</sup> Weale, *Democracy*, 62, 65.

<sup>27</sup> Estlund, *Democratic Authority*, 20, 41–61, 211, 219–22.

<sup>28</sup> Rawls, *Political Liberalism*, li, 155; cf. Rawls, 'The Idea of Public Reason Revisited', 771.

To encourage moral proceduralists of this type to actually endorse the instrumentalism principle and thus become impartial instrumentalists, we point to the function of the instrumentalism principle in narrowing down the range of political systems. By itself, a deontic principle of political equality is highly indeterminate when it comes to constitutional design. My point here is essentially a recapitulation of Estlund’s objection to pure proceduralism.<sup>29</sup> A principle of political equality recommends democracy rather than monarchy, but it has very little to say about the details of elections vs. lotteries, bicameralism vs. unicameralism, parliamentary vs. presidential systems etc. This is a basic implication of the deontic nature of this kind of moral proceduralism: “a purely non-consequentialist theory will never be sufficient in institutional design.”<sup>30</sup> This is not a criticism of deontic political equality, since there is no necessary reason to think that institutional design is what deontic political equality is aiming. However, for the political system to perform its function of dealing with political disagreement, we need to choose one particular political system rather than a class of permissible systems. The instrumentalism principle enables us to do this, and since the instrumentalism principle does not conflict with deontic political equality, there is no reason for those committed to deontic political quality not to adopt it.

I now turn to a second version of moral proceduralism, which does conflict with impartial instrumentalism. Here, the moral basis of proceduralism is conceived not as a deontic side-constraint of political equality, but as a telic goal of facilitating the process of public justification. I refer to this position as *justificatory deliberative democracy* (JDD). Valuing deliberation because of the intrinsic merits of public justification, JDD is defined in opposition to *epistemic deliberative democracy*, valuing deliberation because of its beneficial epistemic effects.<sup>31</sup> I focus on Joshua Cohen as an exemplar of this view. While I focus on Cohen’s version of JDD, similar points will apply to other thick and institutionally determinate versions of moral

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<sup>29</sup> Estlund, *Democratic Authority*, chaps 4–5.

<sup>30</sup> Elster, *Securities against Misrule*, 3.

<sup>31</sup> cf. Christiano, ‘The Significance of Public Deliberation’.

proceduralism, such as the democratic theory of Amy Gutmann and Dennis Thompson.<sup>32</sup>

For Cohen, the primary value of deliberation is that it expresses the freedom and particularly the equality of citizens. He writes that deliberation “expresses the idea that relations among people within a pluralistic, democratic order are relations of equals.”<sup>33</sup> Cohen explicitly states that this kind of value is “not about consequences”.<sup>34</sup> In saying this, Cohen is not referring to deliberation simply in the sense of political discussion. Instead, the practice which he values non-instrumentally is described by its proximity to ideal deliberation.<sup>35</sup> What defines ideal deliberation is, in part, that participants adhere to something like the public justification principle. As he puts it, in an ideal deliberation “a consideration is an acceptable public reason just in case it has the support of the different comprehensive views that might be endorsed by reasonable citizens.”<sup>36</sup> In stressing the non-instrumental value of this sort of deliberation, he does not deny that deliberation might also lead to good consequences because of its epistemic value. Indeed, he also seems to endorse a position of epistemic deliberative democracy.<sup>37</sup> However, it is clear that Cohen views this instrumental case for deliberative democracy as subordinate to the non-instrumental case for it.

It is equally clear that Cohen does not intend his work on deliberative democracy to be only (or even primarily) providing guidance for how individuals

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<sup>32</sup> Amy Gutmann and Dennis F. Thompson, *Democracy and Disagreement* (Cambridge, Mass: Harvard University Press, 1996); For discussion see Weale, *Democracy*, 90–98.

<sup>33</sup> Joshua Cohen, ‘Reflections on Deliberative Democracy’, in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Mass; London: Harvard University Press, 2009), 335; cf. Cohen, ‘Procedure and Substance in Deliberative Democracy’, 102; Cohen, ‘Democracy and Liberty’, 265; Freeman, ‘Deliberative Democracy’, 394–98.

<sup>34</sup> Cohen, ‘Reflections on Deliberative Democracy’, 335.

<sup>35</sup> Cohen, ‘Democracy and Liberty’, 234; See also Joshua Cohen, ‘Deliberation and Democratic Legitimacy’, in *The Good Polity: Normative Analysis of the State*, ed. Alan Hamlin and Philip Pettit (Oxford: Wiley-Blackwell, 1989), 17–34.

<sup>36</sup> Cohen, ‘Democracy and Liberty’, 234; See also ‘Procedure and Substance in Deliberative Democracy’, 100; Rawls also views the idea of public reason as constitutive of deliberative democracy in this way ‘The Idea of Public Reason Revisited’, 772.

<sup>37</sup> Cohen, ‘Reflections on Deliberative Democracy’, 334.

should engage in politics. It would be quite coherent to take the motive behind JDD (that that deliberation is valuable because it expresses freedom and equality) in a more deontic direction, along the lines of the PJP discussed above (section 1.5). One could take the idea to imply a side-constraint on one's own political proposals: one should always offer reasons, or only make proposals which could be reasonably accepted.<sup>38</sup> However, Cohen is evidently not content to see the value of deliberation only as something which side-constrains one's own political activities. Instead, Cohen's JDD has a telic form. It functions as an imperative to actively design the political system so as to facilitate the kind of justificatory exchanges which he finds non-instrumentally valuable. This explains the focus throughout his work on how a more (justificatory) deliberative democracy can be institutionalised through a more participatory democracy.<sup>39</sup> Laura Valentini expresses a similar idea (that constitutional design should facilitate the process of public justification) when she commends "democratic procedures – including deliberation and majority rule" on the basis that they are "as close as we can get, from a practical, real-world, point of view, to the ideal of mutual justification."<sup>40</sup> Whereas deontic political equality is relatively indeterminate, the telic nature of JDD leads to a form of moral proceduralism which can produce determinate constitutional recommendations, some of which have been explored by other scholars.<sup>41</sup>

Before proceeding to look at how JDD and impartial instrumentalism might come into conflict we should briefly explain how JDD, the PJP and public reason liberalism relate to one another. The first thing to point out is that JDD is not straightforwardly entailed by the PJP itself without some additional work. The PJP is a test to see whether a proposal can be justified. It can be used to evaluate proposals

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<sup>38</sup> See for example Sameer Bajaj, 'Self-Defeat and the Foundations of Public Reason', *Philosophical Studies*, 2 January 2017, 1–19.

<sup>39</sup> Cohen, 'Deliberation and Democratic Legitimacy'; Joshua Cohen, 'The Economic Basis of Deliberative Democracy', *Social Philosophy and Policy* 6, no. 2 (1989): 25–50; Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy', *European Law Journal* 3, no. 4 (1997): 313–342; Cohen, 'Reflections on Deliberative Democracy', 343–46.

<sup>40</sup> Valentini, 'Justice, Disagreement and Democracy', 192.

<sup>41</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge: Cambridge University Press, 1998); Bonotti, *Partisanship and Political Liberalism in Diverse Societies*, chap. 7.

for constitutional choices, and it can also be used to evaluate first-order policy proposals. However, it is a further step to say that constitutional proposals should themselves be designed such that first-order policy proposals within that political system tend to satisfy the PJP. This moves away from the PJP as a deontic principle which side-constrains acceptable proposals. JDD sees public justification as in some respects a telic goal: something which constitutional choices should aim to facilitate.

There are two ways of viewing the relationship between public reason liberalism, the PJP and JDD. One way of viewing the relationship is to see the PJP and JDD as two different ways of interpreting the core idea of public reason – the former deontic, the latter telic. This view does not imply that public reason liberals must choose either the PJP or JDD as their preferred interpretation of the underlying ideas of public reason. Characterised in these terms, many public reason liberals will probably endorse both positions: public justification as a deontic side-constraint on acceptable proposals, and facilitating public justification as a telic goal for constitutional design. An alternative way of viewing the relationship is to maintain that the PJP is the master principle of public reason liberalism, and that JDD can be derived from it. As I argued in the previous paragraph, a deontic commitment to public justification does not by itself imply a telic commitment. However, a telic commitment can be extracted from the PJP if we understand a commitment to JDD as constitutive of reasonableness. If commitment to JDD is a required to be considered as reasonable, then it will trivially follow that JDD and (in the case of conflicts) only JDD can satisfy the PJP with respect to constitutional choices.<sup>42</sup> Either way, many versions of public reason liberalism will endorse something like JDD. In order to argue that impartial instrumentalism is preferable to public reason liberalism as a way of dealing with political disagreement, I therefore need to give some reasons why instrumentalism should be favoured over JDD in cases where the two conflict.

JDD is quite likely to conflict with impartial instrumentalism. Most of the time, it may well be the case that the degree of public justification in a political system is positively related to its epistemic or instrumental quality. (This, in a sense, is the claim of epistemic deliberative democracy). However, this relationship cannot be presumed to hold universally. Unless we have a convincing theory of why the

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<sup>42</sup> cf. Estlund, *Democratic Authority*, 53–61.

instrumental and non-instrumental benefits of deliberation always march in step with one another, we have to expect that there will be cases where impartial instrumentalism will recommend a constitutional choice which does not maximise the scope for public justification. When this occurs, JDD conflicts with the instrumentalism principle.

There are two kinds of argument which might be given for favouring impartial instrumentalism rather than the moral proceduralist alternative of JDD. These are, on the one hand, moral or philosophical arguments, and on the other, pragmatic arguments. Moral or philosophical arguments would challenge the moral desirability or philosophical coherence of JDD in its own terms. To develop a satisfactory moral or philosophical argument for impartial instrumentalism over JDD would require not merely a positive argument for impartial instrumentalism but also a negative argument against JDD. There is a long list of objections which have been levelled at public reason liberalism, many of which would also apply to JDD, in addition to objections targeted specifically at JDD.<sup>43</sup> A successful moral or philosophical critique of JDD (not only in Cohen's versions but also those of others) would be a fitting subject for a book in its own right, and would take me on a very long tangent away from my original research aims. Instead, I will confine myself to the arguments in favour of impartial instrumentalism over JDD which can be made on a more pragmatic level. I will give some reasons to think that even if JDD is a correct account of what we morally owe to those with whom we disagree, we still have reasons to make use of impartial instrumentalism in constitutional politics. This parallels the previous section, in which I gave pragmatic rather than moral reasons in favour of impartial instrumentalism over direct instrumentalism.

The essence of my argument is that JDD is a controversial moral doctrine to which many do not agree. Just as direct instrumentalists have reason to fall back on impartial instrumentalism when others disagree with their moral-political

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<sup>43</sup> For catalogues of objections to public reason see Quong, 'Public Reason', sec. 7; D'Agostino and Vallier, 'Public Justification', sec. 5; For objections to Cohen's JDD specifically see Estlund, *Democratic Authority*, 90–93. See also Chap. 13; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2010), 202–30; For related objections to Gutmann and Thompson see Weale, *Democracy*, 90–98.

perspective, so justificatory deliberative democrats have reason to fall back on impartial instrumentalism when others disagree with their conception of the morality of disagreement. This argument is similar to a critique Thomas Christiano advances against Cohen.<sup>44</sup> However, Christiano views himself as making a philosophical objection to Cohen's position on the grounds that it is "self-defeating".<sup>45</sup> By contrast, I claim only to be offering a pragmatic argument against applying JDD in real politics. In this respect, my argument is similar to Waldron's discussion of Rawls' *Political Liberalism*, which does not take issue with the coherence of Rawls' vision, but merely argues for its inapplicability to the kind of politics (characterised by disagreement about justice) we commonly face.<sup>46</sup>

The more determinate content is included in an account of moral proceduralism, the more controversial and sectarian the account becomes. Formally, even a very thick and institutionally determinate moral proceduralism can still claim impartiality between first-order policy preferences. However, in practical terms, this claim to impartiality will start to sound hollow as constitutional recommendations come to be increasingly based on one particular vision of the morality of disagreement that is unlikely to be widely shared. The goal of facilitating public justification is itself a controversial moral value. While the theory may still be formally impartial between first-order policy preferences, substantive moral disagreement about policy has been displaced onto disagreements about higher-order principles. This is intensified the more that the goal of facilitating public justification comes to justify constitutional choices, and the more specific a conception of justification is invoked to do so. To this extent, JDD ceases to provide the thing that originally made proceduralist accounts attractive: a neutral framework for dealing with political disagreement.

In this respect, JDD is in a structurally similar position to direct instrumentalism. As such, some of the pragmatic arguments for why direct instrumentalists should move towards impartial instrumentalism also apply to JDD. In particular, if moral proceduralists need to secure the support of those with different moral perspectives in order to advance their constitutional goals, this will

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<sup>44</sup> Christiano, *The Constitution of Equality*, 215–18.

<sup>45</sup> *Ibid.*, 218.

<sup>46</sup> Waldron, *Law and Disagreement*, chap. 7 especially sec. 4.



generate a version of the civilising force of hypocrisy discussed in the previous section. If other parties in constitutional politics regard the political system in a more instrumental light, justificatory deliberative democrats will find that presenting their arguments in the terms of impartial instrumentalism (stressing the epistemic or motivational benefits of constitutional choices they were originally interested in for moral reasons), will enhance their appeal to other parties. To reiterate, the suggestion here is not that JDD is incorrect as an account of the morality of disagreement. Rather, it is that there are pragmatic reasons not to insist on its imposition at the level of constitutional choices, and to move some distance towards instrumentalism instead.

However, just as the civilising force of hypocrisy is limited in its ability to bring direct instrumentalists round to impartial instrumentalism, it is also limited in its effects on justificatory deliberative democrats. As was the case for direct instrumentalists, if the empirical conditions for the civilising force of hypocrisy do not hold and thick moral proceduralists have the power to unilaterally impose their preferred constitution, there is no way of persuading them otherwise without actually challenging their underlying moral beliefs.

The civilising force of hypocrisy argument deployed here (and in the previous section) could to some extent be seen as a *stability* argument for the superiority of impartial instrumentalism. Stability has traditionally been seen as an important concern of and motivation for public reason liberalism itself.<sup>47</sup> Viewed this way, the argument is that impartial instrumentalism can better reconcile people with different perspectives towards the political system compared with institutionally determinate and morally controversial versions of moral proceduralism. Of course, how far public reason liberals consider this a point in favour of impartial instrumentalism is likely to depend on how moralised their conception of stability is – how far they specifically value stability “for the right reasons”.<sup>48</sup> Nonetheless, it seems hard to deny that there is at least some value in purely “actual” or “descriptive” stability in the sense of an absence of civil strife.<sup>49</sup> This can be true even if one

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<sup>47</sup> D’Agostino and Vallier, ‘Public Justification’, sec. 4.2; Quong, ‘Public Reason’, sec. 8.4; Rawls, *Political Liberalism*, chap. IV.2.

<sup>48</sup> Rawls, *Political Liberalism*, xxix.

<sup>49</sup> D’Agostino and Vallier, ‘Public Justification’, sec. 4.2.

maintains that we should also aim at deeper and more moralised sort of higher-order agreement.

This section has argued that how far moral proceduralism should be considered as a rival to impartial instrumentalism will depend on the version of moral proceduralism under consideration. Moral proceduralism in the sense of a deontic commitment to political equality is fully compatible with the instrumentalism principle, so long as impartial instrumentalism implies an opposition to political inequality (as I argued above in section 2.3). Indeed, a moral justification of proceduralism of this kind can provide a more robust reason to adopt the impartiality principle than the pragmatic reasons I canvassed in the previous section. However, when it comes to thicker and more institutionally determinate version of moral proceduralism, such as JDD, a clash with impartial instrumentalism is likely. Against such views, a civilising force of hypocrisy argument can still motivate some movement towards impartial instrumentalism. However, defending impartial instrumentalism in a more robust way would require actively taking on the moral and philosophical justifications for JDD, something I have not attempted to do here. The intuitive strength of impartial instrumentalism remains its ability to serve as a neutral framework for dealing with political disagreements between parties with divergent moral and causal beliefs. In this respect, it retains certain advantages over the versions of moral proceduralism with which it is in competition.

### **4.3 Three kinds of disagreement in impartial instrumentalism**

If the attraction of impartial instrumentalism is that it is neutral and ecumenical, we should think carefully about how impartial and consensual the approach can really be in the circumstances of real politics. Can it be true that arguments in impartial instrumentalism are acceptable to everyone? Before I conclude my account of impartial instrumentalism, I will address these concerns by distinguishing between several different types of disagreement. Some disagreements can take place within impartial instrumentalism, while other disagreements are with the approach itself. To make this all more concrete, I utilise a currently topical example. How might impartial instrumentalism accommodate a partisan of President Trump? Everything about Trump seems to run counter to the calm rational

constitutionalism of impartial instrumentalism. Yet, we need to carefully distinguish between three different ways we might interpret the politics of Trump supporters. First, we might interpret them as simply being motivated by a strong first-order moral-political perspective. Second, we might interpret them as making epistemic and motivational arguments about the value of intuition or the corruption of politicians. Finally, we might interpret them as directly instrumental opportunists, disregarding existing norms of impartiality in constitutional debate. These three interpretations are not mutually exclusive, and Trump supporters might be doing all three things at once.

Most political disagreements are first-order disagreements over specific policy choices, motivated by different moral-political perspectives. Thus, nationalists favour tighter immigration restrictions, whereas liberals favour a greater willingness to admit migrants. This kind of disagreement does not constitute a challenge to impartial instrumentalism. Impartial instrumentalism is intended as a way of designing the political system which decides these first-order policy decisions. Impartial instrumentalism has nothing to say about policy disagreements themselves, only about how they should be resolved. Far from constituting a challenge, first-order disagreements over things like immigration are presupposed and required by impartial instrumentalism. Impartial instrumentalism gives guidance on how the race should be organised; but there would be no point in staging a race without people to run it. First-order moral and political judgement is fundamental, and there is no substitute for it.

Trump supporters might also be interpreted in a second way, as offering epistemic or motivational arguments that fall within the definition of impartial instrumentalism. Some of the stances taken by Trump supporters are best seen as statements about what features of the political system tend to contribute towards better decision-making, in a way that does not rely on one particular first-order perspective. Consider three examples. First, Trump supporters show a general preference for intuitive judgement over rational argument. This is clearly an epistemic argument, and in this respect, Trump is merely the culmination of a consistent trend in Republican ideology for the last generation.<sup>50</sup> Second, Trump

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<sup>50</sup> Joseph Heath, *Enlightenment 2.0: Restoring Sanity to Our Politics, Our Economy, and Our Lives* (Toronto: Harper, 2015), chap. 9.

supporters distrust the motives of the Washington establishment. This can be interpreted as an argument about the incentives to corruption in the American political system, and the patterns of self-interest connecting politicians, bureaucrats, journalists and the like. Third, Trump supporters often express the idea that business experience is the supreme qualification for political office. This too can be seen as an impartial belief about the kinds of relevant knowledge and character that are useful for political decision-making.

If beliefs like the importance of business experience are arguments within impartial instrumentalism, they should not be seen as challenges to impartial instrumentalism. They do not challenge the general idea that we should assess the value of political systems by looking at their tendency to produce good results, in a way that does not rely on any particular moral-political perspective. These stances of the Trump supporter do not represent a rejection of the impartial instrumentalist game, but different moves within that game. They represent different beliefs about what the institutional implications of the approach are. Within the basic idea of impartial instrumentalism, there will be numerous disagreements about which particular features of institutions make positive or negative contributions. These disagreements can only be settled on the epistemic merits of the case. For example, Joseph Heath's book *Enlightenment 2.0* is a direct attempt to rebut the idea that intuition is superior to reason. To do so, Heath does not appeal to controversial first-order moral-political perspectives, but to the findings of cognitive science.<sup>51</sup> Or again, to rebut the idea that business experience is a good qualification for political office, we might point out the relevant ways in which countries and companies are disanalogous and require different habits of thought.<sup>52</sup>

Constitutional arguments should be impartial in the sense that they do not take as premises any controversial first-order moral or political judgements that are not shared by all parties. This does not mean institutional recommendations made within impartial instrumentalism will in fact be accepted by all parties. People may have various reasons to reject particular constitutional recommendations made in impartial instrumentalism. The impartiality principle merely rules out one particular

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<sup>51</sup> Heath, *Enlightenment 2.0*.

<sup>52</sup> e.g. Paul Krugman, 'A Country Is Not a Company', *Harvard Business Review*, 1 January 1996, <https://hbr.org/1996/01/a-country-is-not-a-company>.

reason to reject constitutional arguments. It implies that people will not have reason to reject the arguments because they contradict their first-order moral-political perspectives. This is the only sense in which impartial instrumentalism is equally acceptable to all first-order perspectives: arguments in impartial instrumentalism do not discriminate against particular parties on the basis of their substantive moral-political perspectives. Disagreement within impartial instrumentalism is fully possible and extremely likely. Disagreements over the respective contributions of intuition and rational thought to good decision-making are merely one example. It is true that certain epistemic stances tend to be correlated with first-order moral-political perspectives. Nationalism often seems to go along with anti-rationalism. However, from the point of view of impartial instrumentalism, first-order political disagreements and second-order disagreements about the value of political systems can be distinguished, and should be treated in very different ways.

There is a third way of interpreting the political stances of Trump supporters (and the man himself). On the third interpretation, like the second, Trump supporters are making constitutional proposals rather than first-order policy proposals. However, unlike the second interpretation, these constitutional proposals are not seen as motivated by impartial considerations (even by aspiration). Instead, they are motivated by first-order policy preferences. In other words, we might interpret Trump supporters as direct instrumentalists. Trump's characteristic incivility and disdain for constitutional conventions points in this direction. On this interpretation, it is not necessary to think of Trump and his supporters as setting out a comprehensive alternative vision of the political system which would be more amenable to their first-order policy preferences. Instead, we can simply think of Trump and his supporters as intending to disregard the constitutional structures that impede their first-order policy preferences on a case-by-case basis.

On this third interpretation we can properly speak of Trump and his supporters as objecting to or challenging impartial instrumentalism. To practice constitutional politics on a directly instrumental basis is to ignore impartial instrumentalism. The core of this chapter has given arguments for adopting impartial instrumentalism rather than the directly instrumental approach. These arguments are limited. If Trump attempts to subvert the constitution in order to achieve some particular policy goal, the most we can say to persuade him otherwise will be to stress that the precedent he sets may become dangerous to him in the future, and

that such a nakedly cynical attitude will be unpopular. Of course, these are themselves rational arguments, which appeal to the listener's concern for good political decisions in the future. If our interlocutor is an irrational gut-thinker motivated by transient vanity and the thrill of power, these arguments will have little purchase.

## Conclusion

This chapter has given some reasons for approaching constitutional choices using impartial instrumentalism rather than alternative accounts. I did not argue that the alternatives of moral proceduralism or direct instrumentalism were incorrect or incoherent as philosophical positions. Insofar as I objected to these alternatives, I objected to them as practical, political doctrines. I tried to show why, in the circumstances of politics, moral proceduralists and direct instrumentalists both have reasons to move towards impartial instrumentalism. This argument relied heavily on the circumstances of politics. By this I mean both the basic set-up of political disagreement outlined in the first chapter (section 1.1), as well with some simple further observations about politics. The argument for why moral proceduralists should accept some element of instrumentalism relied on the need for determinate answers to constitutional questions. The argument for why instrumentalists should accept some element of impartiality relied on the pervasive uncertainty of politics, particularly constitutional politics. A supplementary argument about the civilising force of hypocrisy depended on the discursive context of politics, and the need to persuade others (itself a consequence of the pervasiveness of disagreement).

In response to concerns about the desirability of impartial instrumentalism, this chapter has admitted that the scope of constitutional questions that the approach can settle is somewhat reduced. The issue in this case is not one of epistemic indeterminacy of the kind discussed in the previous chapter. The problem is not that it is difficult to know which political system impartial instrumentalism recommends in practice. Instead, the issue is that the temptation to engage in constitutional politics in a directly instrumental way (or a thickly moral proceduralist way) means that impartial instrumentalism may struggle to gain purchase on constitutional questions that directly touch the perspectives of some parties.

This problem may be ameliorated by working out the practical implications of impartial instrumentalism in more detail. This will have the side-effect of strengthening the uncertainty argument and the civilising force of hypocrisy. The more certain we can be about which constitutional choices are recommended by epistemic and motivational considerations, the more attractive impartial instrumentalism will become as a heuristic when directly instrumental effects are unclear. The clearer we can get about what impartial instrumentalism implies in institutional terms, the more difficult it will become for people to pass off directly instrumentally motivated constitutional proposals under the cover of impartial instrumentalism. The case studies of constitutional choices in the remaining chapters will help with this.

This concludes my account of impartial instrumentalism. In the second half of the thesis, I use this account of democracy's justification to examine the relationship between democracy and the market. The next chapter begins this task by examining a proposal to constitutionally restrict democracy's ability to intervene in the market. In critiquing the idea that markets can serve as an alternative to democracy, I will draw on some of the arguments about impartiality and neutrality that have been developed in this chapter.

# Chapter 5 Restricting democracy's influence over the market: A critique

The previous four chapters developed an account of politics according to which political systems should be evaluated by their tendency to produce good decisions, consistent with impartiality between substantive perspectives. This chapter considers a major challenge to this justification of democracy. According to the argument I will tackle here, the epistemically superior system is not democracy, but the market. In practice, this is taken to imply that government interventions in the market should be constitutionally restricted.

This pro-market anti-democratic argument depends on a diagnosis of democracy's epistemic failings. The diagnosis I will focus on is based on the theory of rational ignorance. This says that because the probability of an individual vote making a difference to the result is so small, voters will generally not bother to spend much time or effort deciding how to vote. Whereas citizens deciding how to vote only have a tiny chance of affecting the result of the vote, market participants deciding whether or not to accept a trade will be decisive in determining whether or not the trade goes ahead. In their capacity as market participants, people thus have a stronger incentive to gather and process the information necessary to make a good decision. For the sake of argument, I accept this diagnosis of democracy's epistemic failings compared to the market. What I challenge is the idea that this analysis implies a case for constitutionally protecting markets from interference by democracies.

A growing set of authors have made arguments along these lines, with numerous minor variations between them. To keep the discussion tractable, I focus on Ilya Somin as a representative of this tradition.<sup>1</sup> Somin has developed this argument at length, and his version of it is in my view the most convincing. Somin is careful to minimise the target he presents to critics, and his substantive conclusions are relatively moderate and plausible. This makes him a more interesting subject of criticism than Guido Pincione & Fernando Tesón, the other authors who have

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<sup>1</sup> Somin, *Democracy and Political Ignorance*.



developed this argument at length.<sup>2</sup> Pincione & Tesón take the argument in a much more radically libertarian direction. I will also briefly touch on some of the other authors who have advanced this argument, such as Bryan Caplan, Mark Pennington and Jason Brennan.<sup>3</sup>

The argument for limiting democratic interventions in the market based on the theory of rational ignorance is itself a representative of a broader set of instrumentalist anti-democratic, pro-market views. On the knowledge side, Hayekian accounts assert the superior ability of markets to process dispersed knowledge and facilitate experimentation, relative to central planning.<sup>4</sup> On the motivation side, public choice theoretic arguments portray politics as a process of negative-sum struggle over the social surplus, in contrast to productive positive-sum exchanges in the market.<sup>5</sup> I focus on the rational ignorance version of the anti-democratic pro-market argument for two reasons. First and most importantly, the rational ignorance argument is, in my view, the most persuasive case that has been made for constitutionally restricting the scope of democracy. If we can rebut the strongest challenge to democracy, we can be more confident that constitutionally restricting democracy is unwise. It should be clear to those familiar with the

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<sup>2</sup> Pincione and Tesón, *Rational Choice and Democratic Deliberation*; see also Guido Pincione, 'Constitutional Neutrality among Economic Policies', *Public Choice* 152, no. 3–4 (25 July 2012): 455–59.

<sup>3</sup> Caplan, *The Myth of the Rational Voter*; Pennington, *Robust Political Economy*, chap. 3; Brennan, 'How Smart Is Democracy?'

<sup>4</sup> F. A. Hayek, 'The Use of Knowledge in Society', *The American Economic Review* 35, no. 4 (1 September 1945): 519–30; Mark Pennington, 'Hayekian Political Economy and the Limits of Deliberative Democracy', *Political Studies* 51, no. 4 (2003): 722–739; Samuel DeCanio, 'Democracy, the Market, and the Logic of Social Choice', *American Journal of Political Science* 58, no. 3 (1 July 2014): 637–52; Pennington, *Robust Political Economy*, 46; See also Ryan Muldoon, 'Expanding the Justificatory Framework of Mill's Experiments in Living', *Utilitas* 27, no. 2 (June 2015): 179–194; These argument are also mentioned in Somin, *Democracy and Political Ignorance*, 185; For critique, see Michael Bennett, 'Experiments in Distributive Justice and Their Limits', *Critical Review* 28, no. 3–4 (1 October 2016): 461–83.

<sup>5</sup> Pennington, *Robust Political Economy*, chaps 1, 2; James M. Buchanan, 'The Constitution of Economic Policy', *Science* 236, no. 4807 (12 June 1987): 1433–36; For critique see John O'Neill, *The Market: Ethics, Knowledge and Politics* (London: Routledge, 1998), chap. 12.

Hayekian and public choice theoretic arguments that much of my critique of Somin's proposals also applies to constitutional proposals based on these other arguments, although it would take me too far off course to distinguish these more precisely. Second, unlike these other arguments, the rational ignorance argument focuses specifically on a contrast between markets and democracy rather than between markets and the state.

In focusing on a comparison between the market and conventional models of democracy, I will set aside the additional options I considered in chapter three: elitist "epistocracy" and selecting representatives by lottery. These options can also be considered as attempts to solve a problem of democratic ignorance. There is a certain degree of overlap between pro-market and elitist responses to democratic ignorance, with Caplan and Brennan focusing primarily on elitism rather than constitutional restrictions on interventions in the market as the primary solution to democratic ignorance.<sup>6</sup> However, I will focus on the pro-market response to democratic ignorance, and particularly Somin's version of it.

The essence of my complaint against Somin is that he presents himself as engaging in something like impartial instrumentalism, while his view actually boils down to a version of direct instrumentalism. I am not suggesting that Somin commits himself to the particular version of impartiality that I have defended. However, he does explicitly claim that his "book does not provide a defence of any particular vision of political morality."<sup>7</sup> Somin presents himself as fixing an epistemic problem with democracy rather than promoting his own conceptions of justice. Showing that Somin's argument violates the impartiality principle is, to that extent, an internal critique. Ultimately, Somin could always respond to this critique by dropping the pretence to impartiality and admitting that his work is a species of direct instrumentalism. This would mean admitting that the argument cannot persuade those who disagree with the premises of his substantive moral-political perspective. On a deeper level, the problem with violating impartiality in a

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<sup>6</sup> Caplan, *The Myth of the Rational Voter*, 197–98; Jason Brennan, 'The Right to a Competent Electorate', *The Philosophical Quarterly* 61, no. 245 (1 October 2011): 700–724.

<sup>7</sup> Somin, *Democracy and Political Ignorance*, 55; cf. Pincione, 'Constitutional Neutrality among Economic Policies'.

constitutional theory can only be explained with reference to the positive case for impartiality that I set out in the previous chapter.

I begin with a detailed reconstruction of Somin's argument. The remainder of the chapter then moves from a more internal critique to a more external critique of Somin's proposals. In section 5.2, I ask whether Somin's proposals succeed within their own terms as a means to increase efficiency. I argue that the variety of mutually exclusive possible ways of promoting efficiency necessitate a flexible political mechanism for choosing between them. Section 4.3 takes a more open-ended view of the ends of government, and criticises Somin for his lack of impartiality. Markets are only an appropriate solution to democracy's failings according to a particular moral-political perspective which takes the purpose of the state as the promotion of efficiency and the protection of basic rights.

## 5.1 Reconstructing the argument

This section is a sympathetic reconstruction of the anti-democratic, pro-market argument. The argument can be divided into two parts, a diagnosis of democracy's failings and a prescription of markets as the solution. Descriptively, Somin and his allies are in close step with one another. They explain empirically attested political ignorance as a consequence of the poor incentives to acquire and process knowledge that voting in large electorates unavoidably produce. Markets, by contrast, offer good incentives for knowledge acquisition and processing. Normatively, there is greater variation between different versions of the argument, and I focus on Somin's version. He argues that central government operations should be constitutionally restricted in favour of an enlarged role for markets and quasi-market competition between local governments.

### *Democracy's failings*

Evidence of voters' political ignorance is sufficiently robust that some have gone so far as to say that "widespread public ignorance is among the strongest findings of the social sciences."<sup>8</sup> Brennan points to research such as that of Scott Althaus, who finds that a quarter of US voters pick the wrong answer when asked

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<sup>8</sup> DeCanio, 'Democracy, the Market, and the Logic of Social Choice', 637; cf. Somin, *Democracy and Political Ignorance*, 17.

which of the two main parties is more conservative.<sup>9</sup> Caplan uses survey data to show that the public have significant anti-foreign and anti-market tendencies compared to economists.<sup>10</sup> However, using the beliefs of economists as a baseline is always likely to be controversial, since the expertise of economists and the degree of consensus amongst economists is disputed.<sup>11</sup> Using empirical evidence in this way can seem suspiciously close to saying that voters must be ignorant because they do not agree with your position. Somin avoids objections of this kind by looking at what voters know about facts that are much harder to dispute.<sup>12</sup> For example, the 2000 American National Election Studies survey found that only 50% of respondents correctly answered that Republicans controlled the senate before the election, only 37% correctly answered that the crime rate had decreased in the last 8 years, and only 15% could name at least one candidate for the House of Representatives in their district.<sup>13</sup>

By itself, ignorance about public policy might simply be a particular instance of a more general ignorance about the world – ignorance which would not obviously recommend one institutional form over another.<sup>14</sup> What makes markets a logical response to democratic ignorance is the particular explanation of voter ignorance that is used, the theory of rational ignorance.

People participate in politics for two main reasons. First, they participate instrumentally, to increase the chance that a candidate or policy has a greater chance of winning. Second, people participate expressively, to express themselves or signal to others what kind of person they want to be. The rational ignorance hypothesis is that instrumental political participation is usually irrational because it has such a low probability of affecting the outcome. Imagine an election where the winner takes 600 votes and the loser 400. In purely instrumental terms, 199 winning voters made no difference; they could have stayed at home and the outcome would be the same.

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<sup>9</sup> Brennan, 'How Smart Is Democracy?', 11.

<sup>10</sup> Caplan, *The Myth of the Rational Voter*, chap. 3.

<sup>11</sup> Gerald Gaus, 'Is the Public Incompetent? Compared to Whom? About What?', *Critical Review* 20, no. 3 (2008): 291–311.

<sup>12</sup> Somin, *Democracy and Political Ignorance*, 9–11.

<sup>13</sup> *Ibid.*, 31–32.

<sup>14</sup> DeCanio, 'Democracy, the Market, and the Logic of Social Choice', 638; cf. Somin, *Democracy and Political Ignorance*, 75–77.

Indeed, the 400 losing voters also made no difference; they lost anyway, so they also might as well have stayed at home. In purely instrumental terms, only a *decisive* vote is worth casting. Whenever the number of voters is very large, the probability of your personal contribution being decisive is extremely small. Somin references a study of the 2008 US presidential election that concluded that “American voters had a roughly one in sixty million chance of casting a decisive vote, varying from one in ten million in a few small states to as low as one in one billion in some large states such as California.”<sup>15</sup>

These examples reduce political participation to the act of voting. However, the same calculation holds for any kind of political participation directed towards influencing the result of a vote taken with large numbers of people. Informing yourself about candidates is a form of political participation in this sense. In instrumental terms, the value of political participation is the value of your preferred political result multiplied by the probability that your personal contribution will be decisive in bringing it about, minus the cost of participation.<sup>16</sup> The most important cost is their own time, which they could be spending on many other things. Instrumentally rational citizens participate in politics up to the point at which the expected marginal value of their participation is exceeded by its marginal costs. This simple calculation is complicated somewhat if we think that voters also care about the margin of victory, but I will follow Somin’s argument that such an effect is unlikely to change the overall picture in any case.<sup>17</sup>

Rational ignorance is often presented as a problem for *selfish* instrumental voting in particular (indeed, this is how Pincione & Tesón and Caplan present it). If this were the case, rational ignorance would not be particularly interesting, since (as I argued in section 3.2), political systems should be designed to discourage straightforward self-interest in politics anyway. However, rational ignorance also applies to ethical instrumental voting, as Somin points out. The payoff of a good election result is much higher for ethical instrumental citizens than it is for selfish

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<sup>15</sup> Andrew Gelman, Nate Silver, and Aaron Edlin, ‘What Is the Probability Your Vote Will Make a Difference?’, *Economic Inquiry* 50, no. 2 (1 April 2012): 321–26; Referenced in Somin, *Democracy and Political Ignorance*, 63.

<sup>16</sup> Somin, *Democracy and Political Ignorance*, 67–69.

<sup>17</sup> *Ibid.*, 73–74.

instrumental citizens, because ethical citizens care about how the election result affects everyone, whereas selfish citizens only care about how it affects themselves. However, even though the payoff is higher, the probability of decisiveness is still so miniscule that the overall expected value of political participation is small. For ethical citizens, the act of voting is usually, just about, worth it. But any political participation above this threshold – including informing yourself about politics – is likely to be instrumentally irrational.<sup>18</sup>

Obviously, citizens do not calculate the costs and benefits of political participation in any precise way. However, it is perfectly plausible that participation levels are influenced by the rough ideas people have about its instrumental efficacy, and that these rough ideas are reasonably close to reality. In support of this, Somin points out that voting turnout is quite sensitive to perceived differences between candidates, to the probable closeness of the result, and to poll taxes.<sup>19</sup>

Because of the low returns to political participation, even morally motivated citizens have little reason to spend time and effort acquiring information that would improve the quality of their political decisions.<sup>20</sup> More subtly, voters also have little reason to spend time and effort processing the information they do acquire in a rational way, avoiding cognitive biases.<sup>21</sup> Some things are more comfortable to believe than others: it's easier to believe that you're one of the good guys, that your problems are not your fault etc. These sorts of self-serving tendencies lie at the root of many cognitive biases. For ordinary voters, giving into these biases has few dangers because your decisions are unlikely to make a difference anyway. Voters are thus unlikely to take on the psychologically uncomfortable task of challenging beliefs that form part of their own identity. In addition to this more passive acquiescence to self-serving biases, the lack of instrumental impact means that voters have little incentive not to use their political stances expressively, to signal to others what kind of person they want to be: “to express themselves, to express their fidelity to a group

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<sup>18</sup> Ibid., 65–69.

<sup>19</sup> Ibid., 68.

<sup>20</sup> Hardin, ‘Deliberative Democracy’, 235.

<sup>21</sup> Somin, *Democracy and Political Ignorance*, 78–88; Pincione and Tesón, *Rational Choice and Democratic Deliberation*, 21–45.

with which they identify, and to express their dislike to groups towards which they have enmity.”<sup>22</sup>

On the basis of this theory, Somin concludes that democracy has a serious and inherent epistemic weakness. The rational ignorance problem is inherent to decision-making by voting among large groups of people. The same problem appears for elections as for referenda. Nor can the problem be solved by adopting an indirect system of representation where small local assemblies send delegates onwards to higher levels. Voters choosing delegates at the first level still face rational ignorance, because they know that the impact their choice will ultimately have on national policy issues is still tiny. The only way to change the incentives to ignorance would be to actually change the level at which decisions are made so that more important matters are decided locally; as will become clear below, this already takes us halfway to markets.

Democracy has been defended against such charges like Somin’s in two main ways. First, some have argued that voters are able to do a good job with only a small amount of information because they are able to rely on “shortcuts”.<sup>23</sup> For example, they can decide whether or not to vote for incumbents based on how well their own lives are going (“retrospective voting”), or they can defer to people or groups they trust, most importantly political parties. Second, it might be argued that the effects of aggregation smooth out many errors of individuals. For the sake of argument, I will accept Somin’s critique of these proposed shortcuts.<sup>24</sup> I will accept his descriptive account of democracy’s epistemic weaknesses, and concentrate on its normative implications.

### *Positive proposals*

Ignorance is rational in politics because the probability of your contribution making a difference is very small. By contrast, when people make buying and selling decisions in markets, they can be certain that their decisions will make a difference to themselves. Market participants therefore have good incentives to become properly informed about important transactions before agreeing to them. Somin

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<sup>22</sup> Brennan, ‘How Smart Is Democracy?’, 8.

<sup>23</sup> Christiano, ‘Rational Deliberation among Experts and Citizens’.

<sup>24</sup> Somin, *Democracy and Political Ignorance*, chap. 4.

illustrates the contrast with the example of the 2003 prescription drugs bill passed in the US:

At the time the plan was adopted by Congress, some 70 percent of the public did not even realize that it had passed, despite the fact it was the biggest new government program in decades. As a result of the program, however, senior citizens were now able to choose from among several different prescription drug plans available through the government's Medicare system... The options offered by the new law were extremely complex and difficult for nonexperts to evaluate; they involved choosing when and whether to enroll in the new Medicare Part D system, which enables participants to purchase discounted coverage for prescription drugs through private insurers. Economist Daniel McFadden found that over 70 percent of a sample of eligible seniors surveyed in 2006 (soon after the new prescription drug benefits first became available) intended to enroll in the new plan at a time that would effectively minimize the expected present value (EPV) of their out-of-pocket expenses on the plan. Some of the 19 percent who planned to enroll too early to minimize their EPV might still have been acting rationally, if they were highly risk averse.<sup>25</sup>

When faced with a market-style consumption decision, most people were able to reach intelligent conclusions about the new programme; as voters, few of them were aware of its existence.

Somin presents his positive proposal in terms of “foot-voting” as opposed to “ballot-voting”.<sup>26</sup> For Somin, markets are only one of three venues where people can vote with their feet: the other two ways of voting with your feet are to migrate between jurisdictions in a federal system, and to move between private planned communities.<sup>27</sup> In each case, the primary advantage of foot voting is the same: it provides stronger incentives for people to inform themselves about their decisions compared to ballot voting. In working out the implications of foot-voting's epistemic superiority, Somin devotes the majority of his time to advocating federalism rather

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<sup>25</sup> Ibid., 136–37.

<sup>26</sup> Ibid., chap. 5.

<sup>27</sup> See also Pennington, *Robust Political Economy*, 59.



than the market. However, it seems clear that the logic of foot-voting is in favour of decentralisation in general, and the maximal possible level of decentralisation is down to the individuals in markets. Moreover, the more collective forms of foot-voting that Somin advocates (federalism and private planned communities) also have a quasi-market structure. The kind of federalism he favours is competitive, with jurisdictions competing to attract tax-paying migrants by offering the most attractive mixtures of policies.<sup>28</sup> It thus differs from models of federalism based on self-determination for ethnic minorities, or that favour co-operation between different jurisdictions. As with Charles Tiebout's model of federalism, Somin's interest in quasi-market federalism rather than straightforward markets seems to be that it offers a way of providing public goods other than through central government.<sup>29</sup> For all these reasons, we can fairly interpret Somin's advocacy of foot-voting as an injunction to greater *marketisation* in general, whether that takes the form of quasi-market federalism or of markets directly.

So far, we have set out a descriptive claim that people tend to be less well informed about voting decisions than they do about market decisions. This will be accepted for the sake of argument. Normatively, Somin and his allies all take this descriptive claim as a premise in an argument that more areas of life should be regulated by markets rather than the (central) state. Reducing the extent to which the (central) state intervenes in economic and social life is recommended as a way to allow more aspects of life to be governed by decentralised market and market-like processes. Caplan points out that “just because *some* democracy is beneficial or necessary, it scarcely follows that we should not have *less*.”<sup>30</sup> However this leaves room for considerable variation about what exactly the balance between the two should be. The optimal extent of markets and state intervention in society is an example of what Jack Knight and James Johnson call a “first-order” institutional question, which in theory could be settled by democracy itself.<sup>31</sup> The question I am

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<sup>28</sup> Somin, *Democracy and Political Ignorance*, 126–27.

<sup>29</sup> Charles M. Tiebout, ‘A Pure Theory of Local Expenditures’, *Journal of Political Economy* 64, no. 5 (1 October 1956): 416–24.

<sup>30</sup> Caplan, *The Myth of the Rational Voter*, 193.

<sup>31</sup> Knight and Johnson, *The Priority of Democracy*, 19.

interested in is the second-order constitutional question of who should decide the first-order balance between state and market.

On this point, gaps emerge between Somin and others who have made similar arguments. Somin suggests two possible answers to the constitutional question of how the extent of democratic interventions in the market should be decided. The first position can be described as a *cautionary* view. Somin writes that it is

possible that the benefits of foot voting can be left to legislatures to balance as they see fit. Since determining the size and degree of centralization of government involves many complex trade-offs, it is possible that legislatures will be in a better position to balance the relevant considerations than constitutional drafters or courts exercising the power of judicial review.<sup>32</sup>

Setting aside any concerns about Somin's descriptive claims, for the sake of argument I will accept that this sort of cautionary view follows from impartial instrumentalism. This kind of view simply states that legislators should be aware of the rational ignorance problem (and foot-voting's immunity to this problem), and it gives them some reason to favour a greater level of marketisation than they otherwise would. This extra reason sits on top of whatever the existing balance of reasons we have for providing goods through the state or through the market. The cautionary view is a counsel of humility for political agents.

This is not the position Somin himself takes. Instead, he favours a *constitutionalised* view: limits on the size and centralisation of government should be constitutionally entrenched and enforced by judicial review. Somin's reason for taking this position stems from a concern about the merely cautionary view. "Unfortunately, the very political ignorance that makes decentralization and limited government desirable also reduces the chance of achieving it through the ordinary political process."<sup>33</sup> We can't trust voters to weigh the rational ignorance argument appropriately, precisely because they themselves are subject to rational ignorance. We can't trust elected representatives to weigh it appropriately either, because they themselves have benefited from rational ignorance. We can't ask the problem to fix

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<sup>32</sup> Somin, *Democracy and Political Ignorance*, 150.

<sup>33</sup> *Ibid.*, 151.

itself. Somin does not say where exactly constitutional limits on the size and centralisation of government should be placed. He accepts that how strong these limits should be is a broader question for which rational ignorance is only one consideration among many. Somin's moderation in this regard distinguishes him from Pincione & Tesón, who favour abolishing democracy in favour of a radically libertarian alternative.<sup>34</sup>

In what follows, I cast doubt on the constitutional implications that Somin draws from his descriptive claims about rational ignorance in voting and markets. I argue that rational ignorance does provide some reasons to increase the scope of the market relative to the state, but these reasons are weaker than Somin takes them to be. I will also argue that the balance between market and state activity should be determined by ordinary democratic legislation, not by binding constitutions. I thus defend a cautionary view against Somin's *constitutionalised marketisation*.

## 5.2 The choice of efficiencies

This section advances a critique of constitutionalised marketisation which is relatively internal to Somin's own argument. Somin seems to accept the desirability of state interventions to promote efficiency by remedying market failures. A standard objection to marketisation is that market failures are widespread, and widespread state interventions are efficiency-promoting in response. I make a slightly different point, stressing not the quantitative extent of market failures, but rather the political choices to which they give rise. There are many different ways states can promote efficiency, and some political mechanism is needed for deciding which forms of efficiency should be pursued. This *choice of efficiencies* problem is liable to make constitutionalised marketisation less efficient than ordinary unlimited democracy.

### *Market failure*

Market failures are situations where markets fail to produce efficient outcomes. The most common example of market failure is a public goods problem, of which Somin himself provides a classic example:

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<sup>34</sup> Pincione and Tesón, *Rational Choice and Democratic Deliberation*, chap. 9.

An individual citizen can enjoy the benefits of clean air in his city even if he drives a gas-guzzling car that generates an unusually high amount of pollution. If other residents of the city restrict their output of air pollution, the individual driver can enjoy clean air even without changing his habits. If the other residents continue to pollute, the individual driver also has no incentive to change his own behavior. Even if he buys a cleaner car or starts taking the bus, that will not have any noticeable effect on the overall level of pollution. The effect of any one car on pollution levels is infinitesimally small. For this reason, most economists conclude that air pollution is unlikely to be effectively controlled unless some external power, such as the government, forces individuals and firms to reduce their emissions of harmful pollutants.<sup>35</sup>

Somin seems to grant the desirability of government interventions to restore efficiency in the face of market failures. This is demonstrated by the two potential disadvantages of federalism he devotes space to discussing. First, he worries about large-scale externalities that cross jurisdictional boundaries. Second, he worries about “races to the bottom” where jurisdictions remove useful regulations (particularly environmental regulations) in an attempt to attract investment (a subject to which I will return in chapter seven).<sup>36</sup>

The concept of efficiency can be defined in several ways. For present purposes, efficiency can be conceived either in terms of Pareto-optimality or of aggregate welfare. Pareto-optimality is a normatively parsimonious criterion that recommends those states of affairs where nobody can be benefited without making someone else worse off. By *aggregate welfare*, I refer to a criterion that compares the welfare of different people (at least to some extent), and recommends the state of affairs with the highest total welfare across the population. Gross domestic product is often used as an extremely rough measure of aggregate welfare. The economics of market failure can be framed in terms of either concept, although the distinction between them will become important below.

Where rational ignorance casts doubt on the ability of the democratic state to promote efficiency, the economics of market failure cast doubt on the ability of

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<sup>35</sup> Somin, *Democracy and Political Ignorance*, 64.

<sup>36</sup> *Ibid.*, 145–47, 154.

the market to promote efficiency. As Caplan puts it, “no matter what you believe about how well markets work in absolute terms, if democracy starts to look worse, markets start to look better by comparison”.<sup>37</sup> The converse is also true. Somin’s proposals rest on the idea that the quality of public policy can only be increased by reducing the quantity of public policy. However, if market failures are extensive, it seems unlikely that high-quality but low-quantity public policy will lead to more efficiency than low-quality but high-quantity public policy.

If we take efficiency as our normative criterion, the balance between state and market comes down to just how ignorant democracy is and just how inefficient markets are. It is thus unsurprising that most pro-market critics of democracy combine pessimism about democracy with optimism about markets. Pincione & Tesón state that government attempts to correct information asymmetries are likely to be more costly than the original market failures.<sup>38</sup> The pro-market implications of rational ignorance can thus be resisted on a first-order institutional level by stressing the quantitative significance of market failure.

### *Choice of efficiencies*

The quantitative significance of market failure is an important debate, but it is not one that I intend to join here. Instead, I make a slightly different point (that has not, to my knowledge, been made before). This point applies particularly to the second-order question of constitutionalised marketisation. Reducing the scope of democracy relative to the market is problematic not simply because of the quantitative extent of market failure (as discussed above). It is also problematic because attempting to remedy market failures requires making decisions which are unavoidably political. Once we accept that some interventions are necessary to remedy market failures, we need a way of deciding which interventions the state should take. There are different ways of promoting efficiency, and these come into conflict with one another. The choice between different efficiency-improving interventions cannot be made by the market itself; it requires some kind of political decision-making system, such as democracy.

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<sup>37</sup> Caplan, *The Myth of the Rational Voter*, 3.

<sup>38</sup> Pincione and Tesón, *Rational Choice and Democratic Deliberation*, 243; More generally, see Pennington, *Robust Political Economy*, chap. 2.

Joseph Heath provides a useful framework for seeing the diversity of ways of promoting efficiency, and the potential for conflicts between them.<sup>39</sup> For my purposes, the key upshot of Heath’s analysis is that “arrangements designed to facilitate the production of one form of cooperative benefit may simultaneously undermine the arrangements needed to secure some other.”<sup>40</sup> Heath describes five primary mechanisms of co-operative benefit, or ways of promoting efficiency: economies of scale, gains from trade, risk pooling, self-binding, and information transmission. Each of these represents a way people can achieve more together than they would alone. To avoid getting bogged down, I will illustrate the idea of a choice of efficiencies using only the first two, which are also the two that have received the most attention from economists.

Gains from trade refer to benefits that can be achieved by re-distributing goods and tasks amongst people in light of their different abilities and preferences. So, someone who is good at growing apples but does not like them personally can gain by trading them with someone else who has different abilities and preferences. Economies of scale occur when the product of a group working together would be larger than the sum of each of them producing as individuals. For example, a group of farmers working together can build barns for all of them in less time than it would take each of them to build a barn for herself. Economies of scale occur even when everyone has identical tastes and skills.

Conflicts arise between these different ways of promoting efficiency because government action to facilitate one type of efficiency can often impede other types of efficiency. A conflict between gains from trade and economies of scale regularly arises in the context of competition and monopolies policy. In a market, gains from trade are maximised when prices reach a level at which the market clears – everyone who wants to sell can find a buyer, and vice-versa. Competition is a device for pushing prices to this market-clearing level. To do this, we need a large number of buyers and sellers, so that none of them are able to affect the market price as individuals. However, while gains from trade are maximised by a large number of firms in competition with one another, in some industries economies of scale are

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<sup>39</sup> Joseph Heath, ‘The Benefits of Cooperation’, *Philosophy & Public Affairs* 34, no. 4 (2006): 313–351.

<sup>40</sup> *Ibid.*, 337.

often maximised when there are very few firms in the market, or even a monopolist.<sup>41</sup> This is most obvious in the case of “natural monopolies” such as railway tracks and water pipes: a single operator is much more efficient than multiple operators, who would duplicate the same infrastructure. Something like electricity generation provides a less extreme case. Large power plants might be more internally efficient than small plants – for example, suppose that three large power plants cost the same amount as ten small power plants, but produce 50% more electricity. However, if we build large power plants, the market will only be able to sustain three firms, which is not enough to ensure competition that would bring prices down to the market-clearing level.

In such a case, there is a difficult choice between two options. First, we could prohibit mergers and break up big firms. By preserving competition, it would have the advantage of forcing companies to keep prices at market-clearing levels, preserving gains from trade. However, forcing the market to have more than three providers will necessitate using small rather than large power plants, forgoing economies of scale. Second, we could simply allow an oligopoly or even a monopoly provider to emerge. This would maximise economies of scale. However, monopoly or oligopoly providers will be able to charge a higher price than that which would prevail in the presence of competition. Charging a price above the market-clearing rate will discourage some consumers who would otherwise have been willing to buy more, and means that gains from trade are not being maximised. The state could regulate the monopoly or oligopoly providers to force them to lower prices. However, this will tempt them to cut costs elsewhere. The interests of providers are fundamentally different from those of regulators, and any system of regulation will come with costs of its own.

If the state’s goal is to promote efficiency, it will have to face trade-offs like this between different ways of promoting efficiency. The adjudication of these trade-offs is deeply political. This is just one example focusing on two ways of promoting efficiency, but there will be many more. If we understand efficiency in the sense of Pareto-optimality, the choice of efficiencies is a choice between different policies that will result in different situations which are all Pareto-optimal, but under which different people are better or worse off. This creates a distributive question about

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<sup>41</sup> *Ibid.*, 338.

how to decide between efficiency-promoting interventions that benefit different groups of people. Since the principle of Pareto-optimality by itself is radically indeterminate, we will require some constitutional mechanism to narrow down the range of possible Pareto-improving government actions. On the other hand, if we understand efficiency in the sense of aggregate welfare, the choice of efficiencies problem is an epistemic question of which efficiency-promoting state actions will best promote aggregate welfare. In this case, we face not so much (or at least, not only) a clash between the groups that will benefit from different measures: we face a clash between groups who believe that different measures will promote the general welfare. Here, we will require some constitutional mechanism to choose those efficiency-promoting government interventions with the greatest impact on aggregate welfare.

### *Problems for constitutionalised marketisation*

The choice of efficiencies is a deeply political question that requires some constitutional means to settle it. This is a problem for Somin, because his proposal involves restricting the democracy, the decision-making process that is normally used to deal with such disagreements. To the extent that democracy is barred from deciding such questions, the trade-offs between different efficiencies have to be set once and for all in the constitutional law. Yet this raises serious problems of inflexibility and of the politicisation of the judiciary which will have to interpret the constitution.

Somin's proposal is to improve the quality of public policy by reducing its quantity. His instrument for doing so is to constitutionally entrench both protections for the autonomy of federal sub-units and limits on the government's ability to intervene in the market. This suggestion raises the question of which activities of government are to be prohibited. The natural answer is that the activities to be prohibited are those least important for promoting efficiency. If efficiency is interpreted in Paretian terms, this question is meaningless, since the Pareto principle is indeterminate: all that matters is that we select an answer. If we interpret efficiency as aggregate welfare, the problem is to decide which government activities make the greatest contribution to aggregate welfare. Either way, choosing which government activities should be prohibited or allowed is a deeply political matter.



This choice will have to take place at some kind of constitutional convention. The convention will necessarily be a political body. Somin offers good reasons to be sceptical about rule by experts in normal politics, and it seems reasonable to think the same problems will carry over to rule by experts in constitutional conventions.<sup>42</sup> If members of the constitutional convention are elected, it will be subject to all the problems of democratic ignorance Somin bemoans in normal politics, and so it is unclear why we should expect it to be better at setting the boundaries between markets and government than ordinary legislatures are. There might be ways to overcome this objection to constitutional restraints. Charitably, we might interpret Somin's proposals as a form of constitutional pre-commitment, with far-sighed constitutional framers binding their hands now to avoid the temptations of big government in weak moments in the future.<sup>43</sup>

Nonetheless, we still face a major problem of inflexibility. Constitutional restraints that simply forbid the state from intervening in specified areas of life are extremely blunt instruments for tackling the problem of political ignorance. Which government activities are more or less important (or to put it another way, the optimal state-market split), is likely to change over time. This is particularly likely to occur due to technological developments. For a long time, lighthouses were the classic example in economics of a public good that should be provided by the state. Now, lighthouses are effectively obsolete, replaced by the Global Positioning System – which itself is a public good provided by the US military. It will be very difficult to specify the role of government in the economy with any precision in a constitutional document. Given that conditions are likely to change, it would be dangerous to permanently lock society into a particular pattern of particular state-market interaction that is efficient at one historical moment. Thus, even if the people would be rational to bind themselves into the future against the dangers of political ignorance, it may be that the costs of doing so are worse than the original problem. This pushes us back to the cautionary position, that the institutions best placed to deal with the problems of political ignorance (to the extent that they can be dealt with at all) are ordinary democratic institutions themselves.

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<sup>42</sup> Somin, *Democracy and Political Ignorance*, 181–85.

<sup>43</sup> Elster, *Ulysses Unbound*, chap. 2.

One might think that the problems of inflexibility could be dealt with in a different way, by phrasing constitutional restrictions more openly and empowering the judiciary to interpret them intelligently. As I argued above, the choice of efficiencies is a deeply political question. Unless the constitution specifies the activities of government in great detail (which would lead to the problem of inflexibility), judges will inevitably end up playing a major role in deciding these questions. Somin accepts that there is a problem with judicial review that transfers power from other branches of government to the judiciary. However, he claims that judicial review that limits the power of other government branches relative to the private sector is democratically valuable as a means to replace ballot-voting with foot-voting.<sup>44</sup> What Somin overlooks is that the power to limit the activities of government is nonetheless an important and political power, because it involves the choice of efficiencies. Constitutionalised marketisation will have the consequence of increasing the power and politicisation of the judiciary. This marks a shift from marketisation to elitist epistocracy as a solution to democracy's ills, and raises a new set of problems. As I argued in the previous chapter, at this point we fall back to a consideration of motivation and knowledge of the kind considered in chapter three. Focusing on motivation in particular, it seems naïve to think that the enormous power of determining what the state should do is best left with unaccountable officials like judges. The most effective remedy for this problem has been to make officials accountable to the population, which leads us back to democracy again. Constitutionalised marketisation would increase the temptations of judicial corruption, and would probably lead to a situation where political disagreements are merely channelled into a judicial forum.

Concerns about a lack of judicial accountability tend to limit attempts to solve the problem of constitutional inflexibility, and vice versa. In response to judicial unaccountability, we would want to restrict judges' interpretive latitude; but this compounds the problem of constitutional inflexibility. In response to constitutional inflexibility, we would want to increase judicial autonomy; but this would see courts lose their distinctive social role and become more generalised elitist-epistocratic bodies.<sup>45</sup> The dilemma Somin faces between inflexibility and

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<sup>44</sup> Somin, *Democracy and Political Ignorance*, 165.

<sup>45</sup> Knight and Johnson, *The Priority of Democracy*, 175.

judicial elitism is even more striking for Pincione & Tesón's more radical proposal to replace the autonomous democratic state with a minimal state providing public goods according to the decisions of a common-law judiciary.

Even on a parsimonious conception of the role of the state as being to promote efficiency by remedying market failures, politics is unavoidable. In this section, I have advanced an internal critique of anti-democratic marketisation that is distinct from the standard market failure argument. Standard market failure arguments inevitably lead to difficult empirical debates about the quantitative extent of market failure. By focusing on the political nature of efficiency gains and market failure, we can to some extent avoid this fate. Nonetheless, my critique is still dependent on empirical facts about the quantitative extent of market failure. To the extent that market failure is only a small problem, disagreements over how the state should deal with market failures are relatively unimportant. On the other hand, the more inefficient we think laissez-faire markets are, the greater the space becomes for disagreements about state action to promote efficiency. However, even on a moderate understanding of the scope of market failure, an efficiency role for the state necessitates further choices that can only be made by political bodies, whether democratic or elitist. Once we move beyond a conception of the state focused purely on efficiency gains, politics re-emerges even more obtrusively.

### **5.3 The politics of moral disagreement**

The previous section advanced a more internal critique of constitutionalised marketisation, focusing on a normative criterion of efficiency that is accepted by the market advocates I am engaging with. The remainder of this chapter broadens the focus of the critique to consider constitutionalised marketisation within the terms of impartial instrumentalism. Instead of considering the impact of constitutionalised marketisation on efficiency, I will consider its impact on the quality of decisions all-things-considered, subject to the constraint of impartiality. Just as markets need democracy to deal with disagreements about which efficiency gains to pursue, I argue that markets need democracy to deal with disagreements based on different moral-political perspectives. Somin's basic problem (which is even more evident for Pincione & Tesón), is that markets and federalism are a solution to political ignorance only according to a particular moral-political perspective. If constitutional

design is to respect the impartiality principle, markets cease to be the obvious solution to political ignorance. By tacitly marginalising serious moral-political disagreement, Somin misses a central part of why we should have democratic institutions in the first place. As before, I will understand foot-voting and marketisation as a scale along which one can move away from democracy and towards competition between ever smaller federal jurisdictions, with full privatisation in markets as the logical end-point. Like Somin, I will focus here primarily on federal foot-voting, and my objections to this weaker form of marketisation will apply even more strongly towards markets proper.

In general terms, the major drawback of marketisation is that it impedes the state's ability to do what is right according to any particular moral-political perspective. Somin considers a concern along these lines under the heading of the protection of minority rights.<sup>46</sup> Federalism in the US in particular has been discredited by the civil rights struggle of the 1960s. At a time when the central government was making efforts to protect the rights of minorities, state governments tried to use their rights under the federal system to preserve systems of racial oppression. Somin's response to objections to federalism based on the 1960s experience is a compelling one. Broadly speaking, in the 1960s US the central government's policy on minority rights was morally superior to that of many local governments, such that it was a moral improvement for the central government to impose a uniform policy on the states. However, political forces are not always aligned in this way. At earlier times in US history (especially before the civil war), the alignment was the other way around, and slave-holding interests used the central government to enforce uniform policies of racial oppression (such as Fugitive Slave Acts) on non-slave states. In general, there is no reason to think the stances of central government will be morally superior to those of local governments.

Moreover, Somin points out that in one crucial respect decentralisation actually has an advantage. An open federal system at least allows people who are oppressed in one jurisdiction to improve their lives by migrating to a less oppressive jurisdiction – as many black Americans have historically done by moving north. Clearly, it remains unjust that people are forced to uproot their lives in order to mitigate their own oppression, and immigrants usually face some discrimination in

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<sup>46</sup> Somin, *Democracy and Political Ignorance*, 147–50.

their new homes as well. Nonetheless, people are better off having the option of movement to a different jurisdiction than they would be without it. Somin's response is a compelling one for those forms of injustice that can be mitigated by the possibility of escape.

However, although Somin's response works well for the kind of moral problem he considers, not all moral problems are mitigated by the possibility of exit. Indeed, some may be intensified. To illustrate this, I will briefly discuss examples of distributive justice, communitarianism and animal liberation. The point of these examples is not that egalitarianism, communitarianism and animal liberation are impeded by decentralisation and this is bad because these three views are morally correct. Rather, the point is to show that decentralisation is not neutral between moral-political perspectives because it is biased against these reasonable views. This list is illustrative, not exclusive; other moral-political perspectives will also be neglected in a more decentralised polity.

First, consider conceptions of distributive justice according to which it is wrong for the wealthy to have large (or unearned) stocks of wealth relative to the poor. Political decentralisation would impede the state's ability to redistribute from the rich to the poor where the rich and the poor live in different local jurisdictions. The possibility of migrating to wealthier jurisdiction is likely to improve the living standards of the poor. However, if distributive inequality is wrong in the first place, the ability to migrate will not mitigate this basic injustice. Indeed, decentralisation is likely to further intensify inequality by allowing the wealthy to escape taxation by moving to tax-haven jurisdictions (a topic I will address directly in chapter seven). A strongly decentralised system is a major obstacle to the redistribution of wealth that many conceptions of distributive justice demand.

Next, consider a communitarian view that people should cultivate certain virtues. Assume this cultivation is onerous in the short-run. If people are able to move to more permissive jurisdictions that do not attempt to cultivate the virtues, they may do so even if they would ultimately benefit from and come to support the communitarian policy. Decentralisation would thus impede this form of communitarian morality.

Finally, consider an animal liberation perspective such that it is wrong for animals to be treated cruelly (for my purposes here it is not necessary to define cruelty with any precision). In a decentralised polity, the central government is

unable to force local governments to enforce animal protection laws. This example has a similar structure to Somin's example of racial oppression, but it has radically different implications, for two reasons. First, the danger that central government will enforce actively bad policy seems much weaker in this case, because it is hard to see what interest central governments would have in forcing a uniform policy of active animal cruelty. Second, animals are unable to benefit from decentralisation by leaving for a less oppressive jurisdiction. Somin's moral advantage for decentralisation only holds for decentralisation with open borders. This advantage is not open to groups that are inherently unable to migrate (or at least only with difficulty) such as some categories of animals, children, and elderly or disabled people. While Somin does consider moving costs, he does not mention that some beings with moral status are unable to move at all on their own initiative.<sup>47</sup> Moreover, the benefits of foot-voting can also be closed to particular categories of people as a result of explicit moral-political choices, either at local or central level (depending how the federal system is organised). This was in fact the situation facing slaves in United States before the civil war.

In terms of promoting the moral good, decentralisation will tend to be superior to unitary central government when a major source of evil is the violation of basic rights of people who are nonetheless relatively free to move between jurisdictions. However, unitary central government will be superior where there are other major sources of evil, such as distributive injustice, a lack of communitarian virtues, or cruelty to animals. The benefits of decentralisation are accordingly not neutral between different moral-political perspectives. They are specifically targeted towards a conception of justice according to which the proper role of government is to promote efficiency and protect basic rights. Although Somin presents himself as engaged in a project of impartial constitutional design, in the end his proposal amounts to constitutionalising the institutions that are functional for his own moral-political perspective, even at a cost to other moral-political perspectives.

Federal foot-voting has the advantage of efficiently sorting people into the kinds of communities they want to live in. However, people have different moral-political beliefs about how society should be structured as well as different non-cognitive tastes or desires about their own environments. Geographically sorting

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<sup>47</sup> *Ibid.*, 144–45.

people according to their moral-political beliefs will not be a moral improvement according to those moral-political beliefs themselves – unless, of course, one simply assumes that moral-political beliefs are really just another kind of personal taste. In this respect, Somin perhaps has greater affinities with the more extreme marketisation of Pincione & Tesón than might initially appear.<sup>48</sup> This is suggested by the limited way Somin discusses redistribution. Somin’s only reference to redistribution is a brief mention of the possibility of a different sort of race to the bottom in an open federal system, where redistributive entitlements are systematically reduced by jurisdictions afraid of becoming “welfare magnets”.<sup>49</sup> Considering threats to redistribution as a kind of race to the bottom suggests that the redistribution is a problem insofar as it reduces the extent to which local preferences for redistribution are satisfied. This suggests that Somin treats redistribution as just one more item of policy, like public tennis courts or garbage collection, over which people have differing personal tastes. What’s missing is a concern for redistribution as a matter of morality, as a belief about normative imperatives.

The difficulties that foot-voting faces when it comes to differences of belief rather than of taste can be illustrated by looking back at the paper that Somin describes as the “pioneering” work on the subject.<sup>50</sup> Tiebout’s paper showed that providing public goods through smaller administrative units would be more efficient (other things being equal) because people would sort themselves into jurisdictions that matched their personal preferences for public goods. However, in the following passage, Tiebout seems to have recognised the limitations of his approach when it came to matters of belief as opposed to preferences:

Surely a radio broadcast, like national defence, has the attribute that A's enjoyment leaves B no worse off; yet this does not imply that broadcasting should, in a normative sense, be a public good (the arbitrary manner in which the level of radio programs is determined aside). The difference between defence and broadcasting is subtle but important. In both cases there is a problem of determining the optimal level of outputs and the corresponding level of benefits taxes. In the broadcasting case, however, A

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<sup>48</sup> Pincione and Tesón, *Rational Choice and Democratic Deliberation*, 235.

<sup>49</sup> Somin, *Democracy and Political Ignorance*, 154.

<sup>50</sup> *Ibid.*, 119.

may be quite willing to pay more taxes than B, even if both have the same "ability to pay" (assuming that the benefits are determinate). Defence is another question. Here A is not content that B should pay less. A makes the social *judgment* that B's preference *should* be the same. A's preference, expressed as an annual defence expenditure such as \$42.7 billion and representing the majority view, thus determines the level of defence. Here the A's may feel that the B's *should* pay the same amount of benefits tax. If it is argued that this case is typical of public goods, then, once the level is somehow set, the voluntary exchange approach and the benefit theory associated with it do not make sense. If the preceding analysis is correct, we are now back in the area of equity in terms of ability to pay.<sup>51</sup>

This passage requires some unpacking. By the "benefit theory" of taxation, Tiebout means an approach to tax policy that attempts to differentially tax people according to the benefits they receive from the public goods paid for by those taxes. This approach understands the goal of tax policy in terms of efficiency. This is in contrast with the alternative approach of attempting to differentially tax people according to their "ability to pay." This approach understands the goal of tax policy in terms of equity. The reasons these approaches are relevant to federalism is that Tiebout's foot-voting model is intended as a contribution to the benefit theory – a more efficient way to charge people for the public goods they actually want.

The point Tiebout seems to be making in the passage is that when it comes to national defence, everyone has the same interest in personal security, and so differences in preferences for defence spending are due to differences in beliefs about how much defence spending is necessary, rather than differences of taste. With broadcasting, on the other hand, some have a stronger interest in broadcasts than others, and differences in preferences for spending are due to differences in personal enjoyment. A benefits theory of taxation makes sense for something like broadcasting. However, it makes no sense for goods like defence, where everyone agrees in theory that a good should be sought, but disagree in practice about what is required to secure that good. For goods like defence, it makes more sense to first come to some kind of epistemically defensible decision about how much spending is objectively required in order to secure the benefit. Only after deciding how much

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<sup>51</sup> Tiebout, 'A Pure Theory of Local Expenditures', 417.



spending is required does it make sense to start dividing the costs. It would make no sense (it would be entirely unfair) to ask those who believed the objective cost of the benefit was higher to pay a greater part of the cost. Tiebout thus seems to recognise that the advantages of his foot-voting proposal do not apply to defence-type goods where disagreements are based on differences of belief rather than of tastes.

This is relevant to the case at hand, because disagreements over first-order policy decisions depend at least as much on differences of beliefs as on differences of tastes and interests. While Tiebout's market-style model offers some support for decentralising or marketising choices that depend on tastes, it offers no reason for decentralising choices that depend on different beliefs. This is true even if we take the goal of the state to be merely one of promoting aggregate welfare, since (as I argued above), disagreements over which efficiency-promoting actions governments should take derive from different causal beliefs at the economy.

As a stronger form of decentralisation, markets are subject to all the problems identified with competitive federalism in an even stronger form. In properly enforced markets, classical liberal worries about basic rights-violations are already assuaged. However, any kind of more demanding obligations people might have – obligations of distributive justice, of cultivating virtues, of treating animals well – cannot be enforced. All such obligations become purely voluntary. Central governments will find it difficult to promote any moral goals more demanding than those required by classical liberalism if federalism is constitutionally entrenched. If markets are entrenched, they will find it impossible.

## Conclusion

This chapter advanced two critiques of constitutionalised marketisation. First, I put forward a more internal critique: constitutionalised marketisation fails on its own terms of promoting efficiency, because it neglects the political nature of the choice of efficiencies. However, I granted that the force of this critique depends somewhat on empirical questions about the quantitative extent of market failure. Second, I brought to light something that I see as a deeper problem. Somin and his allies present themselves as engaged in an impartial, constitutional project of correcting for a bias in democracy. However, on closer inspection, it turns out to be a form of direct instrumentalism premised on a particular moral-political

perspective, according to which markets are largely efficient and the function of the state is to deal with residual market failures and protect basic rights.

In response to this charge, Somin and his allies could simply accept that they are indeed direct instrumentalists of a certain sort. They might say that people who disagree with them are simply wrong about economics (and/or morality), and that we should do what the economists recommend. This would render the impartial, epistemic trappings of the argument somewhat nugatory: why not just directly infer the performance of constitutions by how far they produce the substantive policies with which you agree, rather than taking this circuitous route through rational ignorance theory? Dialectically, it also comes at a cost of admitting that the argument does not provide reasons for people who do not already share the pro-market vision. Nonetheless, directly instrumental advocacy of constitutionalised marketisation would be a perfectly coherent philosophical position. To argue against this position, I would have to fall back on the uncertainty and civilising force of hypocrisy arguments that I advanced against direct instrumentalism in the previous chapter. Interestingly, we might see the rational ignorance framing of marketisation as already an instance of the civilising force of hypocrisy: an attempt to clothe a directly instrumental constitutional proposal in the form of an impartial epistemic argument. In that light, the contribution of this chapter has been to unmask this hypocrisy.

Having said this, we nonetheless face the question of what rational ignorance does imply for constitutional design, if (as I have argued) it does not imply constitutionalised marketisation. First, I have said nothing to dispute the cautionary variant on Somin's argument. However, my argument indicates that we need to distinguish more carefully the scope of government activities for which this cautionary approach is warranted. The cautionary rational ignorance argument does provide an additional consideration in favour of using markets rather than central planning to provide private goods. However, the case for markets in this respect is already relatively well established, even among many socialists.<sup>52</sup> The cautionary argument has more to contribute when it comes to public goods. Pure public goods

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<sup>52</sup> John E. Roemer, 'Thoughts on Socialism Seventy Years after Schumpeter', in *Schumpeter for Our Century*, ed. Horst Hanusch, Heinz Kurz, and Christian Seidl, *Homo Oeconomicus*, 27 (1/2) (München: Accedo Verlagsgesellschaft, 2010); G. A. Cohen, *Why Not Socialism?* (Princeton: Princeton University Press, 2009), 53–70.

(in the sense of goods that are simply impossible to divide up into private property rights) are relatively rare. Often, things like fishing stocks or roads can theoretically be parcelled out into enforceable private property rights. The problem with doing so is just that it would be impractical and inefficient. However, this leaves a large grey area where the appropriate degree of marketisation is unclear and where marketisation can also be implemented in more partial ways (e.g. tradable quotas for fish stocks or tolls for bridges). In such cases, a cautionary version of the rational ignorance argument is a consideration in favour of marketisation, particularly the kind of quasi-market Tiebout competition between local governments that Somin advocates.<sup>53</sup>

Where even the cautionary argument for marketisation lacks force is in the domain of government that is not about the satisfaction of consumer tastes through either public or private goods. This includes redistribution, protecting the rights of the vulnerable (especially when they are also immobile), and indeed anything that requires forcing people to do things they don't wish to do, beyond obeying the rules of the market. Within this domain, it's not that the problem of the rational ignorance ceases to apply to democracy. Rather, the point is that there is no viable impartial market alternative in this domain.

When it comes to the state's role in making moral choices beyond the satisfaction of consumer tastes, rational ignorance can only be ameliorated (if at all) by designing political institutions to raise the relevant knowledge of political decision-makers. One option that I have already mentioned (section 3.6) is to select representatives by lottery rather than election. A second option, which seems more congenial to pro-market sceptics about democracy such as Caplan and Jason Brennan, is political elitism (also discussed above, section 3.3). If these two solutions to political ignorance are also unworkable, it may simply be that that rational ignorance has no particular implications for constitutional design. Something along these lines is suggested by Geoffrey Brennan's observation that the same lack of individual decisiveness that makes ignorance rational is also the very thing that makes people vote for what they believe is in the public good, rather than what is in their own self-interest.<sup>54</sup> The principles of knowledge and motivation may simply be in

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<sup>53</sup> Tiebout, 'A Pure Theory of Local Expenditures'.

<sup>54</sup> Brennan, 'Politics with Romance'.

conflict with one another. The point of this chapter has been that even if rational ignorance cannot be ameliorated within the framework of ballot-box democracy, democracy still performs a fundamental task that markets cannot: impartially dealing with political disagreements.

In this chapter, I have argued for the claim that democracy should not be restricted in its influence over the market by rebutting what I regard as the strongest positive argument in favour of constitutional restrictions. There may be other positive arguments for markets as an alternative to democracy that turn out to be stronger. However, the general lines of my argument in this chapter, stressing the importance of flexibility and impartiality, will also apply to other justifications for constitutionalised marketisation.

In the Introduction, I argued that the influence of democracy over the market is only one half of the relationship between the two. A full account of their relationship also requires investigating how markets can influence democracy, and whether they should be allowed to do so. How might markets impede democracy's ability to make good decisions in the face of political disagreement, and what should be done when this occurs? The final two chapters of the thesis consider these questions in relation to two specific vectors of market interference with democracy: money in politics, and capital strikes or capital flight.

# Chapter 6 Market influence on democracy: Money in politics

The most obvious way markets affect democracy is through the way political activities are paid for. Politics is ultimately a matter of speech acts, but speech on a large scale requires money. Often, this takes the form of like-minded individuals pooling together and contributing enough money to enable activists to engage in politics full time. This chapter looks at whether a free market in the funding of political speech is bad for democracy. I interpret this question in terms of the justification of democracy developed in chapters one to four. By a *free market in the funding of political speech* or a *free market public sphere*, I mean a system in which speakers are free to fund political activities using any money they have available to them in the market economy. I contrast this with an *egalitarian public sphere*, which is regulated so that the distribution of political speech does not correlate with the income or wealth of speakers.

I argue that the free market in the funding of political speech is epistemically defective in one particular respect: in a free market public sphere, the rich will predictably dominate the sources of discussion, reducing the diversity of evidence and argument citizens are exposed to, reducing the epistemic quality of decisions. I argue that a more egalitarian public sphere will increase the relevant political knowledge of voters. Moreover, this can be achieved without negative side-effects according to the motivation principle. My argument for a more egalitarian public sphere depends in part on empirical evidence which I will not be able to marshal fully here. This chapter can thus be taken as a first step in this process, or as a hypothetical exercise in working out the normative implications that would follow from certain possible states of affairs.

The debate about campaign finance in political theory is a small one, but each of the most prominent American theorists of democracy in recent years has contributed to it. While I will discuss some of their arguments in more detail below, it might be helpful to briefly situate myself within the three broad currents in this debate. At one end is Joshua Cohen, who makes a non-instrumental egalitarian

argument for regulations to promote equality of opportunity for political speech.<sup>1</sup> At the other is David Estlund, who makes an epistemic case for incentives that would give the wealthy unequal opportunities for political speech.<sup>2</sup> Estlund does not defend the levels of inequality in political speech found in countries like the United States, but his argument can be viewed as a more moderate and sophisticated version of the reasoning behind the US system. Between these two points is a middle position occupied by Charles Beitz, Ronald Dworkin and Thomas Christiano.<sup>3</sup> These theorists side with Estlund rather than Cohen in arguing that the question of money in politics should be addressed in epistemic rather than fairness terms. However, their conclusions are more sympathetic towards egalitarian regulations.

My argument is located in the middle position alongside Beitz, Dworkin and Christiano. However, it differs from existing work on the subject in at least three ways. First, the specific mechanism I point to that connects unregulated political speech with poor epistemic decisions is different, and potentially generates a more robust case for state intervention. Second, I do not focus as tightly on the funding of formal electoral campaigns as the preceding literature has done, and I spend more time considering the role of money in the informal political sphere. Third, whereas the preceding literature has disproportionately focused on the United States, I consider the issue in more general terms that could be applied to any democratic country. The US jurisprudence is an interesting source of reasoning on the topic, particularly in terms of reconstructing a positive argument for the free market in public speech. However, I am not making an argument within free speech law, and it will be no concern of mine whether my argument is consistent with US jurisprudence.

Throughout this chapter, I refer to political *speech*, even though what I have in mind might more accurately be described as political *communication*, or, as David

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<sup>1</sup> Cohen, 'Money, Politics and Political Equality'.

<sup>2</sup> Estlund, 'Political Quality'.

<sup>3</sup> Beitz, *Political Equality*, chap. 9; Christiano, 'Money in Politics'; Ronald Dworkin, 'Free Speech, Politics, and the Dimensions of Democracy', in *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.; London: Harvard University Press, 2002); See also Ronald Dworkin, 'The Decision That Threatens Democracy', *The New York Review of Books*, 13 May 2010, <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

Estlund puts it (with even more generality), political *input*. The category I have in mind includes newspaper editorials, TV adverts, posters, door-to-door campaigning and protest marches: all discursive elements of political action. *Speech* is chosen over *communication* (and *input*) because it fits better with the existing literature, shaped as it has been by considerations of “free speech”. It also makes for less cumbersome writing, particularly in being able to distinguish between “speakers” and audiences. Since I am writing about speech in general (bad as well as good), I avoid the term *deliberation*, since that is often used to refer specifically to speech that meets certain moral or epistemic standards.<sup>4</sup>

I draw a rough distinction between formal political campaigns (whether for elections or referenda), and the informal public sphere. The visibility of formal campaigns (and the problems with financing them) should not tempt us to over-exaggerate their importance compared to the informal public sphere when it comes to forming citizens’ political beliefs.<sup>5</sup> However, the nature of formal political campaigns does make them an easier target for regulation than the informal public sphere. Several issues around money in politics are quite specific to the context of formal campaigns. In discussing formal campaigns, I will assume that the political system in the background is one where elections and referenda exert an important influence. Just as I set aside lotteries and epistocracy in the previous chapter, so this chapter sets aside these options as well as constitutionalised marketization. I ask how money affects politics against a more conventional democratic background.

Importantly for what follows, I understand donations of money to political campaigns as a form of indirect or delegated speech, since donors provide others the financial resources to speak on their behalf. In this respect I follow both Estlund and the US Supreme Court in *Buckley v. Valeo*.<sup>6</sup> This should not be seen as an admission that epistemic arguments are side-constrained by free-speech considerations, since epistemic considerations themselves are important in justifying free speech

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<sup>4</sup> Fearon, ‘Deliberation as Discussion’, 63.

<sup>5</sup> John S. Dryzek, ‘Legitimacy and Economy in Deliberative Democracy’, *Political Theory* 29, no. 5 (2001): 651–669.

<sup>6</sup> Estlund, ‘Political Quality’, 141; *Buckley v. Valeo*, 424 US 1 (Supreme Court 1976); On which see Cohen, ‘Money, Politics and Political Equality’, 60–62.

protections.<sup>7</sup> For example, *Buckley* itself recognised that constitutional protection of free speech needs to be interpreted according to a theory of why free speech needs protection, and it focused on the value of free speech in creating an informed electorate.<sup>8</sup> However, as I said above, I will not worry about the consistency of my argument with US first amendment law.

One problem with a free market in political speech that I will not discuss is quid-pro-quo corruption. In this kind of corruption, speakers contribute to political campaigns in the expectation that the receiving politicians will use their influence to benefit the speakers. According to this definition, the concern with corruption is necessarily limited to the funding of political campaigns. However, analogous corruption arises in the informal public sphere when speakers such as journalists change what they say to audiences in order to win personal favours from third parties such as advertisers. Everyone I am aware of, including the US Supreme Court, thinks this kind of corruption in election campaigns is wrong and should be prevented by law (whether that Court is willing to allow what is necessary to prevent it is another matter).<sup>9</sup> Given the widespread agreement on the normative issues involved, I will not discuss this kind of corruption in what follows.

I begin by setting out the main aim of regulating political speech (or not) according to impartial instrumentalism: promoting the relevant political knowledge of voters. In the process, I will show how the argument for a free market public sphere can be constructed around this basis. The next section shows how the other constitutional design principle (motivation) constrains this imperative of promoting voters' knowledge. Section 5.3 distinguishes between three ideal-typical functions of political speech: persuasion, motivation, and deception. The three types raise different normative issues, and I situate both the positive case for the free market public sphere and my epistemic argument for regulation within the specific context of *persuasive* speech. The remaining two sections argue for a more egalitarian public sphere. First, I explain why a free market in political speech is likely to skew political speech towards the perspectives that tend to be favoured by the rich. Second, I examine the conditions under which such a skew is likely to have a negative impact

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<sup>7</sup> See also Beitz, *Political Equality*, 209–13.

<sup>8</sup> Dworkin, 'The Decision That Threatens Democracy', sec. 2.

<sup>9</sup> Beitz, *Political Equality*, 203; Christiano, 'Money in Politics', 242–44.



on voter knowledge by reducing the ideological diversity of the public sphere. Under these conditions, regulations to promote a more egalitarian public sphere are epistemically beneficial.

## 6.1 Promoting voters' relevant political knowledge

In chapter three, I argued that impartial instrumentalism implies a constitutional design principle of promoting the relevant knowledge of decision-makers. In the context of funding political speech, the most important set of decision-makers are voters. I also argued (section 3.1) that where we cannot directly assess the people's knowledge about what they should do, we can nonetheless identify two factors that tend to help people acquire this knowledge. These are:

1. Exposure to a variety of relevant arguments and evidence
2. Time and effort thinking

This chapter focuses on the first of these two factors, since this is the variable that is easiest to affect using the design of the political finance system. From the general imperative of the political system to promote decision-makers' relevant knowledge, we thus generate a more specific imperative for the political finance system: to promote voters' awareness of different relevant arguments and evidence.

The positive case for a free market in political speech can be constructed as an argument that a free market public sphere will do best according to this criterion of promoting voters' awareness of different relevant arguments and evidence. I will derive the positive case for the free market public sphere from two sources: first, the 1976 US Supreme Court case *Buckley v. Valeo* (particularly as it has been interpreted by political theorists); second, Estlund's article "Political Quality". The case for the free market in political speech also relies at least as much on a negative argument against regulation. This will be tackled in the next section.

*Buckley* held that aspects of the Federal Election Campaign Act of 1971 were unconstitutional.<sup>10</sup> The court upheld limits on how much individuals could contribute directly to candidates. However, it struck down limits on "independent expenditures" – spending that advocates the election or rejection of specific

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<sup>10</sup> *Buckley v. Valeo*, 424 US.

candidates, but is not directly given to the candidate or their political party. For our purposes the interest of *Buckley* lies not in its effects but in its argument. Dworkin, Cohen and Estlund all emphasise *Buckley's* overriding concern that the state should never be in a position of trying to reduce the quantity of political speech.<sup>11</sup> The positive argument for a free market in political speech relies on the idea that voters' awareness of different relevant arguments and evidence is promoted by allowing the maximum quantity of political speech. The idea behind this proposition cannot be that each individual additional speech act is always epistemically valuable. Some speech acts are deliberately false or misleading; others simply turn out in the end to be incorrect. So the idea must be more subtle: each additional speech act probabilistically tends to be epistemically beneficial (or, better, each speech act has a positive expected epistemic value). To motivate this thought, Dworkin refers to the idea of a Millian competition of ideas: so long as everybody can speak, additional speech will be epistemically positive because false or misleading speech will be rooted out and exposed by other speakers.<sup>12</sup>

Estlund has a more careful version of this positive argument for the free market in political speech. Estlund's recommended system is not the free market in political speech as such, but a set of regulations that make use of market incentives and produce a public sphere where speech is still correlated with income or wealth. Unlike *Buckley*, Estlund does not argue more speech is always better. Estlund states that while there is epistemic value in having a greater quantity of political speech, there is also epistemic value in having a more equal (less wealth-dependent) distribution of political speech.<sup>13</sup> Combining these propositions and others, he comes to the conclusion that epistemic quality requires not that political speech be maximised, but that it be maximised.<sup>14</sup> In other words, we should maximise the minimum quantity of political speech that anyone contributes. This goal, he thinks, "requires that we accept substantive inequalities of political input in the interest of

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<sup>11</sup> Cohen, 'Money, Politics and Political Equality', 60; Estlund, 'Political Quality', 157; Dworkin, 'Free Speech, Politics, and the Dimensions of Democracy', 380–81.

<sup>12</sup> Dworkin, 'Free Speech, Politics, and the Dimensions of Democracy', 380; John Stuart Mill, 'On Liberty', in *'On Liberty' and Other Writings*, by John Stuart Mill, ed. Stefan Collini (Cambridge England; New York: Cambridge University Press, 1989), chap. 2.

<sup>13</sup> Estlund, 'Political Quality', 143–44.

<sup>14</sup> *Ibid.*, 147.

increasing input overall.”<sup>15</sup> Estlund justifies this claim using an incentive argument similar to that often made in favour of the dynamic efficiency of the market: “Some citizens are willing to produce more input (say, through money contributions) but only if they get more of this input than others and it is not simply redistributed equally.”<sup>16</sup> To illustrate how these incentives could be harnessed, he describes a way of modifying the voucher scheme of campaign finance proposed by Bruce Ackerman.<sup>17</sup> Under Estlund’s preferred system, campaign donations could only be made using special “vouchers”, and all citizens would be initially provided with a certain equal amount of “free” (publicly funded) vouchers. People may then purchase additional vouchers from the state at inflated prices, the proceeds of which would cross-subsidise the “free” vouchers for everyone else. The additional purchased vouchers would thus increase the quantity of political speech for everyone by allowing a more unequal (wealth-dependent) distribution of speech.

These positive arguments for the market in political speech have a general problem. More speech does not always generate greater voter awareness of different arguments and evidence. Under some circumstances, more speech can actually reduce voters’ awareness of different arguments and evidence: it has negative expected epistemic value. This chapter identifies one set of circumstances in which this is the case. The crucial mistake in the positive case for the free market public sphere is to aggregate “political speech” as a homogenous good. Treated like an economic commodity in this way, it seems clear that, other things being equal, more is better. When we proceed more slowly and examine how political speech can be disaggregated, this assumption is unwarranted.

Perhaps the reason Estlund (and certainly *Buckley*) aggregate all speech together as a homogenous good is because they think there is no non-partisan, non-corrupt way of disaggregating it. This brings me to the second desiderata for a system regulating the funding of political speech.

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<sup>15</sup> *Ibid.*, 127.

<sup>16</sup> *Ibid.*, 150.

<sup>17</sup> Bruce Ackerman, ‘Crediting the Voters: A New Beginning for Campaign Finance’, *The American Prospect*, Spring 1993, <http://prospect.org/article/crediting-voters-new-beginning-campaign-finance>.

## **6.2 Avoiding motivational side-effects: preserving accountability**

Impartial instrumentalism's second general principle of constitutional design is to encourage decision-makers to act as though morally motivated. In practice, this mainly involves reducing opportunities or inclinations for self-interested actions that are manifestly contrary to public good. As with any measures designed to advance the knowledge principle, we should check whether attempts to promote voters' relevant knowledge have negative side-effects in terms of the motivation principle. In the context of the funding of political speech, the motivations we should be most concerned with are those of elected officials. As I mentioned in the previous chapter, voters themselves are prompted to act on the basis of moral rather than selfish motivations by the very nature of the voting process, which makes self-interested voting irrational. The main way democratic systems encourage representatives to act as though morally motivated is by making them accountable to the judgements of their constituents. Here, I employ a minimal understanding of accountability that stresses the ability of voters to kick out representatives who pursue their own good rather than that of the public. In thinking about how public speech should be funded, we need to ensure that this minimal accountability relationship is preserved. I thus treat the preservation of accountability as a side-constraint on the primary goal of a system of funding political speech, which is to promote voters' relevant knowledge.

The obvious way to avoid negative motivational side-effects in measures to promote voters' relevant knowledge is to ensure that they are content-neutral. This would rule out any regulations on political speech that would allow legislators or bureaucrats to treat speech differently on the basis of the actual content of the speech. Campaign finance regulations do not have this feature. Laws that prohibit individuals from spending more than a certain amount on political campaigns, or that grant subsidies to political parties based on the percentage of the vote they received in the previous election, do not involve the state in any judgement about the worth of the actual content being communicated. The argument for regulations that I make in the sections 6.4 and 6.5 is also content-neutral in the sense that it would not require regulations allowing officials to make judgements about the substantive content of the speech.

Before starting this, we should ask why *Buckley* objects to even content-neutral campaign finance regulations. Doubts about regulations on political speech derive from a concern that they damage the accountability relationship between electors and representatives. This is a negative, motivation-based argument for the free market public sphere which supplements the positive, knowledge-based argument of the previous section. Dworkin nicely interprets *Buckley's* negative argument as comprising two parts:

The first is a diagnosis of danger: that the most significant threat to democracy, even now, lies in government's desire to protect itself, and to cheat citizens of their democratic sovereignty, by filtering and choosing what the public may watch or read or learn, and by attempting to justify that illegitimate control by claiming, as many tyrannies have indeed claimed, that this control is necessary to protect democracy on some other dimension. The second is a maxim of strategy: It supposes that the best protection from that threat lies in prophylactic overkill, that is, in a doctrine that absolutely forbids government to appeal to that kind of justification for constraining speech even when the legitimacy of the appeal seems obvious.<sup>18</sup>

*Buckley's* concern seems to be that even content-neutral regulations could theoretically be abused by incumbent politicians to reduce their accountability. Limits on how much individuals can spend in political campaigns might be set at such a low level that there are simply not enough resources available for campaigners to uncover and communicate to voters the foul misdeeds of incumbent legislators and bureaucrats. This idea that limiting campaign finance donations is more likely to protect incumbents than allowing unlimited donations is questionable; one might be concerned that if donations are unlimited, incumbents are able to amass war-chests to deter potential challengers. However, even setting this aside, *Buckley's* prophylactic strategy fares poorly according to the instrumentalism principle.

In Dworkin's reconstruction of *Buckley*, measures to promote voters' relevant knowledge should be sacrificed to prevent the merest possibility that representatives will manipulate these measures to compromise their accountability. Preserving the motivational benefits of the accountability relationship is thus

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<sup>18</sup> Dworkin, 'Free Speech, Politics, and the Dimensions of Democracy', 368.

presented as being much more important than promoting voters' relevant political knowledge. However, as Dworkin points out, there is no reason to give the motivation principle absolute priority over the knowledge principle.<sup>19</sup> Promoting decision-makers' relevant knowledge and encouraging them to act as though morally motivated are both important desiderata in a political system. A successful motivational objection to campaign finance regulation thus needs to do more than point to the mere conceptual possibility that the regulations could be manipulated. Constitutions should be designed around what is sociologically and politically plausible, not what is merely conceptually possible.<sup>20</sup> Although the preservation of accountability is a side-constraint on increasing voters' relevant knowledge, it should only constrain genuine and not imagined dangers.

### **6.3 Three ideal-types of political speech: Persuasion, deception, motivation**

So far, I have followed the argument for the free market in political speech in tacitly assuming that the primary function of political speech is *persuasion*. However, we can also identify two other ideal-types of political speech according to their function: *deception* and *motivation*. By persuasion, I refer to speech that attempts to change audiences' beliefs. What distinguishes deception from persuasion is that deceptive speakers know that what they say is false or at least deliberately misleading. Motivation does not attempt to change audiences' beliefs at all, but tries to get voters to act on the beliefs they already have.

The argument for the free market public sphere is on much stronger ground when it comes to persuasion rather than deception or motivation. In the remaining two sections, I argue that even when political speech takes the form of persuasion, regulation to promote a more egalitarian distribution of speech is desirable. By focusing on persuasion, I make a considerable concession to the free market argument, operating on the terrain that is most naturally favourable to that view. To show what a concession this is, and to avoid the accusation that I am misleadingly idealising political discourse, this section will briefly discuss deception and

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<sup>19</sup> Ibid., 368–69.

<sup>20</sup> cf. Elster, *Securities against Misrule*, 282.

motivation. I sketch how arguments for regulation might proceed to the extent that political speech takes these forms. Deception and motivation are particularly important in the peculiar context of formal campaigns, where they are arguably dominant.

Plausibly, a great deal of political campaigning is deceptive: either straightforwardly false or deliberately misleading. Very often, campaign materials manipulate cognitive biases to encourage voters to do or believe things they would not choose on reflection. It is unsurprising that this sort of strategy is prevalent, since it has evolutionary advantages: campaigners who distain such tactics will put themselves at a disadvantage, and so will tend to die out.<sup>21</sup> To the extent that political speech takes this form, the positive epistemic case for the free market public sphere – that it promotes the production of political speech – is irrelevant. As such, the more complicated argument for regulation that I advance below (sections 6.4 and 6.5) would be unnecessary. Instead, simpler arguments for regulation can be made on two other grounds.

First, one could appeal directly to the epistemic harm of deceptive speech as a reason to try to reduce its aggregate quantity. When it comes to deception, there is positive argument for increasing the quantity of political speech. However, it will be difficult to identify and prohibit deceptive political speech in an impartial, content-neutral way. Measures against deception might be abused for partisan and self-interested purposes. The most direct means for reducing deception would be laws against false political advertising as stringent as those that apply to false commercial advertising. To my mind, such measures would not raise an unacceptable danger of negative motivational side-effects in jurisdictions with relatively depoliticised judiciaries (such as the United Kingdom). However, if this seems too risky, political deception could be reduced in a content-neutral way by attacking it indirectly, banning political speech in general situations where it seems especially likely that it will take a deceptive form. Deception is particularly likely in formal political campaigns, where it is also easier to regulate. One way of identifying situations where deception is likely to occur is by focusing on particular mediums for communication, such as television or billboard advertisements. Adverts of this kind have to go out of their way to grab viewers' attention, since people rarely make

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<sup>21</sup> Heath, *Enlightenment 2.0*, chaps 7, 9.

active choices to view adverts. For this reason, adverts are particularly likely to play on cognitive biases rather than presenting evidence or argument. It might also be the case that speech is particularly likely to be deceptive when aggregate spending on a political campaign is already at a high level, because speech has to compete for attention in a context where voters' appetites for politics are already well saturated.<sup>22</sup> If so, this situation could be picked out by measures to reduce aggregate campaign spending, such as by limiting how much official campaigns are allowed to spend.

Second, one could also make a fairness argument for at least equalising opportunities for deceptive speech, if not reducing its aggregate quantity. Insofar as money is spent on persuasive speech that contains genuine arguments and evidence, it is wrong to say that campaign contributions are equivalent to buying votes.<sup>23</sup> However, the analogy with vote-buying becomes much more apt when money is spent on deception rather than persuasion.<sup>24</sup> Having the ability to deceive others into voting your way is like having more votes to begin with: it is a form of brute inequality of power. If this is the situation we face, the market in political speech is just an auction in which candidates compete to pay the PR industry to herd gullible voters into their preferred corral. Since epistemic considerations are absent, the argument could proceed solely on fairness terms: that this form of brute political power, like other forms of brute political power (notably, votes) should be equally distributed. Equalisation could be accomplished in a content-neutral way by limiting how much individuals can spend.

The function of political speech that is probably most important in formal political campaigns is that of motivating people to go out and vote. This is distinct from deception, because there is no necessary suggestion that voters would not reflectively endorse their decisions (quite the opposite, potentially). However, it is also distinct from persuasion, because voters are not acquiring new beliefs. Instead, they are encouraged to act on the basis of their existing beliefs. Whether or not there is any deep philosophical difference between giving people new reasons for action

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<sup>22</sup> Beitz, *Political Equality*, 209.

<sup>23</sup> *Ibid.*, 196–202.

<sup>24</sup> Daniel R. Ortiz, 'The Democratic Paradox of Campaign Finance Reform', *Stanford Law Review* 50, no. 3 (1998): 913.



and getting people to act on reasons they already possess, the utility of a rough distinction between persuasion and motivation is evident from the practice of political campaigns.

An impartial instrumental justification for regulating motivational speech would have to proceed by arguing that the quality of decisions is likely to reduce if we allow election turnout to be partially determined by something that is epistemically irrelevant, namely the wealth of political speakers. (Even without the effects of money in politics on political speech, there is a strong trend of higher turnout among the rich). However, I will not attempt to make such an argument here. Alternatively, one could attempt a fairness-based argument that since motivational political speech contains no new evidence or arguments, it should be treated as a form of brute political power in the same way as deceptive speech, and equalised on that basis.

Joseph Heath also makes the interesting point that in formal political campaigns, both deceptive and motivational speech are zero-sum games: most of the money one side spends on political speech just goes towards cancelling out the effects of the money spent by the other side.<sup>25</sup> A great deal of money is wasted for no net benefit to anyone. (This is not true in the case of persuasive speech, where voters hopefully end up more knowledgeable at the end of the process).<sup>26</sup> To the extent that speech in formal campaigns takes the form of deception or motivation, a case can thus be made for lowering its aggregate quantity just on the basis of minimising waste.

To the extent that political speech takes the form of deception or motivation, arguments for regulating it should proceed along the lines sketched out in this section. This is particularly likely to be the case during formal political campaigns. In the informal public sphere, political speech is both more likely to perform a persuasive function, and less amenable to the kinds of regulations mentioned above. The case for regulation is hardest when it comes to persuasion. Spending money to persuade people using evidence and argument is not simply a form of brute political power, and so it is far from obvious that it should be

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<sup>25</sup> Heath, 'The Forever Campaign'.

<sup>26</sup> Harry Brighouse and Adam Swift, 'Equality, Priority, and Positional Goods', *Ethics* 116, no. 3 (1 April 2006): 486–88.

equalised. In the remainder of this chapter, I bracket the problems of deceptive and motivational speech, and ask how political speech should be regulated to the extent that it performs a genuinely persuasive function. Since my argument proceeds on the terrain most favourable to the free market public sphere, it will be all the more significant if it succeeds. Moreover, focusing on persuasion means my argument applies not only to formal political campaigns (where deceptive or motivational speech are common), but also to the informal public sphere.

## 6.4 A pro-rich skew in the public sphere

The remainder of this chapter identifies a mechanism that can cause the free market in political speech to generate worse decisions than alternative systems of egalitarian regulation. How far this mechanism actually obtains in practice is an empirical matter for which I cannot fully provide the evidence here. I will merely try to motivate my argument with some reasons for thinking this phenomenon is worth examining seriously. The first step of my argument runs as follows:

1. Political speech (insofar as it is actually listened to) is subject to scarcity
2. In a free market public sphere, the rich contribute a disproportionate share of speech
3. Wealth correlates with substantive perspectives

Therefore

4. In a free market public sphere, the political speech that is actually listened to is skewed towards the perspectives of the rich

This section contains reasons for thinking that a free market in political speech skews the set of the arguments and evidence citizens are exposed to towards perspectives favoured by the rich. In the next section, I ask what normative implications this has, evaluating how an egalitarian alternative might compare with the free market public sphere with regard to the basic objectives set out in sections 6.1 and 6.2.

The key premise in the first step of my argument is that political speech is subject to scarcity, such that more speech from one party can “drown out” speech from another. This point has been well argued by Thomas Christiano.<sup>27</sup> On the face of it, “drowning out” seems like an odd claim. Especially since the development of

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<sup>27</sup> Christiano, ‘Money in Politics’, 248–49.

the internet, there is no “message scarcity”: you can always get your message out somewhere, and there are no technical barriers to it being read by almost unlimited numbers of people. There is, however, “cognitive scarcity” in the amount of attention individuals devote to an issue, a scarcity exacerbated by the division of labour and distaste many people feel towards abrasive political disagreements. Even if “the internet” is limitless, individuals’ attention is not. In response to this cognitive scarcity, the media industry has created well-packaged, easily digestible sources of news and opinion, and it is rational for individuals to get their political information from these sources. It is in these crucial packaged information sources that the perspectives of the poor are (relatively) drowned out. The internet may be limitless, but the number of pages in *The Sun*, the number of hours *Fox News* broadcasts in a day, and even the amount of stories on the *Buzzfeed* front page are not limitless. Of course, *The Sun* could always decide to add additional pages to the paper, *Fox* could add more channels, and *Buzzfeed* could add more stories to the front page. Ultimately however, the space for reaching people remains limited; increasing the size of a publication like *The Sun* would merely reduce the average number of viewers for each item within it, or even put viewers off that particular publication altogether.

Christiano’s point can be seen most clearly in the controlled context of formal political campaigns. Consider what happens when total spending on a campaign goes up – say from one to two billion dollars. Even though the amount of resources devoted to campaigning has doubled, it’s highly unlikely that the amount of time voters spend thinking about the election will increase at all, let alone double. (If the money goes on negative advertising, voters’ attention could even fall).<sup>28</sup> In US Presidential elections, for example, spending has dramatically and continually increased while voting turnout has fallen over the long run. While the decline in turnout is clearly the result of many other factors, it does suggest that the increase in campaign spending has not had much of a positive effect. If voters are spending the same amount of time thinking about politics, where will that extra billion dollars go? We might think of the situation as akin to a market in which the demand for political attention has doubled while the supply of political attention is inelastic. The predictable consequence is that all the extra money spent campaigning will merely bid up the metaphorical “price” of attention. This might happen in two ways. The

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<sup>28</sup> Estlund, ‘Political Quality’, 148.

candidates might spend their money making their campaigns slicker – more likely to attract voters’ attention relative to other uses of time, or their competitors’ campaigns. The price of attention can also be bid up in a more literal fashion. Owners of billboards, television stations and newspapers effectively control a certain slice of public attention that they can sell to the highest bidder. Increasing aggregate political spending will literally bid up the price of public attention by bidding up the price of advertising space. This example shows how additional political speech can have the effect of drowning out the speech of others by bidding up the price of political attention.

If everyone had an equal propensity to contribute to political debate, it would not be an epistemic problem that the political speech that is actually attended to is subject to scarcity. A problem arises when certain groups have a higher tendency to speak than others, and when these differences also correlate with substantive differences in political perspectives. If everyone were to spend a fixed proportion of their income (say 1%) on politics, the spending of the rich would be well out of proportion to their share of the population. If everyone contributed a fixed proportion of income, the distribution of political spending would be just the same as the distribution of income.

This alone would mean that the rich would contribute a disproportionate share of the money that goes into political campaigns. However, the disproportion is actually even more dramatic than this, because political contributions are a “superior good” that people tend to spend more on as their income increases. Poorer people tend to focus more on immediate necessities such as food and housing. Goods like food and housing are subject to diminishing marginal returns, meaning that as people become richer, additional spending on material goods makes less of a difference to them. Political donations are not so limited in this way: the personal utility you gain from having a second yacht is much less than the utility you got out of your first; by contrast, the utility you get out of your second £10 million political donation is much closer to the utility you get out of your first £10 million donation.<sup>29</sup> When scarce access to public attention is effectively rationed by a market mechanism, it is to be expected that this access is disproportionately purchased by the wealthy.

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<sup>29</sup> Christiano, ‘Money in Politics’, 245.

When it comes to the informal public sphere, it is more difficult to establish that the rich contribute a disproportionate share of public speech compared to the poor. One section of the public sphere, including think-tanks, campaigning groups and lobbyists, is primarily funded by voluntary donations. Organisations of these kinds are subject to the same dynamic that was discussed in the previous paragraph for formal political campaigns. We can expect them to be dominated by the rich for the same reasons. However, another section of the public sphere, including newspapers, TV stations and other media, is primarily funded by audience subscriptions and advertising revenue. This section of the public sphere is forced by the discipline of the market to cater to the preferences of audiences rather than those of donors, and so is not subject to the same dynamic as political campaigns.

However, even for these non-donation-funded parts of the informal public sphere, there are three mechanisms that might cause the rich to contribute a disproportionate share of political speech. First, advertisers (in the aggregate) target not merely the largest audiences, but the wealthiest audiences. Insofar as media firms seek advertising revenue, they are therefore incentivised to cater to the preferences of wealthier audiences in particular, even though their media products are also consumed by poorer audiences. Second, media workers disproportionately come from privileged social origins. The intrinsic desirability of media jobs renders them highly competitive. Employers can demand high quantities of cultural and social capital (including elite university degrees, social connections, and a pleasing written or spoken style). Those who possess this capital tend to come from wealthier backgrounds. Furthermore, employers can also demand years of unpaid internships or insecure freelance work. This similarly filters out candidates from poorer backgrounds. Third, media ownership in most countries is highly concentrated among a small group of wealthy men. How strongly the second and third mechanisms operate depends very much on whether market discipline forces media outlets to cater to the pre-existing political preferences of their audiences, or whether media workers and owners have some slack to produce content that reflects their own political perspectives. I do not attempt to pronounce on that issue here.

The final premise of this step of the argument is that the income or wealth of speakers makes a difference to the content of what is spoken. Riches tend to correlate with certain substantive political perspectives. Income and wealth are excellent predictors of party political affiliation and of stances on a whole host of

issues. Moreover, the rich tend to be not just richer, but also possess other demographic characteristics that correlate with substantive political perspectives (race, gender, etc.) There is no suggestion here of quid-pro-quo corruption, of donors expecting to receive favours from politicians in return for their contributions (that would be a separate issue). Donors might be motivated solely by moral considerations and seeking to advance the common good as they see it. The concern is not with their intentions. The problem is with the consequence: that the kinds of arguments and evidence that tend to be put forward by wealthier people drown out the kinds of arguments and evidence that tend to be put forward by poorer people. The correlation of riches and perspectives is consistent with thinking that people vote for the common good rather than for personal interest: it simply implies that people's political beliefs tend to be skewed in favour of people like them. "Where you stand depends on where you sit."<sup>30</sup> Estlund appeals to something like this to justify his principle that there is some epistemic value in having a more equal (less wealth-dependent) distribution of political speech.<sup>31</sup> This kind of skew in the set of perspectives that are publicly represented is an important one, because the kinds of class-based issues that correlate most closely with income are among the most important political issues in contemporary democracies.

Cognitive scarcity means that the non-wealthy find it more difficult to pay for the prime real-estate of public attention. Coupled with the correlation between wealth and substantive political perspectives, this means that audiences in the free market for political speech pay attention to a set of sources that are skewed towards the perspectives favoured by the rich.

## 6.5 Equality as a proxy for diversity

By itself, a skew towards the perspectives of the rich in the public sphere would be just a descriptive fact. In this section, I bring in normative considerations to help us evaluate the implications of this pro-rich skew.

The normative premise of my argument is supplied by the first principle of constitutional design: promoting voters' relevant political knowledge, by promoting their awareness of different arguments and evidence. This in turn can be interpreted

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<sup>30</sup> Weale, *Democratic Justice and the Social Contract*, 25.

<sup>31</sup> Estlund, 'Political Quality', 137; cf. Christiano, 'Money in Politics', 251.

as promoting the diversity of arguments and evidence voters pay attention to. The epistemic merits of diversity were discussed earlier, in section 3.1. These merits are attested to by formal mathematical results such as those of Lu Hong and Scott Page, but they should also be apparent on a more intuitive level.<sup>32</sup> The supposition is that the best way to improve voters' relevant knowledge is to direct their attention to arguments and evidence offered by a diverse range of perspectives, rather than focusing narrowly on a more limited body of perspectives. Thus, if we are constrained by impartiality towards different theories of economics, we should say that someone who is familiar with neo-classical, Austrian, Keynesian and Marxist schools of thought is more likely to possess relevant knowledge than someone who just knows one in detail. Using a slightly different vocabulary, my claim about diversity echoes Charles Beitz's conclusion that what we should care about in the public political sphere is the ability of all views to get a decent hearing.<sup>33</sup>

Affirming the epistemic value of diversity naturally raises questions about how much diversity is too much. After all, the diversity of views people are aware of could be increased by encouraging people to learn the details of long-abandoned pseudoscience and folklore. There must be some threshold at which it is more beneficial to promote familiarity with popular and plausible perspectives rather than seeking diversity at any cost. I will simply assume that we are a long way short of this point, and that voters in contemporary democracies would benefit from greater diversity. Moreover, my practical proposal for increasing diversity will only increase the prominence of views that significant people actually hold and are willing to spend money on. It thus comes a long way short of John Stuart Mill's suggestion that we should deliberately hang on to discredited views as a means to better understand our true beliefs.<sup>34</sup> At the same time, we should be clear that a commitment to increasing the diversity of views in the public sphere also applies to views that we dislike from within our own substantive moral-political perspectives.

Given the epistemic importance of a diverse set of information sources, we face the following question: is the pro-rich skew conducive to diversity, or could

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<sup>32</sup> Hong and Page, 'Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers'; Landemore, *Democratic Reason*, chap. 4.2.

<sup>33</sup> Beitz, *Political Equality*, 203–13.

<sup>34</sup> Mill, 'On Liberty', chap. 2, p. 45.

diversity be increased by attempting to eliminate this skew using public policy? This could be characterised as a choice between the ideal-types of the *free market public sphere* (the dynamics of which were described in the previous section), and the *egalitarian public sphere*. The egalitarian public sphere is defined by a lack of correlation between the distribution of political speech and the income or wealth of speakers.<sup>35</sup> To choose between the free market public sphere and the egalitarian public sphere, we need to speculate about which public sphere would contain a more diverse set of arguments and evidence. The egalitarian public sphere is superior to the extent that we can treat equality of speakers as a proxy for diversity of views. Whether or not we can do so depends on empirical facts about ideological biases and the distribution of perspectives. I will not attempt to marshal these facts in a way that would be necessary to decisively prove the point in favour of the egalitarian public sphere. Instead, I will simply say that egalitarian regulations are justified to the extent that and in those cases where the egalitarian public sphere would have the requisite characteristics. However, to give the reader an idea of the issues at stake, I will briefly indicate the lines this debate is likely to proceed along.

The idea that a free market public sphere would be more diverse than an egalitarian public sphere depends on what I call the *liberal elitist worry*. This worry has much in common with concerns about the mediocrity of mass society and the danger that the poor will use democracy to expropriate the rich that animated thinkers such as James Madison, John Stuart Mill and Alexis de Tocqueville. The worry relies on an idea I employed in the previous section: that even if people are not deliberately self-interested, their perspectives tend to be biased towards the interests of people like them. Wealth and income tend to be dispersed amongst the population according to a power-law distribution: the poor greatly outnumber the rich. If people's perspectives are biased towards those like them, one would therefore expect the distribution of evidence and argument in the egalitarian public sphere to be dominated by perspectives favoured by the poor. The egalitarian public sphere would thus suffer from the opposite problem to the free market public sphere: the voices of the poor will drown out those of the rich. If this is true, then the pro-rich skew induced by money in politics in the free market public sphere compensates for the homogenising dominance of pro-poor voices that would prevail in an egalitarian

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<sup>35</sup> cf. Estlund, 'Political Quality', 132–33.



public sphere. Hence, the free market public sphere promotes pro-rich perspectives that would otherwise not be heard, increasing the diversity of arguments and evidence voters are aware of.

The liberal elitist worry might be challenged in several ways. First, it might be that self-promoting bias in economic ideology is not symmetrical, but favours the rich in particular. David Graeber's version of this idea was encountered above (section 3.4) in the different context of the mixed motivation problem.<sup>36</sup> Theoretical support for this proposition might also be provided by Adam Smith's ideas about the "disposition to admire the rich and the great", and Thorstein Veblen's theory of "pecuniary emulation."<sup>37</sup> If Graeber, Smith and Veblen are right, the disposition to emulate or sympathise with the rich already compensates (or over-compensates) for the tendency of pro-poor perspectives to dominate in the egalitarian public sphere.

Second, the liberal elitist worry assumes that perspectives vary along only a single dimension of economic ideology, and takes the imperative of diversity to be one of promoting diversity along that dimension. However, perspectives also vary along other axes that might correlate weakly, if at all, with income and wealth. On these other dimensions, a free market public sphere where the rich dominate is less diverse than an egalitarian public sphere simply because the rich are a smaller and less diverse group compared to society at large. Thus, even if the liberal elitist story is true about economic ideology, the free market public sphere might be less diverse overall because of these other dimensions of ideology.

Finally, even if the liberal elitist worry is true to some extent, the pro-rich skew of the market might over-compensate, meaning the free market public sphere is still less diverse than the egalitarian public sphere. It might be the case that there is some tendency for pro-poor perspectives to dominate in the egalitarian sphere, in a way that is regrettable from the standpoint of diversity, but a completely free market in political speech would go too far in the other direction. In such a situation, the distribution of political speech optimal for diversity would be somewhere between

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<sup>36</sup> Graeber, 'Caring Too Much. That's the Curse of the Working Classes'.

<sup>37</sup> Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 2002), sec. I.III.29; Thorstein Veblen, *The Theory of the Leisure Class* (New York: Macmillan, 1912), chap. 2; cf. Graeber, 'Caring Too Much. That's the Curse of the Working Classes'.

the two extremes. This would recommend some egalitarian regulations, but not to the extent of completely eliminating the correlation between political speech and income or wealth.

Rather than pursue these debates further, I will simply admit that my argument is conditional and applies only to the extent that the liberal elitist worry mentioned above is misplaced. The argument applies insofar as we are in the domain where reducing the pro-rich skew induced by money in politics would increase the diversity of the public sphere. When this condition holds, the speech of the rich in the free market public sphere has a negative epistemic impact in absolute terms. This is not because these speech acts are misleading in themselves, but because they are misleading when placed in the broader context of a skewed distribution of speech. In another situation, the same speech-act might be epistemically valuable. Even if measures to create a more egalitarian public sphere reduced the total quantity of political speech, this would still increase epistemic value, because voters would become familiar with a more diverse range of arguments and evidence.

This argument for an egalitarian public sphere is an indirect one. It has the form advocated by Beitz, who writes that if we end up choosing laws to promote equality in political speech, “the explanation would not be that equality of resources has intrinsic or fundamental importance but rather that it serves as a convenient proxy for a more complex criterion that would be excessively difficult to interpret or administer.”<sup>38</sup> Beitz leaves the issue here; my contribution has been to actually set out the more complex criterion (the diversity of arguments and evidence presented before the public), and to set out a reason for thinking equality would be a good proxy for this criterion (the skewed distribution of sources in the free market for political speech).

My account of what’s wrong with the disproportionate influence of the rich is also similar but slightly different to Christiano’s. I agree with Christiano that the public’s sources of political information are skewed towards the perspectives of the rich. His argument continues:

1. The skewed distribution of sources leads to policies that are biased towards the interest of the rich.

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<sup>38</sup> Beitz, *Political Equality*, 209.

2. This is bad because it violates a basic moral principle that people's interests should be treated as equally worthy of concern.<sup>39</sup>

By contrast, my argument runs:

1. The skewed distribution of sources leads to policies that are likely to be less well thought-through because they are based on a narrower body of argument and evidence.
2. This is bad because less well thought-through policies are likely to be less substantively just or moral (according to whatever the correct standards of these things turns out to be).

The first premise of each argument is empirical, and the second is normative. My empirical claim is harder to demonstrate than Christiano's. However, Christiano's normative claim is more demanding, appealing to a particular substantive conception of justice. Mine, by contrast, is much harder to dispute.

The abstract goal of an egalitarian public sphere (where the distribution of speech is independent of the distribution of income or wealth) might be aimed at in a variety of ways. Beitz draws a distinction between strategies of *redistribution* and strategies of *insulation*.<sup>40</sup> Strategies of redistribution cut the Gordian knot of money in politics by simply reducing economic inequality itself. Here, the epistemic argument against money in politics functions as an additional consideration in favour of distributive equality.

Strategies of insulation instead seek to reduce the influence money has on politics and political speech. In formal campaigns, insulation might be advanced by restricting the amount of money citizens can contribute to political campaigns, or through schemes of compulsory public funding or voucher programmes.

In the ordinary course of politics and in the informal public sphere, insulation is much more difficult to achieve. Regulations on speech in the informal public sphere are also more likely to raise concerns about expressive elements of free speech.<sup>41</sup> However, insulation in the informal public sphere might nonetheless be

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<sup>39</sup> Christiano, 'Money in Politics', 252.

<sup>40</sup> Beitz, *Political Equality*, 193; cf. Dean J. Machin, 'Political Inequality and the "Super-Rich": Their Money or (Some of) Their Political Rights', *Res Publica* 19, no. 2 (3 October 2012): 122.

<sup>41</sup> Christiano, 'Money in Politics', 255.

advanced by laws restricting lobbying, or laws against the concentration of media ownership. An important subset of insulation strategies create a more egalitarian distribution not by reducing the speech of the over-represented, but by increasing the speech of the under-represented. This might be achieved through voucher schemes to subsidise the speech of the poor.<sup>42</sup> Alternatively, publicly funded discursive institutions such as state broadcasters and public universities could be interpreted as performing a role of this kind through their mission to promote a balanced debate.

Almost all of these egalitarian strategies could be pursued in a content-neutral way that avoids triggering worries about compromising accountability. The last suggestion (publicly funded discursive institutions) raises the most significant motivational worries about possible partisan manipulation. However, even here, the positive example of institutions such as the British Broadcasting Corporation shows that such concerns can be overcome or at the very least mitigated through appropriate institutional design and cultural norms.

## Conclusion

This chapter has set out an epistemic argument in favour of an egalitarian public sphere. In so doing, it has provided an example of how impartial instrumentalism can be applied to concrete problems of institutional design. This argument relied on the first principle of constitutional design, which states that the design of the political system should promote the relevant knowledge of political decision-makers. This principle directs us to promote the diversity of arguments and evidence voters are exposed to. I argued that under certain circumstances we can best do so by creating a more egalitarian public sphere, removing some of the differential influence of money in politics. Moreover, this can be done in a content-neutral way that does not raise motivational worries about compromising the accountability of representatives to voters. By providing an example of impartial instrumentalism in practice, this chapter provides another example to rebut the indeterminacy objection I raised in chapter three. I have shown how one can make detailed and potentially controversial institutional recommendations without relying

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<sup>42</sup> Ibid.

on any particular substantive moral-political perspective. It is possible to proceed using only epistemic premises that are impartial between different substantive moral-political perspectives.

The argument for an egalitarian public sphere that I have presented is limited in several ways, some of which could helpfully be clarified by further empirical work in the future. There are four core premises on which the argument could be challenged:

1. Wealth or income correlates with differences in substantive political perspectives
2. The rich contribute a disproportionate share of political speech compared to the poor
3. Political speech is subject to scarcity, such that more speech by some can drown out others
4. Perspectives of the rich would not be drowned out in a more egalitarian public sphere

For the sake of simplicity, I have presented these four premises as conditions, but it would be more accurate to view them as continuous variables. The values of these variables determine the strength of the case for egalitarian regulations. Thus, the argument for a more egalitarianism public sphere is stronger the more the rich contribute compared to the poor, the more riches correlate with substantive perspectives, the more political speech is subject to scarcity, and the more other ideological biases operate in favour of the rich rather than the poor. The first premise is relatively uncontroversial, and the second is also well established for the case of formal political campaigns. It is harder to argue for the second premise for the informal public sphere, because the mechanisms through which the rich contribute more speech than the poor in this context are subtler and harder to measure. The third premise is also easier to establish for formal political campaigns than for the informal public sphere. Formal campaigns are subject to tight time constraints, and voters' attention spans are often limited by disillusion with formal politics. Finally, the fourth premise is the most difficult of all to assess with precision, depending as it does on ideological phenomena that are difficult to establish empirically.

Given these preliminary speculations, it seems likely that the epistemic case for egalitarian interventions will be easiest for formal political campaigns, and harder

to make for the informal public sphere. This would tend to reduce the significance of the argument, since (as I discussed in section 6.2), formal campaigns tend to be dominated by motivational or deceptive political speech rather than genuine persuasion in any case. Appropriate empirical research could help to clarify these contested empirical questions. However, we should also be wary of drawing conclusions too quickly from existing research. For example, on standard measures, political ignorance is relatively invariant between different jurisdictions, even when regulations on political speech vary considerably. This might be taken to indicate that political knowledge is overwhelmingly determined by “demand-side” influences (such as the rational ignorance argument discussed in the previous chapter), with “supply-side” influences (such as the pro-rich skew discussed in this chapter) having little effect. However, this inference would be too quick. Political knowledge is normally measured by testing whether respondents know uncontested political facts such as who occupies which political office. Diversity of perspectives was never likely to increase this kind of knowledge (of uncontested facts). Instead, diversity is supposed to increase voters’ knowledge of different moral or causal theories for evaluating government, something that political knowledge surveys are less likely to assess. Assessing the strength of the epistemic case for an egalitarian public sphere will thus require different kinds of empirical research, or more creative uses of existing data.

This discussion of financing political speech could also be extended in other ways. I have focused on the knowledge of voters and the motivation of politicians, but one could also look at politicians’ knowledge and voters’ motivations, as well as the knowledge and motivations of other relevant agents such as media workers. Moreover, the growing importance of the internet is changing the way political arguments and evidence are spread, in ways that I have not been able to address here. If traditional big media outlets become economically unsustainable and people gain their political information from a wider variety of sources, this may mitigate the pro-rich skew. However, a more pluralistic media environment may also come with different epistemic problems of its own. Finally, as I briefly mentioned in the case of the BBC, there may be more direct ways of promoting diversity in the public sphere, although these are likely to be more subject to motivational worries. We might also broaden our focus from the transmission of arguments and evidence to their

creation, considering the roles played by institutions such as publicly funded universities in this process.

The argument against the free market in political speech presented in this chapter does not apply to the market per se, but specifically to the market in a context of economic inequality. In an egalitarian free market for political speech, there would be no skew towards the perspectives of the rich, because there would be no means of distinguishing “the rich”. This is why strategies of redistribution can serve as a solution to the problem identified, and why the same problem does not arise for Ackerman’s egalitarian “quasi-market” voucher scheme for campaign finance. However, even an egalitarian free market public sphere is still likely to have problems with deceptive speech.

This chapter has looked at how the influence of the market can reduce democracy’s (impartially assessable) tendency to make good decisions. The influence of money in politics is not a question of markets serving as an alternative to democracy, as I discussed in the previous chapter. The political decisions that are produced in a political system featuring a free market in political speech are still decisions produced by a democratic political system: my claim is just that these decisions will be less good. However, I was also able to suggest a way of dealing with this problem through constitutional design to promote a more egalitarian public sphere. Policies to promote a more egalitarian public sphere are constitutional choices in the sense that they are choices about how we make choices. However, this need not imply that such policies need to be given any status other than that of ordinary legislation. In the next chapter, I turn to a different kind of conflict between markets and democracy: capital strikes and capital flight. In this case, no comparable constitutional design solution is forthcoming. Instead, capital flight creates an unavoidable trade-off between the value of democracy identified by impartial instrumentalism and the economic goods promoted by markets.

# Chapter 7 Market influence on democracy: Capital strikes and capital flight

On the 2<sup>nd</sup> of May 2010, the Australian Labor party announced a windfall tax on the profits of mining companies. Mining firms immediately began warning that the new tax would deter them from investing, and that this would have disastrous consequences for the Australian economy. On the 23<sup>rd</sup> of June, Prime Minister Kevin Rudd was ousted by his deputy, Julia Gillard. When she took over from him, one of her first acts was to abandon the threatened mining tax, and to implement a much weaker alternative instead.<sup>1</sup>

This example seems to support an argument put forward by Fred Block, which runs along the following lines:

1. Governments seek re-election
2. Re-election depends on how well the economy is doing
3. How well the economy is doing depends on private investment
4. Private investment depends on how much profit investors expect to make

Therefore

5. Governments have a strong incentive to enlarge the profits of investors.<sup>2</sup>

It is not difficult to think of other cases where investors appear to have been treated more generously because it is feared they might otherwise damage the economy. Londoners are frequently told that the government daren't touch bankers' bonuses for fear of precipitating an exodus of financiers to Zurich. Americans are told with equal frequency that the economy must work for "wealth creators" first if it is to work for anyone else at all.

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<sup>1</sup> Stephen Bell and Andrew Hindmoor, 'The Structural Power of Business and the Power of Ideas: The Strange Case of the Australian Mining Tax', *New Political Economy* 19, no. 3 (4 May 2014): 470–86.

<sup>2</sup> Block, 'The Ruling Class Does Not Rule'.



“Capital strikes” of this kind appear to constrain the scope of democracy, limiting the range of options that democracies can choose. They seem to involve the democracy in sharing power with the market, forced to compromise when it comes to issues that deeply touch the interests of investors – like the Australian mining tax. This chapter asks whether capital strikes really do compromise democracy in this way. I clarify what exactly is the problem with capital strikes when we understand the value of democracy along impartial instrumentalist lines.

The phenomenon I am analysing has attracted the attention of socialists and democrats under a range of different names. Michał Kalecki wrote about the “state of confidence,” Charles Lindblom the “privileged position of business,” Fred Block (and following him Joshua Cohen) “structural constraints,” Adam Przeworski & Michael Wallerstein “structural dependence,” Brian Barry “capitalists having power over the government” and Thomas Christiano the “uneasy relationship between democracy and capital.”<sup>3</sup> I follow Stuart White in using the more vivid term “capital strike,” which also occurs in journalistic discussions of the issue (seemingly interchangeably with “investment strike”).<sup>4</sup>

The term “capital strike” has been used in two main ways, both of which are quite distinct from the use of the word “strike” in labour disputes. First, “capital strike” is a term used to describe coordinated investment decisions made for political ends. In the slump of 1937, Franklin Roosevelt suspected a capital strike in this sense

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<sup>3</sup> Michał Kalecki, ‘Political Aspects of Full Employment’, *The Political Quarterly* 14, no. 4 (1 October 1943): 322–30; Lindblom, *Politics and Markets*; Charles Lindblom, ‘The Market as Prison’, *The Journal of Politics* 44, no. 2 (1982): 323–36; Block, ‘The Ruling Class Does Not Rule’; Cohen, ‘The Economic Basis of Deliberative Democracy’; Adam Przeworski and Michael Wallerstein, ‘Structural Dependence of the State on Capital’, *The American Political Science Review*, 1988, 11–29; Brian Barry, ‘Capitalists Rule Ok? Some Puzzles About Power’, *Politics, Philosophy & Economics* 1, no. 2 (1 June 2002): 155–84; Thomas Christiano, ‘The Uneasy Relationship between Democracy and Capital’, *Social Philosophy and Policy* 27, no. 1 (2010): 195–217.

<sup>4</sup> Stuart White, ‘The Republican Critique of Capitalism’, *Critical Review of International Social and Political Philosophy* 14, no. 5 (2011): 561–579; Peter Frase, ‘The Right’s Favorite Strike’, *Jacobin*, 19 September 2011, <https://www.jacobinmag.com/2011/09/the-rights-favorite-strike/>; ‘A Capital Strike’, *Wall Street Journal*, 31 January 2009, sec. Opinion, <http://www.wsj.com/articles/SB123336321034435421>.

when he thought investors were conspiring to deliberately wreck the economy in order to hurt him politically.<sup>5</sup> The normative undesirability of a capital strike in this sense is relatively clear, and such strikes would be prohibited by current competition and antitrust laws. Consciously organised business power also carries a more benign aspect (often under the label “corporatism”), where it has been argued that collusion between businesses can help resolve collective action problems around issues such as worker training, in a way that also benefits the wider public.<sup>6</sup> In order to gain analytical clarity, this chapter bracket questions of the desirability of organised business power in this sense.

Second, the term “capital strike” is used to refer to the political by-products of the normal, uncoordinated profit-seeking activity of investors. Commentators on the left sometimes exploit the ambiguity between the two meanings, hinting at capital strikes in the first sense (normatively clearer but very difficult to prove) while only having evidence for capital strikes in the second sense (easier to observe but normatively unclear).<sup>7</sup> This chapter focuses on capital strikes in the second sense. I use the term to refer exclusively to situations where investors act fully within the law in exercising their property rights.

Throughout this chapter, I will refer to the agents of capital strikes as *investors*. This term is chosen in preference to *capitalists*, hitherto more common in this literature, since “capitalist” might suggest a particular model of ownership, whereas “investor” is more general. My question is whether and how private investment, as commonly practiced, is harmful to democracy. To answer this question, the relevant agents to examine are those who control and derive benefits from capital. In the simplest case, this refers to private individuals. However, investors in this sense can also be firms, as directed by their officers. This latter possibility raises some complications. The separation of ownership and ownership

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<sup>5</sup> David Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999), 352.

<sup>6</sup> Joel Rogers and Wolfgang Streeck, ‘Productive Solidarities: Economic Strategy and Left Politics’, in *Reinventing the Left*, ed. David Miliband (Cambridge: Polity, 1994), 136.

<sup>7</sup> e.g. Michael Burke, ‘The Investment Strike Is One the Government Would Do Well to Bust’, *The Guardian*, 4 August 2012, <http://www.theguardian.com/commentisfree/2012/aug/04/investment-strike-business-economy>.

and control in the modern corporation creates uncertainty about whose interests firms' investment decisions are made in. Corporate law gives company officers a fiduciary duty to direct the firm in its shareholders' interests. This is encouraged by the design of compensation schemes, and by the threat of hostile takeover which hangs over under-performing companies.<sup>8</sup> However, these legal duties and economic mechanisms are conceived against a background assumption that managers have the motive and opportunity to direct firms so as to profit themselves, at the expense of shareholders.<sup>9</sup> Of course, managers could also attempt to pursue public goals (rather than personal profit) at the expense of shareholders, just as private individuals could pursue public goals at their own expense. This is one of the possibilities I examine below. In describing "investors" as the beneficiaries of capital strikes, I refer both to the final owners of capital, and to managers to the extent that managers can siphon off benefits for themselves. I thus remain agnostic on Joseph Heath and Wayne Norman's contention that "it is not greedy shareholders who are the enemies of other stakeholders; it is greedy (or lazy or unethical or unsupervised or simply unqualified) managers."<sup>10</sup>

Many people earn income from both labour and property. For this reason, if I say that a measure benefits investors and burdens workers, what I mean more precisely is that the measure benefits people to the extent they are investors and burdens them to the extent they are workers. This distinguishes my analysis from the Przeworski and Wallerstein model I will discuss below, which does require the assumption that people can be rigidly divided between capitalists and workers – an assumption which, as we will see, has important consequences.

The chapter is divided into five sections. First, I look at the most prominent existing account of what is wrong with capital strikes, that of Thomas Christiano. Christiano claims capital strikes are necessarily bad because they violate a duty to

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<sup>8</sup> Joseph Heath and Wayne Norman, 'Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-Run Enterprises Teach Us in the Post-Enron Era?', *Journal of Business Ethics* 53, no. 3 (1 September 2004): 253.

<sup>9</sup> Ibid.; Adaman and Devine, 'On the Economic Theory of Socialism', 58–59; For a famous example see Bryan Burrough and John Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (New York: Harpercollins, 1990).

<sup>10</sup> Heath and Norman, 'Stakeholder Theory, Corporate Governance and Public Management', 261.

make political decisions on terms of equality. I argue this deontological account should be rejected because it is incompatible with the way all markets work. The second section looks at how an objection to capital strikes could be framed within impartial instrumentalism to avoid these problems. An impartial instrumentalist account of what's wrong with capital strikes stresses the importance of showing that capital strikes systematically restrict the goals democracies can pursue. The remainder of the chapter assesses whether capital strikes can be faulted on this basis. The third section asks whether the problem with capital strikes is that they necessarily impede the state's ability to tax capital. I show that this is not the case, by pointing to various ways that a state with a closed economy would be able to tax capital successfully. Section four argues that the real problem with capital strikes lies in their effects in open international markets. In open economies, capital strike (or rather, capital flight) is the vector for tax and regulatory competition – a race to the bottom in which jurisdictions compete to offer the most attractive political environment for investors. The final section reinforces this conclusion by showing how strategies for reducing capital flight all come with significant normative drawbacks. I describe a capital flight trilemma between strong regulatory regimes, national policy autonomy, and gains from international trade.

## 7.1 Christiano's account

Christiano's account of the badness of capital strikes is *deontological* in the sense that it assesses political and economic outcomes based on whether certain posited duties have been observed. Christiano's account is founded on a duty for property-holders to directly pursue democratically chosen goals. According to Christiano, fairness requires that decisions are made in a way that gives affected parties equal influence over the outcome (within certain reasonable limits). Moreover, fairness requires that all parties actually respect and obey the decision that is made. This applies not only to formal laws but also to less strictly defined democratically chosen goals: "when the democratic assembly has chosen a policy with a certain aim in mind, each person has duties within the society to carry out the policy and to cooperate in the pursuit of the aim to the best of his or her ability."<sup>11</sup>

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<sup>11</sup> Christiano, 'The Uneasy Relationship between Democracy and Capital', 207.

On Christiano's account, investors engaging in capital strikes violate this duty. If the goal of the Australian government was to raise revenues while maintaining employment in the mining industry, mining investors were obliged to facilitate this goal as much as possible. By declaring their intention to cut investment if the mining tax was implemented, investors announced that they would knowingly pursue their own self-interest at the expense of what democracy had judged to be in the public good. When the wrong of capital strikes is defined in this way, capital strikes are not restricted to issues of taxation and investment. Christiano's primary example is not a tax but a minimum wage. Imagine a minimum wage that is high enough that employers respond by cutting employment. The consequence might well be to increase rather than decrease poverty. If tackling poverty was the goal of the minimum wage, that goal has been frustrated.

Capital strikes (or effective threats thereof) imply that decisions are not determined democratically. Investors have "necessarily had an extra say in what aims are to be brought about" compared to ordinary people.<sup>12</sup> Ordinary people only have one input into the policy process: as citizens, through whatever political mechanisms we regard as normal and legitimate. But investors influence the policy decision twice: firstly as citizens like everyone else, but also a second time when the government responds strategically to them. By prompting the Australian government to revise its taxation plans, mining investors had an additional, extra-constitutional influence on what happened. Even if the government had gone ahead with its original plan and imposed the tax anyway, investors would still have had an extra influence on the eventual outcome, because they would have reduced their investments in response, depriving the government of its ideal outcome (taxation without reduced investment).

One obvious response to capital strikes would be to simply legislate that firms must respond in the desired manner. Christiano's reason we should not respond in this way is that societies employing markets are decentralised in such a way that central governments don't know all that needs to be done to pursue a particular goal.<sup>13</sup> However, to the extent that markets advance the public good, they do so not only in a decentralised way, but also in a highly indirect way. Individual

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<sup>12</sup> Ibid., 203.

<sup>13</sup> Ibid., 216.

participants in markets are motivated by their own self-interest, not directly by the public good. When a market works properly, the self-interested actions of individual participants are led to advance the public good because of the structure of the market itself - as if by an invisible hand. Markets are the most prominent example of an indirect approach to the public good that can also be found in other institutions such as adversarial legal systems. Lawyers do not directly aim to advance justice, but to advance the interests of their clients. However, because of the careful way the system is set up, justice is supposed to emerge as a by-product of the vigorous partisanship of each side.<sup>14</sup>

The indirect way markets operate presents a problem for Christiano's account of capital strikes. It means that for market participants to directly pursue the public good would defeat the purpose of the institution. If buying decisions were ethicised in the sense of everyday morality, sellers would be willing to sell for less in order to help out buyers, and vice versa. But as a result, prices would cease to convey useful information about the relative scarcities of goods and services in the economy.<sup>15</sup> To see how Christiano's duty interferes with the efficient working of the market, consider two different ways the state might try to achieve a distributive goal. The first is to tax the wealthy (let us suppose, investors), to provide benefits for the poor (let us suppose, workers). The second is for the state to impose a minimum wage, and for investors to follow the suggested duty to avoid capital strikes. If the state's goal is distributive, then for investors to follow their duty will require them to respond in such a way that the result would be as though the state had simply taxed them and redistributed. Of the two situations, the second places strenuous epistemic demands on investors, as Christiano recognises, and seems much more prone to error.<sup>16</sup> It also sends misleading price signals. It will incentivise low-paid work to an inefficient degree (relative to leisure, education and training, and unwaged work in the home). It will also incentivise labour-intensive production techniques to an inefficient degree (relative to capital-intensive production

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<sup>14</sup> Joseph Heath, 'A Market Failures Approach to Business Ethics', in *The Invisible Hand and the Common Good*, ed. Bernard Hodgson, Studies in Economic Ethics and Philosophy (Berlin: Springer, 2004), 69–89.

<sup>15</sup> Heath, 'An Adversarial Ethic for Business'.

<sup>16</sup> Christiano, 'The Uneasy Relationship between Democracy and Capital', 211.

techniques). Capital strikes are an instance of the ordinary way market participants respond to and send supply and demand signals. An objection to all capital strikes is therefore an objection to the very thing that makes markets work. Instead of being intrinsically wrong, capital strikes have a kind of presumptive desirability. They are an instance of economic agents responding to price signals in a way that is necessary for markets to efficiently allocate resources.

Christiano might reply that the explanation I have given of how markets indirectly advance the common good only applies to perfectly competitive markets. Real markets are often subject to market failures such as externalities, information asymmetries and monopoly power. However, if we face problems of market failure and monopoly power, those problems should be dealt with on their own terms through the familiar toolkit of taxation, regulation, competition policy and state provision of public goods.

A different possible reply would be to escalate from an objection to capital strikes to an objection to indirect market-style institutions in general.<sup>17</sup> I certainly do not wish to claim that indirect methods of advancing the public good are always superior. As I argued above (section 3.2), it is important that people aim for the public good directly when it comes to political decisions such as voting. Moreover, it may be true that the direct approach would dominate the indirect approach in all spheres of life if people were sufficiently morally motivated – although even here co-ordination problems might remain.<sup>18</sup> Even granting the superiority of a direct approach in ideal circumstances, given more pessimistic assumptions about human nature in the medium term, the market-style indirect approach is indispensable in many areas of life.

I argue that Christiano's account of what is wrong with capital strikes relies on a foundation of individual duties that are implausible because they are inimical to the way markets work. One might ask why this is objectionable from the point of view of impartial instrumentalism, since I argued in chapter five that impartial instrumentalism points towards democracy rather than the market. However, the principle of impartiality means that our account of democracy should not rule out an institution (the market) which most perspectives judge to be very useful in

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<sup>17</sup> e.g. Cohen, *Why Not Socialism?*

<sup>18</sup> *Ibid.*, 53–70.

promoting the public good. Moreover, I will argue below that even from within impartial instrumentalism the market can be seen as playing a useful epistemic role in communicating information about interests to political decision-makers.

My objection to Christiano's account is compatible with maintaining that citizens have a duty to advance that which is democratically agreed to be the public good in some very broad sense. To object to Christiano's account of capital strike, I only need to claim that a duty to advance the democratically defined public good must be framed in a way that allows individuals to participate in institutions that advance the public good in indirect ways. In the next section, I outline what would be required to explain what is wrong with capital strikes in a way that avoids this problem.

## **7.2 Capital strikes as a problem for impartial instrumentalism**

Normativity enters into Christiano's account through the positing of citizens' fundamental democratic duties. By contrast, according to impartial instrumentalism, democracy is justified through its decisions rather than by non-instrumental features of its processes. Democratic processes are valuable to the extent that, without relying on substantive moral-political premises, they can be judged as more likely to produce better decisions than alternative political systems. Given this different starting point, impartial instrumentalism approaches capital strikes quite differently to Christiano's account.

An account of what's wrong with capital strikes from the standpoint of impartial instrumentalism needs to have two features. First, it needs to be impartial: it needs to identify what's wrong with capital strikes without appealing to any particular substantive moral-political perspective. Second, it needs to be instrumental: it needs to show that capital strikes have an important impact on political decisions. To be instrumentally problematic, capital strikes need to affect what gets decided, not just how things are decided. This section focuses primarily on the first of these requirements; the remainder of the chapter addresses the second.

An impartial reason for objecting to capital strikes can be found in the motivation principle. Capital strikes influence government decisions in a way that is different to deliberately counter-majoritarian institutions such as supreme courts.



Institutions like courts are designed to promote justice or the common good, and their members are supposed to decide cases with this goal in mind. Capital strikes, on the other hand, are unintended products of investors aiming for personal profit. To the extent that political decisions are determined by capital strikes, they are the outcome of self-interested decisions rather than attempts to promote the good of the community. Thus, according to the motivation principle, to the extent that they affect outcomes, capital strikes tend to reduce the quality of democratic decisions.

Given the nature of capital strikes, any tendency they may have to push democracy in a beneficial direction can only be unintentional and accidental. By relying on a substantive moral-political perspective, one might nonetheless claim that capital strikes have a positive impact on social justice. If you believe redistribution is immoral, and that capital strikes deter redistribution, you might think that a political system featuring capital strikes is superior to one without it. A more sophisticated version of this argument starts from the belief, derived from public choice theory, that government tax powers do not benefit the public, but only swell the size of government itself, leading to a deadweight social loss.<sup>19</sup> Those who find this argument sufficiently persuasive may conclude that capital strikes have a beneficial effect because they counteract this tendency.<sup>20</sup> However, defending capital strikes using a first-order policy stance against taxation is contrary to the requirement of impartiality. It is a form of direct instrumentalism.

Any defence of the self-interested aspect of capital strikes faces the same general problem which I identified with self-interest driven mechanisms in politics in section 3.4 and in chapter five. In section 3.4, I illustrated such mechanisms by looking at the idea that generalised self-interested voting promotes public utility. Because they rely on self-interest, these mechanisms lack robustness in two ways. First, they require stringent empirical conditions on the structure of the interaction and the strategies that self-interested actors may employ (no polluting in markets, no logrolling in voting). Second and more importantly for present purposes, self-interest-based mechanisms are not robust to different perspectives on what constitutes goodness in political decisions. They rely on a more limited subset of

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<sup>19</sup> Reuven S. Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State', *Harvard Law Review* 113, no. 7 (1 May 2000): 1614–16.

<sup>20</sup> Hardin, 'Deliberative Democracy', 244.

substantive perspectives. Because of this, it is difficult to argue in a general, impartial way that allowing self-interest to affect political decisions is likely to produce good outcomes. This is especially clear when only the self-interest of a limited subsection of the population has an influence, as is the case with capital strikes in an unequal economy.

This said, we should be careful not to take the condemnation of self-interest in politics too far. Markets can have a useful epistemic function even within impartial instrumentalism. On closer inspection, some examples of capital strikes given in previous work turn out not really to impede policies so much as reveal their unavoidable costs. So, if a democracy decides that the environmental benefits of some particular measure are outweighed by the reduction it would cause in economic growth, this need not imply any sinister influence of the market. It may of course be wrong (people may undervalue the environment), but that is a separate issue. Whatever they decide, people have to weigh up the costs and advantages of the proposal. This would be true whatever economic system was employed. If markets function well, they will help with this deliberative weighting, because prices will convey information about the relative scarcities of commodities and the costs and benefits of different ways of doing things, in the simplest possible way.<sup>21</sup> The information that market prices can provide ultimately depends on economic agents' private tastes and interests.<sup>22</sup> However, this does not make this information inadmissible for impartial instrumentalism, because almost all perspectives are likely to regard information about interests and efficiency as useful for democratic decision-making. To the extent that markets are properly competitive, the prices they produce allow democracies to reach better informed decisions.

We thus need to distinguish carefully between two different functions markets can play in the political system. On the one hand, self-interested market activity can produce prices which can provide information to political decision-makers. This role for markets can be acceptable and even positive within impartial instrumentalism so long as markets merely provide information. Political decision-makers then have to decide how to react to this information on the basis of their own normative goals and perspectives. Political decision-makers remain free to choose

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<sup>21</sup> Hayek, 'The Use of Knowledge in Society'.

<sup>22</sup> O'Neill, *The Market*, chaps 2–3.

the goals of state policy, and markets only provide information about the trade-offs between these goals. On the other hand, capital strikes would become problematic from the standpoint of impartial instrumentalism if they not only conveyed information about costs and benefits of different means towards public ends, but actually influenced the choice of ends to be pursued. This would take us beyond the positive epistemic role of markets in communicating interests and into the territory of naked interests determining democratic decisions. This distinction is subtle but important. To determine whether capital strikes cross the boundary between communicating information and influencing decisions, we need to investigate whether there are any goals which democracies might want to pursue that are systematically impeded by capital strikes. This is what I will do in the remaining three sections of the chapter.

The self-interested nature of capital strikes offers an impartial way of explaining why they are problematic from a democratic standpoint. However, if we are also being instrumental in our approach, an account of what's wrong with capital strikes also needs to show that capital strikes do have a real impact on decisions. We need to show that capital strikes systematically influence political decisions in favour of particular social groups or particular moral-political perspectives.

This instrumentalism marks an important difference between my account of capital strikes and Christiano's deontological account. Christiano's account implies that wrongdoing occurs whenever the state's chosen means to its goals are impeded by capital strikes. The wrongness of capital strikes consists simply in the duty-violations of capital strikers, no matter the consequences. By contrast, I claim capital strikes are regrettable if and only if the state has no other equally good means to advance its goal. The wrongness of capital strikes is that they influence which goals the state should pursue in a way that is traceable only to self-interest. Consider again the example of a choice between a minimum wage and tax-transfers as means to achieve a distributive goal. Christiano's account implies there is something wrong with employers frustrating the minimum wage policy even if an alternative tax-transfer policy is available. By contrast, I claim that as long as the state has some effective means to achieving its goals, we should not complain about other less effective means to those goals being blocked by capital strikes. Indeed, it seems to me that if capital strikes push the state to adopt more effective means to its ends, this is something to positively welcome. It can be classed as an instance of markets in

communicating the real costs and benefits of different means to given ends. However, if other means towards distributive goals were also compromised by capital strikes, then we could say that capital strikes reduce the value of democracy according to impartial instrumentalism. As a deontological account, Christiano evaluates capital strikes based on whether or not democratic duties are observed. As an (impartial) instrumental account, I evaluate capital strikes according to the effects they have on the goals democracies pursue.

The remainder of the chapter ascertains whether there are some goals that democracies might want to pursue that are systematically impeded by capital strikes. In the next section, I ask whether capital strikes necessarily impede the state's ability to tax investors, even in a closed economy. In the following two sections, I ask whether capital strikes impede the state's ability to tax and regulate businesses in an open economy.

### **7.3 Taxing capital in a closed economy**

This section looks at the threat of capital strikes in a closed economy. It focuses specifically on whether capital strikes impede the taxation of capital, for reasons I explain below. I test several different types of taxation for their vulnerability to capital strikes in a closed economy. I show that in a closed economy there are policy tools for taxing capital without triggering the negative effects of capital strikes. This demonstrates that markets do not inherently or necessarily reduce democracy's (impartially assessable) tendency to make good decisions. The interest of this claim will become more apparent in the next section, where it will allow us to see that the real problem of capital strikes is to do with the structure of international trade.

The idea of a capital strike was originally developed to explain obstacles to taxing capital. Socialists and Marxists such as Kalecki and Block sought to use capital strikes to explain why democratic governments were so timid in taxing investors. However, it might be asked whether the focus on taxation is not too narrow. Might there be non-tax policies and non-distributive goals that would be constrained by capital strikes, even if taxes and distribution are not? I think this is unlikely, for three reasons. First, taxing capital is the most direct possible assault on the interests of investors. If capital strikes are ineffective in this case it seems likely they will be

ineffective elsewhere too. Second, as I mentioned in the previous section, when it comes to the negative economic effects of non-distributive policies, it is more likely that investors' responses reveal the genuine, unavoidable costs of these policies rather than impose some kind of additional cost or constraint. Finally, when businesses resist non-distributive policies, it is often possible to explain what's wrong with this in other ways. For example, banks might resist regulations to reduce systematic risk in the financial sector. If so, the wrongness of this can be explained in terms of the wrongness of exploiting market failures such as information asymmetries and monopoly power.<sup>23</sup> In the end, whether capital strikes impede specific non-distributive policies can only be established for sure by analysing each particular case. However, I will take it that if we can show that capital strikes do not impede taxing capital, this is strong evidence that capital strikes do not influence democratic choices more generally.

Taxing capital is not an end in itself, but it can stand in for those ends for which it is an indispensable means. The most obvious of these is redistribution, itself a means to promote moral goals such as economic equality or sufficiency. While many people earn income from both labour and capital, ownership of capital is much more unequally distributed than income from labour. Under these circumstances, any attempt to redistribute from the rich to the poor without taxing capital will be hobbled if not impossible. However, although redistribution is the most obvious goal of taxing capital, it is not the only one. Perhaps a democracy seeks revenue for some non-distributive grand project, like constructing the Eiffel Tower. Even if it would be economically feasible to raise enough money from labour taxation alone, if the democracy has the composite goal of (a) building the Eiffel Tower, and (b) doing so in a way that does not disproportionately burden workers or the poor, this goal will require taxing investors. In saying that there is something wrong with capital strikes constraining capital taxation, I am not saying that capital should be taxed, and that therefore obstacles to taxing capital are bad. Rather, my argument is that we should decide whether or not to tax capital democratically, in a way that is not determined by the naked self-interest of investors through capital strikes.

I focus specifically on capital taxation rather than taxes on labour. Taxes on capital disincentivise investment, whereas taxes on labour disincentivise work. For

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<sup>23</sup> Heath, 'A Market Failures Approach to Business Ethics'.

investors, the alternative to investment is consumption; for workers, the alternative to work is leisure. My question is whether taxes on capital affect investors' investment choices in ways that defeat the purposes those taxes are raised for in the first place. An analogous set of issues surrounds labour taxation. With labour taxation, the normative question is how far it is permissible for highly talented individuals to respond to progressive taxation by withdrawing from the labour market. In political philosophy, this question has largely been addressed under the banner of the "basic structure" debate.<sup>24</sup> I will leave this debate aside to focus on the somewhat different issues raised by capital taxation.

In what follows, I will focus on what we might call the constraints of *economic feasibility*. I thus ignore what we might call the constraints of *political feasibility*: constraints on government policy caused by factors internal to the political system. Such constraints might be legitimate (a majority of voters simply disagree with the policy), or pathological (such as the ideological effects discussed in the previous chapter). Even if there are ways of taxing investors that avoid economic feasibility constraints, these policies may nonetheless face political feasibility constraints. Having discussed a political, ideological mechanism in the previous chapter, this chapter focuses on economic constraints. This will help us distinguish between the economic and political aspects of the problem. Theorists like Kalecki and Block developed ideas about capital strikes because they wanted an explanation for why democracies were not more socialist, and they wanted to avoid the explanation that voters simply disliked socialism. The point of my analysis is to show how far pro-investor policy decisions really can be ascribed to the economic constraints of capital strikes, rather than to political constraints (legitimate or pathological). I will show that in a closed economy, there is no structural pro-investor bias in workings of the market itself. Pro-investor decisions in such a situation must be explained politically. However, in an international context there are genuine economic constraints on democratic politics.

Having set out the purpose and limits of the exercise, I now turn to the economics of capital taxation. The vulnerability of simple income taxes to capital

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<sup>24</sup> e.g. G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass: Harvard University Press, 2008).

strikes has been demonstrated by Przeworski and Wallerstein.<sup>25</sup> I follow Przeworski and Wallerstein in making two simplifying assumptions. First, I assume savings are equal to investments. In reality, the two can fall out of sync, but the issues discussed here will not make that more or less likely, so I will bracket the distinction and speak only of investment. Second, I lump corporate-level profit taxes and individual-level income taxes together into a general category of “income tax”. The arguments for and against having an additional layer of taxation at the corporate level (rather than just taxing dividends when they are finally distributed to shareholders) are complex, but again they run orthogonally to the issues discussed here.

Without going into the details of their model, Przeworski and Wallerstein show that rational investors will pay income taxes only out of money they would otherwise invest. (If the tax rate gets high enough, they will begin liquidating their assets). This means the state is faced with a straightforward trade-off between how much revenue it can raise from investors through an income tax, and the aggregate rate of private investment in the economy. This does not mean that an egalitarian government limited to income taxes should not tax investors at all; it just means that it would always have to be wary of killing the goose that lays the golden eggs.

Having established that simple income taxes (including corporate taxes) are highly vulnerable to capital strikes, Przeworski and Wallerstein consider the vulnerability of more sophisticated forms of taxation. If the state is concerned with maintaining private investment while raising revenue, the most obvious course of action is to exempt investment from taxation. Exempting investment from taxation would remove any disincentives to invest, and place the burden of taxes entirely on consumption. Although a simple income tax is vulnerable to capital strikes, differential taxation of investment and consumption is not.

Exempting investment from taxation is liable to provoke two worries that can be quickly dispelled. The first is that investors will escape taxation by shifting their income from consumption to investment (or for corporations, shifting from dividend payments to investment). It is unclear why investors would want to respond in this way, but even if they did, the state could still raise all the revenue it wished to from consumption. As long as they want to eat, investors will have to consume at some point. At this point, the state can set consumption taxes as high as

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<sup>25</sup> Przeworski and Wallerstein, ‘Structural Dependence of the State on Capital’.

is necessary to produce the desired amount of revenue. A second common misunderstanding is that exempting investment from taxation is necessarily regressive, because poorer people tend to consume a higher proportion of their income compared to richer people. Taxing consumption through sales taxes is indeed regressive for this reason. However, consumption can also be taxed by using the ordinary income (and corporate) tax system, and then allowing individuals and firms to claim tax rebates on the money they invest. In this way, the level of progressivity can be adjusted in the same way it usually is through the ordinary income tax system. Most states already do provide tax breaks for investment in various ways, and to different extents.

The possibility of replacing simple income taxes with consumption taxes allows a state to tax investors as much as it wishes, and use the revenue for whatever ends it chooses. However, Przeworski and Wallerstein do not consider whether democracies might also want to pursue goals that are difficult to accomplish using consumption taxes alone. A democracy might want to tax wealthy investors not only to raise revenue, but also out of a belief that the unequal distribution of wealth is itself normatively problematic. They might agree with James Meade that “an unequal distribution of property means an unequal distribution of power and status even if it is prevented from causing too unequal a distribution of income.”<sup>26</sup> If we want to attack wealth inequality directly out of motives such as these, it would be much easier to do so using wealth, inheritance or simple income taxes rather than consumption taxes. This suggests that the problem with capital strikes might be that they constrain governments’ abilities to pursue wealth equality.

However, even this concern about capital strikes in a closed economy can be shown to be exaggerated. This is because there is another way of maintaining optimal levels of investment while raising taxes, which can be described as ‘compensatory investment’. Put simply, reduced investment from tax-payers can be compensated by increased investment from transfer-recipients. Przeworski and Wallerstein miss this possibility because their model makes the simplifying assumption that classes of workers and capitalists are rigidly distinct and that capitalists are the only people

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<sup>26</sup> J. E. Meade, *Efficiency, Equality and the Ownership of Property* (London: Allen & Unwin, 1964), 39; See also Martin O’Neill and Thad Williamson, eds., *Property-Owning Democracy: Rawls and Beyond* (Chichester: Wiley-Blackwell, 2014).



who ever invest. This assumption initially seems reasonable as a way of abstracting away from the complexities of the real distribution of income and wealth, but it turns out to have important consequences.

Compensatory investment by the state has been proposed as a possible solution for capital strikes before, for example by Samuel Bowles and Herbert Gintis.<sup>27</sup> If higher taxes reduce private investment, the government could respond by using its tax revenues to increase investment in those sectors of the economy which it controls. Public compensatory investment has several problems. One problem is that public and private investment may be imperfect substitutes, since they tend to be directed to different sectors. Another problem, noted by Bowles and Gintis, is that avoiding capital strikes through compensatory investment forces governments of the left to be more radical than they originally intended: governments may have just wanted new progressive taxes to fund public goods, but now they find themselves creating a new publically owned state sector.<sup>28</sup> Compensatory state investment puts us on a track towards continual expansion of public ownership, which may not lead to a destination we wish to arrive at. Taken together, these problems mean that compensatory public investment is at the very least unlikely to be a fully satisfactory remedy for negative effects of capital strikes.

Compensatory investment does not necessarily have to take place through the state as a conscious policy, however. It could also take place through the private recipients of redistribution investing some of their windfall. This could happen directly with cash benefits, or indirectly if in-kind benefits free up space elsewhere in the budget. Private compensatory investment can lead to a level of aggregate investment which is better for poorer people than the previous pre-tax level of aggregate investment. This defeats the worry that capital strikes against redistributive taxation might leave poorer people worse off than they were before the attempted redistribution. To show this, we need to consider two potential problems with the idea. First, can we be sure that there will be enough tax revenue to compensate for the reduction in investment in the first place? Second, if transfer

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<sup>27</sup> Bowles and Gintis, *Democracy and Capitalism*, 89.

<sup>28</sup> cf. Harry Brighouse, 'Transitional and Utopian Market Socialism', *Politics & Society* 22, no. 4 (1 December 1994): 569–84.

recipients invest at a lower rate than tax-payers were previously investing at, might this reduce the welfare of recipients?

In Przeworski and Wallerstein's model, the shortfall in investment caused by an income tax on investors is exactly equal to the revenue generated by this tax. Przeworski and Wallerstein note that "with a tax on income from capital, tax payments come entirely out of investment."<sup>29</sup> However, they do not explicitly state that the contrary proposition also follows from their analysis: with a tax on income from capital, reductions in investment are directed entirely towards tax payments. Thus, investment shortfall is equal to tax revenue. A formal proof that this conclusion follows from Przeworski and Wallerstein's analysis is given in the Appendix.

To see why this makes sense, consider the contrary possibility: that the shortfall in investment would be greater than the revenue raised. For this to be the case, investors would have to not merely reduce their spending on investment in order to pay the tax, but additionally increase their absolute spending on consumption, further reducing their spending on investment. This would be very strange behaviour and would (as Przeworski and Wallerstein demonstrate) be to the detriment of their long-run utility. Indeed, it is not surprising that Przeworski and Wallerstein focus instead on the claim that tax payments come entirely out of investment (and not at all out of consumption), since this is the much striking result of their analysis. Tax revenue and the investment shortfall are equivalent because, in a closed economy, the only thing investors can do with their capital other than investing it is to consume it. As the next section shows, an open economy would very significantly alter the picture. It might also be helpful to bear in mind that investors' responses to taxes on their income are quite different to workers' responses to taxes on their income, since workers' decisions about how much to work also depend on their preferences for leisure. Consequently, depending on the shape of workers' utility functions, a small increase in taxes on labour income could potentially generate a large shift from labour to leisure, in a way that has no equivalent in the case of capital investment.

Nonetheless, it is clear that the exact equality of the investment shortfall and the revenue generated is a feature of the simplified assumptions of Przeworski and

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<sup>29</sup> Przeworski and Wallerstein, 'Structural Dependence of the State on Capital', 16.

Wallerstein's model, and some of these assumptions might be challenged. In particular, Przeworski and Wallerstein make the simplifying assumption that output is a linear function of capital investment.<sup>30</sup> If this assumption is relaxed, then it is possible that an initial fall in investment in response to the tax might tip us over into a section of the graph with a lower return on investment, thus precipitating a more general reduction in investment. Yet, there is no reason to think that this is generally likely to be the case. Moreover, other aspects of Przeworski and Wallerstein's model tend in the opposite direction, notably their "neoclassical" treatment of investment "as the result of an intertemporal allocation of consumption by owners of capital."<sup>31</sup> By contrast, a more Keynesian approach which incorporated "the importance of investing to satisfy future demand" would tend to suggest that the revenue generated by a tax on income from capital would exceed the resulting shortfall in investment.<sup>32</sup> This is because putting more money in the pockets of transfer recipients would boost aggregate consumption, encouraging additional investment to meet this demand. For the purpose of generating a rough picture of the relationship between tax revenue and investment in the long run, Przeworski and Wallerstein's assumptions seem reasonable. In a closed economy, the shortfall in investment in response to a tax is unlikely to be larger than the revenue generated.

The preceding three paragraphs established that there is likely to be enough tax revenue available to fully make up the shortfall in investment caused by taxes on income from capital. If recipients invested the entirety of their transfers, this would entirely negate the effect of the capital strike, maintain aggregate investment at its pre-tax level. However, this is very unlikely to occur in practice. In reality, poorer people confronted with additional income are likely to invest less and consume more of it compared to richer people. This is the phenomenon of the declining marginal propensity to consume. Due to this effect, the aggregate amount of investment in the economy will be lower after a redistributive investment income tax policy than before it. It might therefore seem that a capital strike will go ahead anyway. However, this concern can be addressed in two ways. One response is to say that the tax system can be further tinkered with to provide incentives for poorer people to

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<sup>30</sup> Ibid., 14.

<sup>31</sup> Ibid., 27.

<sup>32</sup> Ibid.

invest a sufficiently large portion of their income. A much more direct way of dealing with this concern is to question the assumption, unchallenged so far, that a decline in aggregate investment is necessarily a bad thing. Rather than seeing any decline in investment as negative, we should think more carefully about what the optimal rate of investment is for different sections of society. Existing work on capital strikes has tended to fetishize investment without properly examining its desirability in the first place.

To make this argument, let us define more precisely what the concern is that we are trying to assuage. The position we are addressing is one which claims that taxes on income from capital are blocked by capital strikes in a closed economy because poorer recipients of tax-transfers will be left worse off as a result of the redistributive policy, because of reduced aggregate investment in the economy. For this to be the case, it must be that the post-tax level of aggregate investment is less optimal for transfer recipients than the pre-tax level of investment. This implies in turn that when transfer recipients have a greater say over the aggregate level of investment in society, the level of investment which results is worse for transfer recipients. After all, what the redistributive policy is doing is taking an income stream away from investors (who chose to invest it), and giving it to recipients (who choose what they want to do with it). Thus, the position implies that transfer recipients who choose to consume some their transfer payment rather than investing it are somehow being irrational in doing so. This is a strong claim, and one we should seek to avoid. Instead, we would expect that a given rate of aggregate investment in society is optimal for different social groups according to the share they have in determining that rate. Przeworski and Wallerstein's model, for example, predicts that workers will choose a lower rate of growth compared to capitalists.<sup>33</sup> It would be very surprising if there was an investor class with superior knowledge of what rate of investment would be optimal for society in general (and motivation to act on that knowledge). We should reject the idea that transfer recipients make irrational investment decisions. This idea is implied by the concern that a redistributive income tax policy will be blocked by a capital strike, and so we should reject this concern too.

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<sup>33</sup> *Ibid.*, 16.

There are numerous possible explanations of the declining marginal propensity to consume which do not involve impugning the rationality of poorer consumers. The declining marginal propensity to consume would be irrational if investment were just deferred consumption. But to a certain extent investment is also motivated by the desire to hold wealth as a form of insurance against unanticipated risks, and to hold wealth for its own sake and for the pleasure of bequeathing it to one's heirs. The quote from James Meade with which we began this particular enquiry continues as follows:

A man with much property has a great bargaining strength and a great sense of security, independence, and freedom; and he enjoys these things not only vis-a-vis his propertyless fellow citizens but also vis-a-vis the public authorities. He can snap his fingers at those on whom he must rely for an income; for he can always live for a time on his capital.<sup>34</sup>

Meade points to additional psychological and other benefits of wealth which are not reducible to the value of wealth as a store of future consumption. Enjoying these goods provides an additional motive for investment, beyond what would be required for deferred consumption. These additional benefits of investments are luxury goods: things which people tend to demand more of (relative to other goods, such as basic necessities) as their incomes increase. In Fred Hirsch's terms, investment is thus an intermediate good which contributes to several different final goods which consumers really care about.<sup>35</sup> Clearly, deferred consumption remains the most important motive for investment. But because investment also contributes to other final goods which are luxury goods, investment as a whole is partially a luxury good. Hence, poorer people maximise their welfare by investing a lower proportion of their marginal income compared to richer people.

To be clear, I am not denying that investment is fecund – that the main motive for investing is that by deferring consumption now, one can consume a larger amount in the future. This fecundity of investment is what drives Przeworski and Wallerstein's original conclusion that capital strikes leave workers facing a trade-off

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<sup>34</sup> Meade, *Efficiency, Equality and the Ownership of Property*, 39.

<sup>35</sup> Fred Hirsch, *Social Limits to Growth* (London: Routledge, 1978), chap. 4.

between wage growth and wage-share of national income.<sup>36</sup> However, this conclusion is also driven by their simplifying assumption that society is rigidly divided into classes of capitalists who do not work and workers who do not invest. If we relax this assumption, we can see that the recipients of transfer payments too can benefit from the fecundity of investment, rather than having to consume the entirety of their income, as Przeworski and Wallerstein's model implies. My point is merely that we should not think there is necessarily something unfortunate going on if transfer recipients invest at a lower rate than taxpayers did before the imposition of the tax.

It might be objected that the optimal level of investment for individuals does not necessarily produce the optimal level of investment at a collective level. Familiar market failures surround the funding of public goods, and Keynesian economics has identified other irrationalities in collective saving and investment decisions. However, these problems have their own well-established remedies. More importantly, none of them seem especially related to the issue here, which concerns the relationship between the distribution of income and the optimal level of aggregate investment. The same thing can be said about issues of justice between generations: investors may well discount the future at normatively indefensible rates, but this problem is best dealt with separately on its own terms.

Within impartial instrumentalism, capital strikes are problematic only insofar as they systematically impede democracies from pursuing whichever reasonable ends they choose. The purpose of this section has been to argue that, in a closed economy, worries about capital strikes are unfounded. I have focused on whether capital strikes stand in the way of taxing investors. This was because many goals that democracies might want to pursue will require financial contributions from investors, and because taxing investors is the thing most likely to come up against a capital strike. The discussion of consumption taxes showed that, in a closed economy, capital strikes do not impede states from raising as much money from investors as they wish. These funds might be used for any purpose the democracy might decide on, whether it is for boosting the consumption of the poor or for some grand project like the Eiffel Tower.

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<sup>36</sup> Przeworski and Wallerstein, 'Structural Dependence of the State on Capital', 15.

The discussion of private compensatory investment was meant to deal with a residual concern that one important goal democracies might decide to pursue (reducing wealth inequality), could not be advanced by consumption taxes alone, and so might be blocked by capital strikes. More specifically, the concern was that it would not be possible to reduce wealth inequality without harming the welfare of the poor (due to reduced aggregate investment). I showed that, on the contrary, straightforward redistribution funded by taxes on income from capital will still have a positive effect on the welfare of their recipients, even if they lead to a fall in aggregate investment. In saying that even simple income taxes are not constrained by capital strikes, I do not mean to imply that there is no purpose to the differential taxation of consumption and investment. From a revenue-raising perspective, consumption taxes remain superior. Compared with income taxes, consumption taxes are able to capture some flows of income that would otherwise be directed to the private consumption of investors.

The generally optimistic picture painted in this section is subject to an important caveat. Even if capital strikes do not stand in the way of taxing capital in the long run, there are transition costs. For consumption taxes, the danger concerns the anticipation period between announcement and implementation.<sup>37</sup> Investors will tend to reduce investment during the anticipation period, aiming to consume now while consumption is cheap rather than later when it will be taxed. When it comes to simple income taxes, transition costs go beyond worries about anticipation periods. Even when aggregate demand remains constant, the friction caused by shifts between investment and consumption or between different types of investment can be painful. Despite these concerns about transition costs, the potential for capital strikes in a closed economy is much more limited than many have feared. However, once we drop the assumption of a closed economy, the effects of capital strikes change significantly.

## 7.4 International capital flight

Domestic capital strikes ultimately proved unproblematic because they did not affect the choice of ends that democracies could pursue. Market reactions to

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<sup>37</sup> *Ibid.*, 23.

government interventions thus retained their presumptive desirability as a means to efficiently allocate resources and provide information to political decision-makers about costs and benefits. In an international context where we can talk about capital flight rather than capital strikes, this is no longer the case. Capital flight is the vector for tax and regulatory competition. Tax and regulatory competition is normatively problematic because it pushes states towards weakening any policies (including taxes) that are contrary to the interests of investors.<sup>38</sup> This section describes how tax and regulatory competition stops states from pursuing reasonable goals.

Tax and regulatory competition occurs when economic (and therefore fiscal) interdependence is combined with a world in which some jurisdictions have more capital-friendly laws than others. Such competition could not occur if states were completely autarkic, and nor could it occur if all parts of the world had the same policies. To see why tax competition occurs, imagine the simplest possible “baseline model”: two identical countries sharing a common international tax base.<sup>39</sup> The first country has an incentive to cut tax rates in order to increase tax revenues by attracting some of the tax base of the second country. But the second country can easily win back that tax base by cutting its tax rates too. The two countries are left with the same share of the tax base they began with, only now with a lower level of taxation. The countries are in a prisoners’ dilemma situation that pushes tax rates and revenues in both countries below the level they would otherwise choose. Countries will also be incentivised to shift their tax burden from relatively mobile tax bases (mainly capital) to the relatively immobile (mainly labour), with regressive distributive consequences. One important assumption in this simple model is that

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<sup>38</sup> Peter Dietsch and Thomas Rixen, ‘Tax Competition and Global Background Justice’, *Journal of Political Philosophy* 22, no. 2 (1 June 2014): 150–77; Miriam Ronzoni, ‘The Global Order: A Case of Background Injustice? A Practice-Dependent Account’, *Philosophy & Public Affairs* 37, no. 3 (1 June 2009): 229–56; Gillian Brock, ‘Taxation and Global Justice: Closing the Gap between Theory and Practice’, *Journal of Social Philosophy* 39, no. 2 (1 June 2008): 161–84; Alexander W. Cappelen, ‘The Moral Rationale for International Fiscal Law’, *Ethics & International Affairs* 15, no. 1 (1 March 2001): 97–110; Avi-Yonah, ‘Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State’.

<sup>39</sup> Phillipp Genschel and Peter Schwarz, ‘Tax Competition and Fiscal Democracy’, in *Politics in the Age of Austerity*, ed. Wolfgang Streeck and Armin Schäfer (Cambridge, UK: Polity Press, 2013), 59–83.



the two countries are of similar size. Countries sufficiently smaller than their neighbours can actually increase their net revenues by becoming tax havens. This is because for smaller countries, the increase in the tax base has a much greater effect than the decrease in the tax rate. However, these benefits for small tax havens only occur at the cost of greater losses for their larger neighbours. Many empirical studies have attempted to test the theoretical predictions explained above (and those based on more sophisticated models), with mixed results. Put crudely, the consensus has been that tax competition does exist, although it is not as severe as the simple model would predict. Real investors have a certain additional bias towards their home countries, and domestic political structures can slow the race to the bottom.<sup>40</sup>

For the sake of simplicity, this example has focused on taxes. However, the same dynamic will also put downward pressure on regulations that reduce the profitability of investments, such as remedies for market failures. This means that capital flight is not only a threat to redistribution, but also to efficiency: even economically equal countries would still feel downward pressure on their attempts to curb negative externalities and provide public goods. The economics literature has largely focused on tax competition because it is easier to measure, but regulatory competition may be just as much of a problem.

Whereas domestic capital strikes can often be characterised as efficient responses to the real costs of policies, the same is not true of international capital flight. When choosing between two investment opportunities, so long as both are under the same tax and regulatory system, investors will choose the opportunity with the lowest costs and greatest benefits. However, when regulatory systems differ, investors will choose what would otherwise be much worse investments merely because taxes in that country are lower.<sup>41</sup>

The solutions to capital strikes in a closed economy will not work on capital flight in open economies, because investors with access to international markets have

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<sup>40</sup> Michael Devereux and Simon Loretz, 'What Do We Know about Corporate Tax Competition?', Working Paper (Oxford University Centre for Business Taxation, 2012), <https://ideas.repec.org/p/btx/wpaper/1229.html>; Genschel and Schwarz, 'Tax Competition and Fiscal Democracy'.

<sup>41</sup> Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State', 1604–16.

a much improved outside option. In a closed economy, when investment becomes less lucrative, investors can only respond by shifting to greater consumption. This is why consumption taxes work. In an open economy however, investors also have the option of shifting their investments abroad. This means they can sidestep consumption taxes. It also means that simple income taxes on investors can actually have a negative impact on the welfare of the non-investors they are supposed to help – something which I argued will not happen in a closed economy. When investors can move their investments abroad, the reduction in investment caused by higher taxes might be greater than the revenue they raise, meaning the tax revenue is insufficient to match the gap in investment. Capital outflow cannot continue indefinitely, and will eventually be balanced by currency depreciation (in a floating exchange rate system) or monetary tightening (in a fixed exchange rate system). But either way, significant damage will be done to the interests of non-investors.

On an impartial instrumentalist account, capital strikes are only problematic in the context of open international markets. Under these conditions, capital strikes (or rather, capital flight) exert a systematic influence on how easy it is for democracies to pursue different options, an influence that does not simply reflect the real, unavoidable costs of policies. The dynamic of tax and regulatory competition exerts downward pressure on taxes and regulation, pushing countries towards low-tax, light-regulation regimes.

## **7.5 Dealing with capital flight**

In section 7.3, I showed that although capital strikes in a closed economy initially appear powerful, they are toothless against properly designed policies. Unfortunately, the same is not true of international capital flight. This section surveys the two main approaches to reducing capital flight. The first is to use international co-ordination to reduce the national differences that are one of the necessary conditions for tax and regulatory competition. The second is to use capital controls to reduce the fiscal interdependence that is the other necessary condition. Evaluating these proposed solutions has obvious interest in its own right. However, this exercise also has diagnostic value in pointing out the true nature of the problem with capital strikes. By showing that there are no solutions to capital flight that do

not carry significant normative drawbacks of their own, I show that the international dimension is crucial to explaining what's wrong with capital strikes.

The drawbacks of international co-ordination vary depending on the type of tax and regulatory competition under consideration. I will leave aside the normatively simpler issue of "paper" profits, and focus on competition over real investment (FDI).<sup>42</sup> There are normatively relevant differences between two motives countries might have for cutting tax rates below that of their neighbours. First, countries might be deliberately trying to lure capital flight from abroad. This is exemplified by Ireland, which cut its corporate tax rate to 10% with the explicit goal of attracting foreign direct investment.<sup>43</sup> Second, countries might choose to cut taxes or regulations due to genuine fiscal disagreement. They might prefer a smaller state just because they judge that kind of society to be superior. In this case, from their perspective the investment diverted to them is just a positive side-effect.

Whereas deliberate tax competition is an attempt to profit from the ruin of others, genuine fiscal disagreement is morally more ambiguous. The policy of a low-tax nation (let us call it Britain), would still have an adverse impact on a high-tax nation (let us call it France), even if Britain were motivated by genuine fiscal disagreement. This will put pressure on France to bring its tax rates closer to British levels. But it is not obvious that Britain should behave differently out of regard for France. The fiscal preferences of the two countries are simply in conflict: they cannot both have their way as long as their economies remain interconnected.

Normatively, eliminating deliberate tax and regulatory competition would be straightforwardly positive. However, the practical problems are formidable. Even if the political will necessary for co-ordination was forthcoming, distinguishing between deliberate competition and genuine fiscal disagreement would be extremely difficult. Peter Dietsch and Thomas Rixen have proposed a system under which a high-tax country that has been harmed by the low-tax policies of another country would be able to bring a quasi-judicial claim before an International Tax Organisation.<sup>44</sup> The plaintiff nation would be excused if it could show that it cut taxes because of genuine fiscal disagreement – that is, for reasons other than luring

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<sup>42</sup> Dietsch and Rixen, 'Tax Competition and Global Background Justice', 157.

<sup>43</sup> *Ibid.*, 161.

<sup>44</sup> *Ibid.*, sec. III.

investment from other countries. Dietsch and Rixen are mindful of the danger that plaintiffs will find it too easy to produce spurious excuses. They hope that, as has occurred with the WTO, arbiters will come to “rely on objectively observable proxies for the defendant’s intentions.”<sup>45</sup> However, I think this underestimates the extent to which the complexity and controversy of macroeconomics can provide plausible alternative explanations for most tax competition measures. Nonetheless, even if Dietsch and Rixen’s proposal would be unable to prevent all deliberate tax-competition, it could at least rule out measures like preferential tax regimes for foreign investors, that are difficult to justify on the basis of genuine fiscal disagreement.

When it comes to genuine fiscal disagreement, even the most idealised system of international co-ordination would have significant normative drawbacks. Dietsch and Rixen argue that prohibiting countries like Britain from lowering taxes would unfairly prioritise the fiscal preferences of high-tax countries like France.<sup>46</sup> However, their suggestion of simply allowing tax competition to run its course is an equally arbitrary and unfair prioritisation of low-tax countries like Britain, because it completely ignores the negative effects of low British tax rates on France. The fairest level of harmonisation would be somewhere between the preferences of the two. Whether fair harmonisation would also be efficient (in terms of the preferences of each country) is another story. Moreover, any co-ordinated solution will reduce the freedom of both countries to set their own tax rates as they see fit. As a means of defending democracy’s freedom of action, this cure for capital flight may well be worse than the disease.

The alternative approach to mitigating tax competition is to use capital controls. This is the device Przeworski and Wallerstein use to make their analysis applicable in a global context.<sup>47</sup> If a state’s concern is to maintain domestic investment at a certain level, capital outflows are just as bad as investors gobbling up potential investment in the form of higher consumption. As such, a state concerned about this should tax capital outflows at the same rate as consumption. It might seem that the obvious practical advantage of capital controls is that they can be

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<sup>45</sup> *Ibid.*, 168.

<sup>46</sup> *Ibid.*, 162.

<sup>47</sup> Przeworski and Wallerstein, ‘Structural Dependence of the State on Capital’, 20.

immediately implemented unilaterally. However, permanent capital outflow controls have historically been opposed by the World Trade Organisation and the International Monetary Fund, and may even incur sanctions.

In addition to sanctions, capital controls have three significant “natural” disadvantages. Most importantly, capital controls discourage possible gains from trade. Investments will not be made where they would be most efficient. This is because domestic investors have to bear in mind the added cost of capital controls when considering whether to invest abroad, and foreign investors will be deterred from entering the country by the knowledge that they will find it expensive should they later choose to leave. This creates an absolute “deadweight” waste of economic welfare. The second disadvantage, which Przeworski and Wallerstein point out, is that capital controls only help countries that want to retain capital, and will be no help for those who want to attract it.<sup>48</sup> It is a solution for a first-world problem. Third, if our concern about tax competition is partly derived from a concern for democracy, we might be worried that capital controls can only be implemented in a somewhat undemocratic way. Anticipation effects are likely to be particularly strong with capital controls, with investors trying to get out quickly before the controls are implemented. To avoid this, effective capital controls will have to be introduced without warning in the dead of night. This means they cannot be subject to public deliberation beforehand.

Capital controls set up a trade-off between fiscal freedom and these three disadvantages, especially the loss of gains from trade. Economists have generally valued gains from trade highly enough that the first disadvantage is taken to be a knockout blow. One notable exception was J.M. Keynes.<sup>49</sup> He valued fiscal freedom as an enabler of economic experimentation, and saw the loss of gains from trade as an acceptable price to pay in order to preserve fiscal freedom against threats of capital flight.

To cement the conclusion that the problem with capital flight lies in international tax and regulatory competition, I have showed that attempts to reduce

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<sup>48</sup> Ibid.

<sup>49</sup> John Maynard Keynes, ‘National Self-Sufficiency’, *The Yale Review* 33, no. 4 (June 1933): 755–69; For context see James R. Crotty, ‘On Keynes and Capital Flight’, *Journal of Economic Literature* 21, no. 1 (1 March 1983): 59–65.

capital flight will necessarily either constrain the options available to national democracies (in the case of international harmonisation), or reduce welfare derived from gains from trade (in the case of capital controls). This is what I call the *capital flight trilemma*. States cannot pursue more than two of the following goals at the same time:

1. Taxes and regulations unfavourable to investors
2. Policy autonomy in relation to other countries
3. Gains from international trade in capital

Thus, a state using capital controls can retain a strong regulatory regime and national policy autonomy, but only at a cost to international trade. Alternatively, by taking part in a system of international co-ordination, a state can retain a strong regulatory regime while gaining from international trade, but only at a cost to national policy autonomy. Finally, by simply giving into tax and regulatory competition, a state can retain policy autonomy in relation to other countries while continuing to enjoy the benefits of international trade, but only at the cost of being unable to maintain a strong regulatory regime.

## Conclusion

Previous accounts of capital strikes have located the normative problem in the wrong place. I have shown that capital strikes do not necessarily violate a duty to directly promote the democratically defined public good, and nor do they impede a government's ability to pursue its ends in a closed economy. Instead, the real problem with capital strikes only arises when international markets are open. Under these conditions, capital strikes (or rather, flight) set up a structural dynamic that presents democracies with an ugly trade-off which I call the capital flight trilemma. Either democracies pay significant economic costs from reduced trade, or they accept an external influence on which social goals they will pursue – whether because they accommodate to the interests of investors, or because they bind themselves to international agreements.

The capital flight trilemma presents an important practical decision for democracies. Even just the more blatant forms of tax competition such as bank secrecy and preferential regimes for foreign investors contribute to hundreds of

billions of dollars of lost tax revenue worldwide.<sup>50</sup> Policy responses to capital flight should depend on empirical facts about the efficacy of tax and regulatory competition, and the quantity of economic welfare that would be lost from capital controls. However, this is also very much a topic for political theorists, because it raises difficult issues about the optimal extent of decentralisation. If the main drawback of international co-operation is international homogeneity and a loss of national autonomy, we need to return to the question of why and how far international diversity and national autonomy are valuable in the first place. The optimal extent of political decentralisation in the international system is a topic to which impartial instrumentalism should have something to contribute. In chapter five, I rejected certain arguments for decentralising political power to the federal level, and set out some of the moral costs of doing so. However, although these market-based arguments for decentralisation violated the principle of impartiality, this does not mean that impartial instrumentalism is committed to centralisation at the global level. An epistemic case for international decentralisation could be made along the lines of Keynes' argument that national autonomy facilitates epistemically valuable policy experimentation.<sup>51</sup> Impartial instrumentalism thus also needs to consider questions of constitutional design at the global level of inter-state relations.

Despite acknowledging the importance of tax and regulatory competition, I will close on a more positive note. It is all too easy to exaggerate the dangers of capital flight, because investors themselves have strong incentives to exaggerate them. When an investor or investor-friendly politician claims that we must endorse their preferred vision of society in order to keep up with the international race, the correct response in many cases is surely to echo Mandy Rice-Davies: "well, he would say that, wouldn't he?" In their analysis of the Australian mining case, Stephen Bell and Andrew Hindmoor conclude that the potential capital flight was quite manageable in purely economic terms.<sup>52</sup> The reason Labor politicians abandoned the tax was not because they really believed it would damage the economy, but because they believed that voters believed it would, and the politicians did not want voters to regard them as incompetent or irresponsible. Moreover, both the public's

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<sup>50</sup> Dietsch and Rixen, 'Tax Competition and Global Background Justice', 154–56.

<sup>51</sup> Bennett, 'Experiments in Distributive Justice and Their Limits'.

<sup>52</sup> Bell and Hindmoor, 'The Structural Power of Business and the Power of Ideas'.

perception of the risk posed and politicians' perception of the public's perception were strongly influenced by the spirited public relations campaign of the mining industry. Clearly, there is more empirical work to be done on this question, but Bell and Hindmoor's explanation of real-life capital strikes as primarily an ideological problem is compatible with my arguments about domestic capital strikes and the mixed empirical evidence on international capital flight.

This makes a difference to how we should think about other ways the influence of markets can reduce value which impartial instrumentalism ascribes to democracy. Capital strikes interact with the problem of money in politics that I discussed in the previous chapter. For diagnostic purposes, it has been helpful to separate out the two problems in order to understand the nature of the normative issues they raise. However, for practical purposes the two problems are not independent, and do not simply add up to give the total problem of pathological market influence on democracy. Instead, they multiply; the more of a platform the rich have, the more they are likely to use it to spread fears of capital strikes. And the more capital strikes are feared, the more the rich will use this as the content with which they persuade the public to accede to their demands. In defending democracy against the influence of markets, we should therefore be careful that we do not accidentally contribute to an ideological perception that capital flight is much to be feared and that tax and regulatory competition is inevitable.



# Conclusion

This thesis has sought to shed light on the justification of democracy and its relationship with the market. To conclude, I return to these overarching themes to ask what my findings imply about them, and how my work could be extended to provide more comprehensive guidance on these issues in the future. I will first look at where we are left in terms of normative principles for constitutional design, before returning to the idea that democracy should have priority over the market.

## **Normative principles for constitutional design**

### *Findings*

My first research goal was to give an account of the justification of democracy. According to the account I have called impartial instrumentalism, democracy is justified by its tendency to make good decisions in ways that can be impartially assessed. I defended this conclusion in two ways.

First, I showed that the combination of impartiality and instrumentalism was internally coherent. This required tackling an epistemological objection about the very possibility of making an instrumental assessment while being impartial about ultimate standards for good decisions. I argued that making inferences about the quality of decisions based on the epistemic capacities of the processes that produced them is a common epistemic practice. In politics specifically, we can learn from how different decision-making procedures fare in cases where there is some uncontroversial criterion of success (e.g., predictive accuracy or success in instrumental goals). Some of these lessons can be used to design the political system to make better decisions when it comes to controversial cases (e.g., whether taxes should go up or down). For theorists of epistemic democracy, the compatibility of instrumentalism and impartiality is important. It means that they can admit to being instrumentalists while continuing to deny that democracy is merely second-best to an all-wise philosopher king. This means epistemic democrats should not feel the

need to make the implausible claim that our reasons to care about the epistemic properties of democracy are independent of their impact on the quality of decisions.<sup>1</sup>

Second, I argued that impartial instrumentalism captures attractive features of two rival accounts of democracy's justification (proceduralism and direct instrumentalism), while at the same time offering a more complete and plausible account than either of them alone.

Impartial instrumentalism preserves the following core insight from procedural justifications of democracy: if political systems are only justified directly by some controversial moral-political perspective, they cannot perform their role of dealing with policy disagreements, disagreements are themselves prompted by differing moral-political perspectives. This idea is reflected in the impartiality element of impartial instrumentalism. However, I also argued that a purely procedural account of democracy was insufficient; hence the need for an instrumentalist element. On the one hand (following Estlund), I argued that a purely procedural account of democracy is institutionally indeterminate, particularly if the procedural account is limited to basic principles of political equality. On the other hand, a thicker version of proceduralism which provided more determinate institutional recommendations would by the same token be controversial and limited in its appeal. Thick moral proceduralists would need a way of dealing with those who do not share their moral beliefs, and this leads us back to impartial instrumentalism.

From direct instrumentalism, impartial instrumentalism preserves the basic intuitive idea that constitutions should be designed to promote justice (or the common good etc.). I argued that under certain conditions this basic commitment of instrumentalism is better advanced by impartial rather than direct instrumentalism. The most important condition is that citizens are uncertain about which constitutional choices would be instrumentally best for justice (etc.) as they see it. If so, citizens can use the epistemic and motivational considerations of impartial instrumentalism as a heuristic for working out which constitutions will best promote justice or the common good. To supplement this, I also explained a higher-order version of the mechanism Elster calls "the civilising force of hypocrisy." To the

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<sup>1</sup> Fabienne Peter, 'The Procedural Epistemic Value of Deliberation', *Synthese* 190, no. 7 (1 May 2013): 1253–66.

extent that they need the support of others with different views, even those motivated by direct instrumentalism will feel pressure to advance constitutional proposals which can be justified in an impartial way.

The practical upshot of impartial instrumentalism is that political systems should be designed to promote the relevant knowledge of decision-makers and their tendency to act as though morally motivated. This helps to give more content to the basic idea that the justification of democracy depends on impartiality and quality of decisions. In doing so, it also helps cement the plausibility of that main conclusion by showing how impartial instrumentalism has determinate institutional implications. In the process of arguing for knowledge and motivation considerations, I showed that these considerations both explain the value of some familiar features of contemporary liberal democracy and point to directions for reform. By putting the motivation and knowledge principles on an equal footing, I integrated aspects of the “protective” case for democracy into the epistemic democracy debate.

Impartial instrumentalism is a set of normative principles for guiding constitutional design and, by extension, a theory of why democracy is justified over alternative political systems. However, the normative principles for constitutional design that I have presented are limited. On a theoretical level, I have only considered the value of democracy as a means to dealing with political disagreement. However, constitutional design should also take account of incidental values – ways that political institutions produce good or bad outcomes apart from the actual decisions they make. On a practical level, I have concentrated on impartial instrumentalism’s implications for the relationship between democracy and the market, and I have only sketched out its implications for other aspects of the political system, such as the selection of representatives. These two types of limitation point to the two main ways the theory could be developed and extended in the future.

### *Incidental values*

Although I have not attempted to dispute the philosophical foundations of non-instrumental accounts of democracy, the impartiality principle incorporates what I take to be the key insight of these accounts. In extending the theoretical reach of impartial instrumentalism, I would thus concentrate on incorporating incidental (non-decision-based) values into the theory. This would raise several challenges. At the most basic level, it will require moving from a principle that the political system

should promote the quality of *decisions* to a principle of promoting the quality of *outcomes*. This basic change to the fundamental principles will impact on the downstream principles of constitutional design. Promoting relevant knowledge and promoting moral motivation were the two principles that could be judged as tending to improve the quality of decisions from any perspective. If we think instead about promoting the quality of outcomes from any perspective, it is likely that we can also identify additional principles which meet the test of impartiality.

There are at least three additional principles which I think could be added alongside the knowledge and motivation principles. First, promoting *policy consistency* seems to be an important virtue of political systems. This refers to tendency of the system to produce sets of policies (whatever their substantive content) that remain stable over time and fit together coherently across different areas of government. Consistency reduces the transition costs of continual policy change, reduces the costs of different areas of government working at cross-purposes, and allows citizens to plan more easily for the future.<sup>2</sup> Second, *compliance* refers to the way the structure of the political system itself makes citizens more likely to comply with political decisions, irrespective of their content. Voluntary compliance reduces the deadweight costs of monitoring and enforcement, and reduces the possibility that politics will break down into violence. The main way to promote compliance is by increasing the *subjective legitimacy* of the system, understood as citizens' perception that the system is legitimate, regardless of whether philosophers think they are right to do so.<sup>3</sup> Third, to the extent that a political system carries *economic costs*, (for example, costs of counting ballots or paying legislators), this puts it at a disadvantage compared to alternatives that are cheaper to run.

To show that these three principles could be the object of impartial agreement would require additional work of the kind I undertook in chapter three for the knowledge and motivation principles. These three considerations could operate alongside knowledge and motivation in a similar way: a constitutional choice that improved on one of these dimensions without setting back any of the others would be straightforwardly recommended; however, difficult questions of

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<sup>2</sup> cf. Madison, 'The Federalist No. 62'.

<sup>3</sup> Simmons calls this a 'Weberian' or 'attitudinal' sense of legitimacy. 'Justification and Legitimacy', 748–49.

judgement would arise when a constitutional choice constituted an improvement on one dimension but a setback on others. Moreover, simply by increasing the number of principles from two to five, such clashes between principles would become more common. There would thus be more room for disagreement about which constitutional choices impartial instrumentalism recommends.

However, if these three incidental values can be incorporated into impartial instrumentalism without too much difficulty, other proposed incidental values of democracy raise deeper problems. Two cases seem particularly important: *educative effects* and *symbolic expressions of moral equality*. In both cases, the problem is that these effects are controversial. Regarding educative effects, tendencies for institutions to mould individuals are unlikely to be the subject of impartial agreement because there is likely to be substantial disagreement about which shapes (if any) individuals should be moulded into. When it comes to the symbolic expression of moral equality, we first face a difficult philosophical question. Should we understand the symbolic expression of equality as an incidental value of democracy, or does it only make sense as a non-instrumental value, along the lines of moral proceduralism discussed in section 4.2.<sup>4</sup> There, I argued that a mere implication of political equality does not raise any conflicts with impartial instrumentalism. However, if the symbolic expression of moral equality is taken to imply something more extensive (substantive limits on the content of public reason, for example), then other moral-political perspectives are unlikely to accept it. Given the controversial nature of these educative and symbolic effects, we might say that their advocates will simply have to set them aside when they come to think about a decision-making structure for dealing with disagreements with those who are not convinced. However this kind of response perhaps dismisses the concerns of participatory democrats or public reason liberals too quickly. It thus remains an open question as to whether impartial instrumentalism can integrate these more controversial incidental values, or whether it must actively deny either their relevance or their validity.

### *Other institutional variables*

As a set of general principles for constitutional design, impartial instrumentalism could be applied to any number of political issues (particularly if the

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<sup>4</sup> Arneson, 'The Supposed Right to a Democratic Say', 209–11.

framework was extended to include incidental values). I will briefly mention four topics that seem particularly important and fertile territory: the selection of representatives, decision procedures within assemblies, constitutionalism, and the international system.

In section 3.6, I argued that representatives should be selected by lottery rather than election. The function of this argument in the context of the thesis was to give an example of how impartial instrumentalism might be deployed on practical questions of institutional design. In the future I would like to set out the case for lotteries in a more serious and comprehensive way that also considered potential objections.<sup>5</sup> Doing so adequately would also require touching on other aspects of the political system, such as the relationship between the legislature and the executive, and the internal organisation of the legislature (unicameral, bicameral etc.).

Within representative assemblies, there is an interesting puzzle as to why decisions should be made by majority voting rather than lottery voting. Under lottery voting, one person is randomly selected to make the decision for the group. Since the superiority of majority voting seems so obvious, it is troubling that epistemic theories of democracy have been unable to convincingly explain it so far. For example, it is striking that although Estlund makes the implausibility of decision-making by coin-flipping the centrepiece of his objection to pure proceduralism, he is unable to convincingly explain why majority voting is better than lottery voting on his own account.<sup>6</sup> Although he certainly stresses the value of discussion between many people, and that decision procedures should be responsive to people's reason-based preferences, neither of these things recommend majority voting over lottery voting.<sup>7</sup> In section 3.5, I argued that Condorcetian arguments are unable to explain the superiority of majority over lottery voting. It also seems to me that the knowledge and motivation-based principles of constitutional design presented above will be insufficient by themselves. This suggests that something is missing from

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<sup>5</sup> On which see Weale, *Democracy*, 136–40.

<sup>6</sup> Estlund, 'Beyond Fairness and Deliberation', 91–94 In this early essay, Estlund seems to rely on a Condorcet-type argument for why majority voting is superior. However, his later work rejects such arguments. *Democratic Authority*, chap. 12.

<sup>7</sup> Estlund, *Democratic Authority*, 181–82; Yann Allard-Tremblay, 'The Epistemic Edge of Majority Voting Over Lottery Voting', *Res Publica* 18, no. 3 (18 November 2011): 212, 214. Allard-Tremblay's own solution relies on Condorcet-type arguments.

impartial instrumentalism as it currently stands. The hypothesis I would like to explore is that the missing ingredient here is the tendency of majority voting to promote policy consistency, as discussed in the previous subsection.

Another major question in constitutional design is whether legislative decisions should be subject to judicial review on the basis of a written constitution. Although I have given hints of an argument against constitutionally entrenching substantive rights (section 4.1), and an extended argument against constitutionally restricting the scope of democracy in relation to the market (chapter five), I have not tackled this question directly. Building on these particular arguments, it should be possible to construct a more general case against strong judicial review. This would draw on impartiality considerations against privileging particular moral-political perspectives. It would also draw on epistemic reasons to favour a political system with the ability to flexibly (and reflexively) adapt itself in the face of new knowledge, new political issues, and new strategies to “game” the existing system.<sup>8</sup>

Finally, a topic that has not to my knowledge been considered by epistemic democrats so far is how national political systems should fit into a broader international system. I demonstrated the importance of an international dimension in the previous chapter, where I showed that the structure of the international system impacts on the value of national democratic systems. The international question also follows naturally from my argument against market alternatives to democracy in chapter five. Given that I argued against decentralisation from states to markets (and market-like federal arrangements), it might be questioned why my argument does not also run in the other direction, favouring centralisation from national states to a global government. There might be several ways to resist this implication, but the route I would particularly like to explore is Keynes’ argument that a multiplicity of states facilitates knowledge-enhancing experimentation with different policies.<sup>9</sup> The challenge would be to explain why facilitating experimentation favours decentralisation at the international level of multiple states rather than at the individualistic level of markets.

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<sup>8</sup> cf. Knight and Johnson, *The Priority of Democracy*; Heath, ‘The Forever Campaign’.

<sup>9</sup> Keynes, ‘National Self-Sufficiency’.

## The priority of democracy over the market

Turning away from democratic theory in general and back to the relationship between democracy and the market, I finish by reflecting on how far the arguments in this thesis support the claim that democracy should have institutional priority over the market. I first consider the influence of democracy over the market (my second research aim) before turning to the influence of markets over democracy (my third).

### *Influence of democracy on markets*

In chapter five, I rebutted what I take to be the strongest argument for constitutionally limiting the scope of democracy relative to the market. Somin's scheme is questionable even in his own terms of advancing economic efficiency, because he underrates the political nature of efficiency gains. More fundamentally, constitutionally limiting democracy for these reasons fails to meet the standards of impartiality set by my justification of democracy. These objections to Somin's project would also apply to other proposals of the same nature (not least because Somin's proposal is relatively moderate compared to others such as Pincione & Tesón's). However, since I have only made a negative argument against restricting democracy rather than a positive argument that democracy should be totally unconstrained, it is always possible that someone else will come up with a stronger argument for restrictions.

In this respect, it seems to me that if there is a stronger challenge to democracy's full freedom to intervene in the market, it will not be one that replicates the structure of Somin's constitutional restrictions but merely grounds them on different considerations (such as the virtue of decentralisation in facilitating experimentation. Instead, a deeper challenge might come from the idea that democracies should be able to voluntarily bind themselves to market norms in a pseudo-constitutional fashion. This possibility finds its practical expression in the field of international trade law, most strikingly in the practice of Investor-State Dispute Settlement (ISDS). Under ISDS provisions in investment treaties, foreign investors can sue states that have expropriated their investments. The most notorious ISDS case was the tobacco company Phillip Morris' failed attempt to sue



Australia after that country legislated to require plain packaging for cigarettes.<sup>10</sup> ISDS involves democracies limiting their own future freedom to intervene in markets. Ostensibly, this is done to provide assurances to foreign investors, with the ultimate aim of boosting economic welfare by encouraging foreign investment.

How we should think about such democratic self-denying ordinances in favour of the market is an important topic for future research, and one that could be helpfully focused through the lens of impartial instrumentalism. The question of whether states should enter international agreements featuring provisions like ISDS could be framed as a choice between the epistemic merits of flexibility and the supposed economic benefits of trade that could be won by committing to an ISDS regime. Determining which of the two should win out would require an empirically sensitive analysis and a consideration of other potential pitfalls behind committing to market norms.

### *Influence of markets on democracy*

I have shown that there are at least two ways in which the influence of markets can reduce democracy's ability to make good decisions in the face of disagreement: through money in politics, and through capital flight. Looking at how political speech is paid for, I argued that a free market approach to the funding of political speech is likely to reduce the value of the political system by reducing the knowledge of voters. Clarifying the nature of the threat posed by capital strikes, I argued that capital strikes only threaten democracy (according to impartial instrumentalism) when they systematically influence the ends democracies pursue. Although it was seen that this problem does not inherently arise from markets (as demonstrated by the case of a closed economy), capital flight does limit the democratic choice of ends when there is international capital mobility. For both my case studies, I set out possible mechanisms through which markets influence could impede the proper working of democracy, and I provided some theoretical reasons to think such effects were indeed taking place. However, empirical evidence is

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<sup>10</sup> Gary Clyde Hufbauer, 'Investor-State Dispute Settlement', in *Trans-Pacific Partnership: An Assessment*, ed. Cathleen Cimino-Isaacs and Jeffrey J. Schott (Washington, DC: Peterson Institute for International Economics, 2016), 205.

necessary to substantiate just how powerful these mechanisms actually are in practice.

In addition to the two cases I have discussed, there may be additional vectors for market influence. For example, markets might influence democratic decisions through the role they play in financing government debt. The existence and normative issues raised by other vectors of market influence on democracy is an important question for future research.

When we ask how we should respond to these market influences on democracy, in the case of money in politics I set out a policy solution for the problem identified. I showed how government interventions to create a more egalitarian public sphere could increase the relevant knowledge of voters. To provide more confidence that egalitarian reforms would be epistemically superior, it would be necessary to consider more empirical evidence than would be feasible here, and this is something I would like to undertake in the future. For the epistemic problem of money in politics, I set out a potential solution. For the problem of capital flight, I argued no true solution can exist. The capital flight trilemma creates an unavoidable trade-off between democracy's ability to impartially make good decisions and the economic advantages of open capital markets. As policy solutions to capital flight, international co-ordination and capital controls could turn out to be cures worse than the disease.

Whether preserving gains from international trade is worth bearing the costs to democracy will depend partly on empirical questions. However, a situation where the benefits of trade outweigh the costs to democracy is certainly conceptually possible. Imagine, first, that international co-ordination is off the table as an option – perhaps because international partners are not forthcoming. Second, imagine capital flight has only a small causal impact on democratic decisions - say, for the sake of simplicity, it has the effect of pushing corporation tax from 20% to 19%. Third, imagine that the capital controls necessary to completely eliminate this effect would severely reduce economic welfare – again for simplicity, say they would reduce GDP per capita by 20%. In such a scenario it seems to me that we should not enact the capital controls, and we should accept some market influence on democracy. While I have not tried to make this thought-experiment particularly empirically plausible, what does seem plausible is that even if some capital controls are desirable, setting them at a level that would totally eradicate investor influence on democracy would

not be. Capital controls, like most things in economics, are likely to be subject to diminishing marginal returns. Chasing the very last morsel of investor influence on democracy may well become quite costly.

### *Full and partial priority*

In general, I have provided reasons in favour of what we might call the *partial* priority of democracy over the market. The partial version of the priority thesis is that democracy should be mostly unconstrained in its ability to affect the market, while markets should mostly be limited in their ability to affect democracy. The partial priority thesis contrasts with the *full* priority thesis: that democracy should have total freedom of action in relation to the market while markets should have no possible influence over democracy.

My analysis of capital strikes and the example in the previous subsection suggest that the full priority thesis must be incorrect. We can imagine situations where it would be desirable to accept some capital flight rather than completely eliminate it using capital controls and international co-ordination. This shows that it is not always desirable, all things considered, for the market to have zero possibility of influencing democracy.

If we understand the justification of democracy in terms of impartial instrumentalism, it should not be surprising that it is at least conceptually possible that some improvements in democracy's ability to make good decisions are not worth their economic costs. This possibility is implied by the simple fact that impartial instrumentalism is a form of instrumentalism. Democracy is envisioned as a tool for achieving certain very important goods, but at some point these goods have to be balanced with all the other goods in the world. In this thesis, I have treated economic cost as an external (dis)value that competes with democracy's instrumental value. As I mentioned in the previous section, a more comprehensive version of impartial instrumentalism would seek to incorporate economic costs directly into the framework of impartial instrumentalism itself.

The need to weigh the economic costs and benefits of capital flight means that the full priority thesis is wrong when it comes to the influence of markets on democracy. Interestingly, the potential trade-off I suggested around international investment law suggests something similar might be true for the influence of democracy on the market. If economic benefits can sometimes justify treaties that

bind democracies to respect market norms in the future, this would imply that it is not always desirable for democracy to be completely unconstrained in its influence over the market. However, this remains a hypothesis to be questioned by future research, since I have not analysed international investment law in this thesis.

If the full version of the priority thesis is incorrect, this raises tricky questions about how we should decide whether or not the economic benefits of compromising the full priority of democracy are sufficient to recommend a proposal. After all, there is likely to be a great deal of disagreement about such matters. Since I have conceptualised democracy as a device for dealing with disagreement, it would be good if we could refer this disagreement to democracy itself as well. However, this is problematic if democracy is already compromised by market influence. Asking a market-influenced democracy whether market influence is acceptable is like asking a legislature elected by a first-past-the-post electoral system whether first-past-the-post is a good electoral system. A “no” answer to either of these questions would be a striking result, but a “yes” answer is merely what one would predict given the biases built into the decision-making process. One way of avoiding this difficulty might be to appeal to a hypothetical choice: would a democratic system with no market influence choose to accept some market influence in exchange for economic gains?

An additional complicating factor here is the temporal element in these decisions. Even if a choice for or against the priority of democracy appears sensible given what we know now, it might not do so in the future given changes in our knowledge and circumstances. This was part of the problem I identified in chapter five with schemes to limit the scope of democracy. The inflexibility of such schemes meant that they were not robust to changes in knowledge or circumstances. Allowing democracies to bind themselves to market norms in the future is likely to raise similar problems. The difficulty of the subject is itself a consideration in favour of flexibility. Political systems should be flexible enough to adapt to changes in our ideas, including ideas about the topics I have explored here: the value of democracy and its relationship with the market.

Many contemporary theorists of democracy are wary of instrumental justifications. On the face of it, it seems odd to deny the relevance of the fact that

democracies are generally much better governed than other regimes. Still, this wariness rests on an important insight: as a system for dealing with disagreements, democracy itself should be impartial with respect to the disagreements it deals with. However, there is no contradiction in combining this insight with instrumentalism. Doing so provides a philosophical foundation for epistemic democracy, making sense of why we should focus on the knowledge-processing properties of democracy rather than appealing directly to its results. It also enables us to integrate motivational considerations that have historically played an important part in democratic theory.

Viewing democracy in this way allows us to better understand the relationship between democracy and its major counterpart institution in the modern world, the market. The problem with schemes to replace democracy with the market is not only that doing so will lead to poorer decisions. It is also that these schemes ignore democracy's fundamental role as an impartial way of dealing with disagreement. Moreover, market influence on democracy can be criticised even when we cannot or should not appeal directly to a principle of political equality. Democracy and the market both produce many valuable goods. In order that they can do so, democracy needs to be free to influence the market, while market influences on democracy need to be restricted.

# Appendix

This Appendix demonstrates that Przeworski and Wallerstein's model of capital strikes implies that the reduction in aggregate investment caused by an income tax on investors (capitalists) is equal to the revenue generated by that tax. What follows is not intended to be an original proof, but merely the explicit elaboration of a conclusion which is implicit in Przeworski and Wallerstein's results.

The relevant definitions from Przeworski and Wallerstein's model are as follows. Let the net national income be  $Y$ , let aggregate wages be  $W$ , let aggregate investment be  $I$ . Implicitly define the share of wages in the national product,  $m$ , as  $W = mY$ . Implicitly define the rate of investment out of the total return to capital,  $s$ , as  $I = s(1 - m)Y$ .<sup>1</sup>

We now add a tax on income from investment. Let the revenue from the tax be  $T$ , and implicitly define the tax rate,  $t$ , as  $T = t(1 - m)Y$ .<sup>2</sup> To distinguish between a case in which a tax is and is not present, let  $I_M$  be the "market" level of investment without a tax, and let  $I_t$  be the level of investment in response to the tax, such that  $I_M - I_t$  is the reduction in investment as a consequence of the tax. Everything thus far has been a matter of definition.

Przeworski and Wallerstein prove an equation for  $s_M$ , the rate of investment which maximises investors' utility across time in the absence of taxation, given investors' discount rate  $q$ , the productivity of capital  $v$ , and the labour share of national income  $m$ . I have omitted this equation and its proof here, since they are not necessary for my purpose, which is only to show that  $T = I_M - I_t$ . Przeworski and Wallerstein then amend their equation for  $s_M$  to include the additional variable  $t$  to prove that

$$I_t = (s_M - t)(1 - m)Y$$
<sup>3</sup>

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<sup>1</sup> Przeworski and Wallerstein, 'Structural Dependence of the State on Capital', 14.

<sup>2</sup> Ibid., 16.

<sup>3</sup> Ibid., 25, equation A-4. This equation is originally stated in terms of the optimal investment rate for investors given tax  $t$  ( $s^*[m, t_i]$ ), but an equation for  $I_t$  follows trivially.

The equation for  $I_t$  and the implicit definition of  $S$  given above can be plugged into an equation for the reduction of investment as a consequence of the tax:

$$I_M - I_t = s_M(1 - m)Y - (s_M - t)(1 - m)Y$$

This can be rearranged as

$$I_M - I_t = (s_M - s_M(m) - s_M + s_M(m) + t - t(m))Y = t(1 - m)Y$$

Which is equal to the definition of the tax revenue given above

$$T = t(1 - m)Y = I_M - I_t.$$

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