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A Dilemma for Proceduralist Theories of Democracy: Elected Delegates or Elected Monarchs?

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ABSTRACT

Emphasizing the intrinsic value of formal political equality, a prominent strand of democratic theory—proceduralism—sharply disassociates democracy from substantive justice. This paper elucidates a resultant dilemma: that proceduralism is either underinclusive in its exclusion of robust forms of representative democracy or overinclusive in its inclusion of elective dictatorship. I show how the horns of this dilemma respectively derive from different conceptions of political equality: the standard view, which foregrounds the choice of legislative text itself, and an alternative view, drawn from Robert Dahl's model of "procedural democracy," which privileges the choice of procedure by which to resolve disagreement over the choice of text. Conceiving of democracy in terms of political equality alone leads to a rigid characterization of the elected legislature either as an institution whose structure is entirely open or as a mechanism for enacting citizens' wishes that denies legislators their intuitive input.

KEYWORDS: Democratic Theory; Representation; Proceduralism; Burke; Political Equality; Dahl

I. INTRODUCTION

Within the dominant tradition of liberal political thought, a legal system's democratic character is key to its legitimacy. But the question of the nature of democracy receives conflicting answers. "Proceduralists" hold that a law's democratic character depends on its procedural pedigree[1]; "rationalists" emphasize that a rule is properly democratic only if the outputs of the relevant procedure are apt to meet certain standards of substantive value.[2] Both schools may agree on constitutional guarantees of rights of political participation,[3] and even on the importance of such participation for the achievement of certain substantive goods, such as the capacity "to act as a self-determining, morally responsible being."[4] But, for the proceduralist, "the claim of any decision

[1] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999); Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008); Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge, MA: Harvard University Press, 2014).

[2] Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge, MA: MIT Press, 1996); Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy*, ed. James Bohman and William Rehg (Cambridge, MA: MIT Press, 1997); David Estlund, *Democratic Authority: A Philosophical Analysis* (Princeton, NJ: Princeton University Press, 2008).

[3] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43 (2008): 1-61.

[4] Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 175.

to be 'democratic … depends upon *how it was made*, not upon its *content*,"[5] whereas, for the rationalist, any "plausible theory [of democracy] would need to give some role to a tendency to make substantively good decisions."[6] These views underpin a far-reaching debate as to whether, in addition to the requirements of formal political equality, "[t]here may be other conditions to be met for … 'the blessing of the people's representatives' to carry moral weight."[7]

A fact with which all legal and political theory must grapple is the co-existence of a "clear, impartial, and acceptable view of the [legislative] status quo"[8] with general disagreement over what the status quo ought to be. It seems natural to suppose that questions of a system's democratic legitimacy might similarly co-exist with normative disagreement. But suggestions that morality is "baked in" to phenomena that might otherwise appear to consist in concrete facts alone have become commonplace, as evident, for instance, in inquiry into the nature of intentional action,[9] causation,[10] and the rule of law.[11] Indeed, the debate over what makes law democratic has a close analogy in debates over the nature of law itself, that is, in debates as to whether morality is intrinsic to legality, or whether, as legal "positivists" argue, "[t]he existence of law is one thing; its merit and demerit another."[12] A main argument of legal positivists is that looking to morality to determine the content of the law would "resurrect the very questions [about how to act] that laws are 'designed to settle.'"[13] Likewise, democratic proceduralists seek to avoid subjecting the procedurally derived outcome to "the inevitable contestedness of standards that define the quality of outcomes,"[14] thereby preserving the prospect of an authoritative resolution under a liberal form of government. This essay aims to provide a succinct statement of a problem that is internal to the proceduralist analysis—a dilemma that has been hiding in plain sight.

In common with analytic philosophers in many subfields, democratic proceduralists freely invoke our sense of what is obvious, developing arguments from the intuitive importance of political equality.[15] Proceduralism's predicament is that, unlike rationalism, it appears to be at odds with either the intuitively genuine democratic claims of the elected representative or the intuitively bogus claims of the elected monarch. On explicating our seeming commitment to the democratic character of responsible representative government (Part II), I explain how identifying democracy with the value of formal political equality places pressure on this commitment (Part III). Specifically, I show how requiring political equality in the choice of policy substance necessitates delegate-style legislators (Part III.A) while requiring it instead in the choice of procedure admits of the no less unwelcome possibility of sole-member legislatures (Part III.B). With its equation of democracy and political equality, proceduralism cannot include both a commitment to collective law-making *and* the scope for responsible legislators to defy an opinion poll. Insofar as we would test proceduralism and rationalism against our intuitive understanding of democracy, the described dilemma offers a reason for preferring the latter account.

[5] Austin Ranney and Willmoore Kendall, *Democracy and the American Party System* (New York: Harcourt, 1956), 13 (emphasis in the original).

[6] David Estlund and Hélène Landemore, "The Epistemic Value of Democratic Deliberation," in *The Oxford Handbook of Deliberative Democracy*, ed. Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (Oxford: Oxford University Press, 2018), 116.

[7] B. Baum Levenbook, "Mark Greenberg on Legal Positivism," in *The Cambridge Companion to Legal Positivism*, ed. T. Spaak and P. Mindus (Cambridge: Cambridge University Press, 2021), 756.

[8] Kenneth Arrow, "Questions about a Paradox," in *The Oxford Handbook of Political Economy*, ed. B. Weingast and D. Wittman (Oxford: Oxford University Press, 2006), 974.

[9] J. Knobe, "Intentional Action in Folk Psychology: An Experimental Investigation," *Philosophical Psychology* 16 (2003): 309-24.

[10] Craig Roxborough and Jill Cumby, "Folk Psychological Concepts: Causation," *Philosophical Psychology* 22 (2009): 205-13.

[11] Raff Donelson and Ivar Hannikainen, "Fuller and the Folk: The Inner Morality of Law Revisited," *Oxford Studies in Experimental Psychology* 3 (2020): 6-28.

[12] John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), 157.

[13] Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 177; Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), 207-209.

[14] Fabienne Peter, "Political Legitimacy," in Edward Zalta (Ed.) *Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/entries/legitimacy/>; and similarly Urbinati, Democracy Disfigured, 97; Brian Barry, "Is Democracy Special," in *Politics, Philosophy and Society* (Fifth Series), ed. Peter Laslett and James Fishkin (Oxford: Oxford University Press, 1979), 195.

[15] Niko Kolodny, "Rule Over None I: What Justifies Democracy," *Philosophy and Public Affairs* 42 (2014): 209; Christiano, *The Constitution of Equality*, 98-99.

II. RESPONSIBLE REPRESENTATIVE GOVERNMENT

The Rousseauian view that a people cannot be represented by the acts of mere officials has long been a contrarian position: "almost everyone now agrees that democratic political institutions are representative ones."[16] Moreover, although a complete picture of the nature of political representation remains elusive, it is generally acknowledged to encompass some autonomy on the part of the representative: "in representative regimes … the decision-making of those who govern retains a degree of independence from the wishes of the electorate."[17] A traditional, maximalist account, associated with Edmund Burke, has been to compare the representative's autonomy to that of a trustee:

> Your Representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion … . You chuse a Member indeed; but when you have chosen him, he is not Member of Bristol, but he is a Member of *Parliament*. If the local Constituent should have an Interest, or should form an hasty Opinion, evidently opposite to the real good of the rest of the Community, the Member for that place ought to be as far, as any other, from any endeavour to give it Effect.[18]

Ordinarily, trusteeship involves a degree of independence that is not present in typical principal-agent relationships, like those between a client and their lawyer or between a patient and their doctor. Like a lawyer or physician, a trustee acts with another party's interests at heart. But a doctor cannot legitimately perform surgery on a patient against her wishes and a lawyer cannot sue without the prospective litigant's consent. In contrast, the relation of beneficiary to trustee assigns to the latter a capacity to reject the former's wishes as to the conduct of their affairs, e.g., to sell certain property over a beneficiary's objections. Of course, unlike a typical trust beneficiary, citizens can periodically change their representative—just as a principal can change their agent. Nevertheless, trusteeship captures the idea that representation, between elections, encompasses the scope to cast a vote at odds with constituents' settled position on a critical matter (as exemplified by Burke's own vote to reduce barriers to Irish trade with Britain over the objections of the electors of Bristol).[19]

Earlier debate had offered a stark choice between the elected representative as either a free agent who is entrusted with her constituents' welfare or a delegate who merely transposes her constituents' wishes into legislation. Contemporary theorists have rightly cast doubt on the accuracy of any such sharp dichotomy; crucially, for our purpose, this advance has not obscured the residual Burkean insight that a policy might be democratic even while unpopular.

An influential criticism of the traditional notion of the legislator as trustee is that it significantly underplays the reciprocal nature of the representative-represented relationship. Unlike an ordinary trustee, the representative might, for instance, be obligated to actively engage with her constituents on the merits of her conclusions between elections[20] or to give their opinion special weight in her deliberations.[21] Notice, however, that recognition of a *particular* feature of the legislator-citizen relation as being distinctively trustee-like in form need not entail a complete analogy, by which "[n]o room is left for a two-way relationship, where representatives alter the intentional structure of constituents."[22] In principle, a composite approach is available, where, situated within a broader conception of representation as an inter-subjective relationship in which policy preferences are formed and evaluated, Burkean autonomy is understood to reflect that part of the legislator's responsibility that consists in her ultimate burden of casting the legislative vote. In this reciprocal context, the possibility that a responsible representative might legitimately feel compelled to prioritize her own understanding either of the national interest, as Burke himself anticipated, or,

[16] Suzanne Dovi, "Political Representation," in Edward Zalta (Ed.), *Stanford Encyclopedia of Philosophy* <https://plato.stanford/entries/political-representation/>.

[17] Bernard Manin, *The Principle of Representative Government* (Cambridge: Cambridge University Press, 1997), 6.

[18] Edmund Burke, "Speech to the Electors of Bristol," in *Select Works of Edmund Burke: Miscellaneous Writings*, ed. Francis Canavan (Indianapolis, IN: Liberty Fund, 1999), 11, 12 (emphasis in the original).

[19] Burke, "Two Letters to Gentlemen in Bristol on the Trade with Ireland," in ibid, 31.

[20] See, e.g., Eric Beerbohm, "Is Democratic Leadership Possible?," *American Political Science Review* 109 (2015): 639-52; Monica Brito Vieira, "Representing Silence in Politics," *American Political Science Review* 114 (2020): 976-88.

[21] See, e.g., James Wilson, *Democratic Equality* (Princeton, NJ: Princeton University Press, 2019).

[22] Beerbohm, 641.

alternatively, of her particular constituents' interest, is readily appreciated both by theorists: "most … would want to say that … [one is] not necessarily a bad *representative* for doing the right thing"[23]; and, it would seem, by voters themselves.[24] In what follows, we shall take it that Burke's recognition of this possibility, rather than any model of full-blown legislative trusteeship, is his enduring contribution to our understanding of the concept of political representation.

Take an issue that is critical to the definition of the public interest (but which does not concern citizens' formal political equality), say, the question of the treatment of animals or of rights to abortion services. Suppose a news event makes this issue newly salient and that research reveals a sharp division in the electorate's considered view. Now imagine a bill inspired by one of the competing opinions; a bill to which a narrow majority of citizens, who elect a narrow majority of legislators, are opposed. It so happens that, following a sustained period of earnest reflection and wholehearted engagement with their constituents, a small number of these legislators, even after giving significant weight to their constituents' views, ultimately come to the sincere belief that, properly conceived, the public interest requires them to vote in favor of the bill, thereby securing its passage.

In the result, the citizens of the constituencies that elected these legislators are faced with an undesired policy, in the formulation of which, they prima facie enjoyed less influence than their representatives. (Equally, the state's median citizen enjoyed less influence than citizens' median representative.) Nevertheless, in principle, it seems right to allow that, led by their best lights to make the harder choice, these legislators might have acted democratically.[25] Significantly, this impulse is reducible neither to a mere observation about contemporary legal practice, i.e., that, where "constituents and representative disagree … it is the latter's view that prevails"[26] nor to a concern that the majority view would alienate citizens' very capacity for self-rule, as might a proposal to circumscribe the freedom of speech or assembly.[27] Likewise, the intuition that the described legislators might have acted legitimately cannot be identified simply with the sense that, all things considered, their democratic duty was overridden. Rather, the impulse stems from an assumption about the underlying concept of democratic representation:

> In a democracy, the voters pass the final judgment … on their representative by re-electing him or refusing to do so. But it does not follow that whatever will get him re-elected is what he is obligated to do … . Representation as an idea implies that … [constituents'] view of their interest … may not be definitive.[28]

Ceteris paribus, a theory of democracy that makes sense of this platitude seems preferable to one that must explain it away. Rationalist democratic theory promises an apparently straightforward account of the Burkean legislative scenario described above: that the representatives' judgements satisfied relevant substantive standards that those of their constituents did not.[29] In contrast, any theory which takes citizens' political equality as the *sole* criterion faces a dilemma: either to preclude Burkean legislation altogether or to accommodate elective dictatorship.

[23] Andrew Rehfield, "Representation Rethought," *American Political Science Review* 103 (2009): 216 (emphasis added).

[24] Rosie Campbell, Philip Cowley, Nick Vivyan, and Markus Wagner, "Legislator Dissent as a Valence Signal," *British Journal of Political Science* 49 (2019): 105-28.

[25] Consider, in this vein, the US judicial commentary on the constitutionality of the then newly enacted Affordable Care Act (Obamacare) in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Whereas, at the time, the Act was notoriously unpopular with the public (J. de Pinto, "Public Opinion of Healthcare Law," CBS News, 28 June 2012: <http://www.cbsnews.com/8301-250_162-57462689/public-opinion-of-the-health-care-law/>), US Chief Justice John Roberts *defended* his deciding vote on the authority of Congress to pass the legislation noting, "It is not our job to protect the people from the consequences of *their* political choices" (emphasis added).

[26] Dimitrios Kyritsis, "Representation and Waldron's Objection to Judicial Review," *Oxford Journal of Legal Studies* 26 (2006): 746; similarly, Arash Abizadeh, "Representation, Bicameralism, Political Equality, and Sortition: Reconstituting the Second Chamber as a Randomly Selected Assembly," *Perspectives on Politics* 19 (2021): 798; Dimitri Landa and Ryan Pevnick, "Representative Democracy as Defensible Epistocracy," *American Political Science Review* 114 (2020): 1-2.

[27] Dahl, *Democracy and its Critics*, 175.

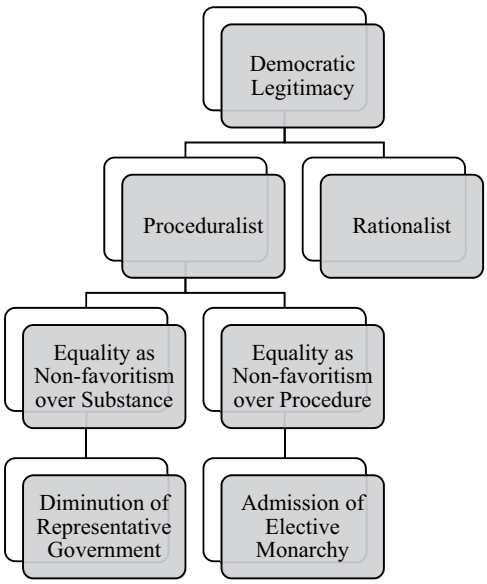
[28] Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 164-65; and similarly, Thomas Fossen, "Constructivism and the Logic of Political Representation," *American Political Science Review* 113 (2019): 834-35.

[29] The idea of legislators simply ignoring the will of constituents might seem equally problematic (e.g., Beerbohm 2015, 641). Notably, rationalism does not imply that the prospect of better outcomes will justify legislators systematically preferring their own judgment. Rationalism's commitment to political equality can be elucidated in ways that treat consistency with public opinion as a desideratum in itself, and which call for legislators to seek out and engage with constituents' views.

III. POLITICAL EQUALITY

Any analysis of the difference between democracy—the rule of a demos or people—and illiberal forms of government will point to the basic democratic imperative of achieving some manner of "balance" between "citizen preferences and public policies"[30] that reflects the idea that the citizen is in some sense a co-author of those policies. Taking such balance to be defined purely in terms of explicit rules of aggregation that preclude "favoritism to some voters' preferences,"[31] proceduralism requires that "all voters should be treated equally."[32] As we shall see, the non-favoritism principle may be taken to demand equal influence tout court or merely equal opportunity for influence. More important for present purposes is the question of the sort of attitude to which the principle applies.

It is generally assumed that favoritism is precluded as between individuals' preferences over the substantive alternatives, that is, over the alternative texts that might be enacted into law. Accordingly, an outcome is commonly thought to violate the non-favoritism principle if it is unpopular, for instance, if there is a majority preferred alternative.[33] Another, overlooked possibility is suggested by Robert Dahl's notion of a "procedural democracy," namely, that favoritism is precluded as between individuals' preferences over the procedural alternatives, that is, over the alternative rules whose application to conflicting preferences over substance would decide which text is duly enacted.[34] We shall see that, depending on whether the non-favoritism principle is applied to attitudes over substance or over procedure, the proceduralist is driven onto one or other horn of the "either-delegates-or-monarchs" dilemma.



A. Equality over Substance

In voting down a legislative text preferred by a majority of citizens, elected representatives would exert a greater policy influence (and exploit a greater opportunity for policy influence) than other, ordinary citizens. Accordingly, any commitment to non-favoritism between citizens' substantive

[30] Frank Baumgartner and Bryan Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993), 15; and similarly, Amartya Sen, "The Informational Basis of Social Choice," in *The Handbook of Social Choice and Welfare*, ed. Kenneth Arrow, Amartya Sen, and Suzumura Kotaru (Amsterdam: Elsevier, 201) 2: 33.

[31] Donald Saari, "Which is Better: the Condorcet or Borda Winner?," *Social Choice and Welfare* 26 (2006): 111.

[32] Kenneth Arrow, "Current Developments in the Theory of Social Choice," *Social Research* 44 (1977): 614.

[33] The prospect that, in respect of *every* outcome, a majority might favor some other outcome (see e.g., Kenneth Arrow, *Social Choice and Individual Values* (New York: Wiley, 1951)), has sometimes been thought to pose a challenge to proceduralism (e.g., Joshua Cohen, "Deliberation and Democratic Legitimacy"; and Jules Coleman and John Ferejohn, "Democracy and Social Choice," *Ethics* 97 (1986): 6-25). Notice that any such challenge displays a symmetrical relationship to that posed by the prospect of Burkean legislation: the more likely constituents are to form a unique majority preference, the greater the potential for divergence between the majority of constituents and their elected representative.

[34] Robert Dahl, "Procedural Democracy," in Laslett and Fishkin, P*olitics, Philosophy, Politics and Society (Fifth Series)*, 97-133; and Dahl, *Democracy and its Critics*.

preferences—"substantive non-favoritism"—precludes representatives from voting down such a text. Proceduralists have sought to defend this implication either by offering a deflationary interpretation of the value of representative autonomy or, alternatively, by restricting scope of the commitment to non-favoritism to law-making on matters of primary importance only.

We noted, at the outset, some important respects in which the role of an elected legislator is comparable to that of the expert professional advisor, such as the lawyer or financial planner. These similarities invite the suggestion that the relationship between legislator and constituent is akin to those 'ordinary, nonpolitical contexts' in which "a person … as 'principal,' delegates to another person, as 'agent.'"[35] Certainly, there are comparisons between the broad discretion exercised by the expert agent and certain ways in which an elected legislator might legitimately discharge her voting burden. Notably, the legislative representative, acting in the fashion of a retained expert, might transform the electorate's unconsidered "impulse and sentiment into judgment."[36] The exercise of this limited form of representative independence, on which it is analogous to the standard principal-agent relationship, has been described as "gyroscopic" representation, whereby "the voter often expects the representative … to act with considerable discretion in the legislature … open[ing] the door to creative deliberation … at the legislative level."[37] So understood, legislative votes that conflict merely with constituents' *provisional* judgments do *not* present instances of favoritism.

On a deflationary interpretation of the notion, legislator autonomy is *confined* to such gyroscopic representation. Thus, where citizens come to form a settled, rather than an inchoate or provisional, majority view of a matter—an "expressed will"[38] or "judgment"[39]—the legislator's discretion ends.[40] Any legislative vote that conflicts with citizens' settled majority opinion must wrongly deny them an equal substantive influence (or, alternatively, an equal opportunity for substantive influence) over the law. This constraint reflects limits inherent in the ordinary principal-agent relationship. Just as the lawyer/financial planner must always, qua agent, defer to the clear preference of their principal,[41] so, on this analogy, must the legislator defer to the clear preference of their constituents.

The plausibility of a deflationary interpretation of legislator autonomy increases with the infrequency of genuine legislator-constituent policy disagreement. If we take popular political opinion to be generally provisional rather than settled in nature, then the requirement that legislators defer to any settled citizen view of the public interest will rarely compel them to set aside their own view. Accordingly, substantive non-favoritism might perhaps be reconciled with legislators' intuitive remit to attempt to do the right thing. Conversely, a political discourse that is characterized chiefly by provisional opinions will generate superficial disagreements, and, as such, will tend to undercut proceduralism's initial motivation.

When motivating proceduralism, theorists emphasize the broad scope for meaningful policy disagreement: "The circumstances under which people make judgements about [political] issues … are exactly those circumstances in which we would expect … that reasonable people would differ."[42] Granted a political discourse replete with fully considered judgments among citizens at large, there is a significant prospect that any given set of substantive values might be the subject of

[35] Niko Kolodny, "Rule over None II: Social Equality and the Justification of Democracy," *Philosophy and Public Affairs* 42 (2014):317; and similarly, Harry Brighthouse, "Political Equality in Justice as Fairness," *Philosophical Studies* 86 (1997): 167-68.

[36] Jeremy Waldron, "Representative Lawmaking," *Boston University Law Review* 89 (2009): 354; and similarly, Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2002); Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006).

[37] Jane Mansbridge, "Rethinking Representation," *American Political Science Review* 97 (2003):522.

[38] Kolodny, "Rule Over None II," 318.

[39] Waldron, "Representative Lawmaking," 353.

[40] If, to qualify as "settled," it is supposed that a constituency's majority view must first satisfy standards of substantive value, then a representative might depart from her constituents' views whenever they are sufficiently incorrect (see, e.g., Donald Bello Hutt, "Political Representation as Interpretation: A Contribution to Deliberative Constitutionalism," *Ratio Juris* 33 (2020): 351-67). Such a departure would, however, violate substantive non-favoritism, which precludes assigning a greater say to one individual (the representative) based on their superior discernment. Moreover, it would not account for the possible legitimacy of legislators who hold an erroneous view of the public good voting their conscience.

[41] "An agent acts with actual authority when … the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act" (American Law Institute, *Restatement of the Law (3d) of Agency* (Eagan, MN: Thomson Reuters, 2006) § 2.01).

[42] Waldron, Law and Disagreement, 113; and similarly, Kolodny, "Rule Over None I," 196-97.

genuine popular contestation—including, notably, any such values that the democratic rationalist might consider intrinsic to democratic authority. If, however, public discourse is such that meaningful objection to the standards that define the quality of outcomes is not "inevitable"[43] but *rare*, then the advantage of an account of democracy that refrains from invoking such standards is not as obvious.

The assumption that public political opinion generally exhibits a merely provisional character makes plausible a deflationary view of representative autonomy in which representatives are bound to defer to settled majority views (only). Equally, though, this assumption reduces, in pari passu, any threat to the certainty of public decision that might motivate proceduralist resistance to linking democratic authority with substantive justice. The lower the risk that the values in question would be genuinely controversial among citizens, the weaker the concern that citizens could legitimately demand "the chance to test the outcomes of the laws before obeying them."[44] With limited scope for meaningful popular disagreement over substantive questions, there would be commensurately less need to immunize public decision-making from the prospect of such disagreement by retaining an exclusive focus on procedure. The plausibility of analyzing legislator autonomy in terms of ordinary principal-agent relationships therefore appears to be negatively related to the cogency of proceduralism's basic insight. Accordingly, the deflationary view cannot readily reconcile proceduralism's privileging of political equality with the possible legitimacy of voting contrary to the views of constituents.

Let us suppose then, that, at least as a standard applied across the legislative agenda generally, substantive non-favoritism unduly narrows the scope of responsible representative government. We shall take it, in other words, the autonomy of the democratic representative, whilst narrower than that of a trustee, may be broader than that of a mere agent. Notably, this conclusion allows that constituents' majority opinions might be required to be definitive over *certain* domains of legislative voting. It seems reasonable, after all, to distinguish the general public's appetite (and aptitude) for making legislation at different levels of generality:

> [T]he formulation of general rules and broadly applicable normative provisions … is something that most citizens will likely be able to do if given time to reflect. Ordinary law-making, in contrast, is usually about solving very specific policy problems that more often than not are difficult to understand for any non-specialist (think of the myriad complex question to do with climate change and sustainability) and/or exceedingly boring.[45]

In line with this intuitive distinction, it has been suggested that legislators are obligated to operate in strictly responsive, delegate-mode only on particular sorts of questions, namely, those of the *aims* of public policy.[46] So long as lawmakers recognize this constraint, the legitimacy of Burkean legislation on the merely subsidiary questions of the means of implementing citizens' chosen aims can be explained as a function of citizens' broader policy control: "If the legislature genuinely pursues the aims the citizens choose, the fundamental equality among citizens is not threatened." [47] The advantage of this interpretation of the principle of substantive non-favoritism is that it permits a straightforward understanding of legislative autonomy in means-oriented fields of law-making. Unfortunately, it does so at the price of both inflating the public's control over aims and discounting its control over means.

Recall the question at issue in the legislative scenario described above. The matter concerned the proper definition of the public interest, which involved a choice of aim, namely, whether or to what extent society should aim to protect the interests of, say, animals or fetuses/unborn children.[48] The legislators in question acted conscientiously, engaged meaningfully with their

[43] Peter, "Political Legitimacy."

[44] Urbinati, Democracy Disfigured, 97.

[45] Fabio Wolkenstein, "Should Traditional Representative Institutions be Abolished? A Critical Comment on Hélène Landemore's Open Democracy," *Res Publica* 30 (2024): 166.

[46] Christiano, *The Constitution of Equality*; Wilson, *Democratic Equality*.

[47] Thomas Christiano, *The Rule of the Many* (London: Routledge, 1996), 218; and similarly, Christiano, *The Constitution of Equality*, 104.

[48] The characterization of the latter interest is itself controversial, and tracks positions in the underlying debate.

constituents, and, in telling contrast to the legislators featuring in discussions of the putative obligation to act as an aims-delegate,[49] reneged on no election promise. In this context, at least, it would seem that legislators might honor their obligations as representatives even without ultimately deferring to their constituents. It follows that the subject matter of responsible representative government might not be strictly defined by measures of logical priority as between aims and means but rather that representatives might legitimately vote their conscience even on a text addressing a matter of primary importance.

Equally, any proposal to center the demands of political equality on questions of aims, thereby diminishing the public's control over questions of means, threatens to blind us to purported violations of democratic principle. Consider a legislator who proposes a tax to which nearly all his elected colleagues, and the public itself, are strongly opposed (they would prefer to borrow to achieve the public's chosen aim). Now suppose that this legislator suggested a coinflip. Ostensibly, his suggestion would be absurd. Accordingly, theories that conceive of substantive non-favoritism as merely an equal opportunity for substantive influence[50] face a standard objection: "The legitimacy of the coin flip is all the legitimacy … [that such theories] can find in democratic choice."[51] Some proceduralists have been persuaded by this criticism to instead understand substantive non-favoritism as referring to citizens' equal *positive* influence.[52]

For these proceduralists, the unacceptability of the proposed coinflip extends beyond mere epistemic unreliability[53] or the diminution of political expression[54] to its degenerate *democratic* credentials: "an egalitarian approach to collective decision-making must reject a lottery approach except in cases where equality can reach no further anyway [viz., the disposal of indivisible goods]."[55] However, no version of proceduralism that treats political equality on questions of means as moot can admit of the possibility that the described tax coinflip could be democratically problematic, thereby exposing the theory to an objection which at least some proceduralists (including prominent proponents of an aims-means distinction) are anxious to avoid. Conversely, any acknowledgment that citizens' political equality on questions of means *is* decisively at stake reintroduces the problem of reconciling substantive non-favoritism with the scope of representative autonomy in means-oriented fields of law-making.

To square substantive non-favoritism with the intuition that citizens' own view of their interest might not always be definitive, deflationary interpretations have been proposed of the scope of representative autonomy and of the domain of political equality respectively. But in different ways these proposals both appear to unravel. An alternative approach dispenses altogether with the effort to explain away the Burkean insight: consider a proceduralism that appeals instead to non-favoritism between citizens' *procedural* preferences.

B. Equality over Procedure

Proceduralists generally assume that the subject of the attitudes to which the non-favoritism principle applies are the respective substantive alternatives. But a different possibility is implicit in a central aspect of Robert Dahl's influential sketch of the fundamentals of a democratic process, specifically, his association of non-favoritism with citizen control over the voting agenda.

In a seminal contribution to political theory, Dahl describes a set of five conditions for the existence of a democracy[56]: effective participation; voting equality; enlightened understanding; control of the agenda; and inclusion of adults. While all conditions are derived from the concept of

[49] Christiano, *The Rule of the Many*, 219; Wilson, *Democratic Equality*, 208-209.

[50] Daniel Viehoff, "Democratic Equality and Political Authority," *Philosophy and Public Affairs* 42 (2014): 337-75; Kolodny, "Rule Over None I" and "Rule Over None II."

[51] David Estlund, "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority," in Bohman and Rehg, *Deliberative Democracy*, 179; and similarly, Estlund, *Democratic Authority*, 79-83; Ben Saunders, "Democracy, Political Equality, and Majority Rule," *Ethics* 121 (2010): 156.

[52] Waldron, *Law and Disagreement*, 113-14; Christiano, *The Constitution of Equality*, 107-11.

[53] Kolodny, "Rule Over None II," 313-14.

[54] Viehoff, "Democratic Equality and Political Authority," 375.

[55] Christiano, *The Constitution of Equality*, 111.

[56] Dahl, "Procedural Democracy"; *Democracy and its Critics*; and *On Democracy* (New Haven: Yale University Press, 1998).

political equality—"to the extent that any of the requirements is violated, the members will not be politically equal"[57]—the relation between voting equality and agenda control is not immediately transparent. Whereas the former requires that, "[a]t the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight,"[58] the latter specifies that, "[t]he demos must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process."[59] In later work, Dahl appears to gloss these two criteria as discrete, cumulative conditions which would together exclude the possibility of institutions whose existence might impede the enactment of a majority's substantive preference.[60] On this understanding, it seems that control of the agenda reserves to citizens a power to put individual policy proposals to a vote, i.e., "that, at any given time with respect to a given issue, the demos has … [a] right to 'recall' an issue" (Saward 2001, 4-5).[61] In his earlier work, in contrast, Dahl seems to present a less demanding principle, in which the conditions of voting equality and agenda control have a disjunctive relationship. On this alternative understanding, a matter is either one which is decided by citizen voting (and is therefore subject to voting equality) or one which is delegated to a secondary authority (and is therefore subject to citizens' right of retrieval).[62]

For our purpose, it is not crucial which reading of the relation between voting equality and agenda control is either the more plausible or the more consistent with Dahl's overall opus. What matters is that, in its disjunctive version, Dahl's analysis opens up the possibility of a proceduralist explanation of Burke's insight that can dispense with the defensive strategies described above.

In their possession of "control of the agenda," Dahl recognizes the citizen's entitlement, not to an equal say tout court, but to an equal "final" say. Favoritism is duly precluded, but in relation only to the choice of procedure, not to the outcome thereby derived. Severing the direct tie between popular sovereignty and public opinion, this model permits not only the assignment of policy issues to a defined citizen subgroup but also the exercise of discretion regarding "the *terms* on which the demos [so] delegates."[63] Accordingly, the model recognizes the possibility of a people reaching a decision by adopting as its own *whatever* is decided by the relevant subgroup, whether they be "judges or administrators" or regularly elected legislators.[64] Respect for citizens' political equality is thus taken to supply a principled reason to accept an undesired policy, in the selection of which, one might in fact have enjoyed less say than others.

′In Dahl's foregrounding of citizens' procedural preferences, we see the outline of a proceduralist accommodation of the sense that Burkean legislation is not necessarily undemocratic. Insofar as citizens prefer to empower elected legislators over deciding by plebiscite, a legislator might discharge her function consistently with citizens' political equality even while declining to help enact the more popular policy alternative. In its indifference to the content of alternative procedures for resolving disagreement, and, consequently, to outcomes' possible divergence from public opinion, procedural non-favoritism promises to explain the democratic acceptability of responsible representative government. Notably, in his original justification of the legitimacy of legislative autonomy, Burke himself seems implicitly to appeal to his constituents' approval of such independence:

[57] Dahl, *On Democracy*, 38.

[58] Dahl, *Democracy and its Critics*, 109.

[59] Ibid., 113.

[60] Dahl, *On Democracy*, 39-40.

[61] Michael Saward, "Direct and Deliberative Democracy," European Consortium for Political Research Joint Sessions, Copenhagen: <https://ecpr.eu/Filestore/PaperProposal/0fb32bfb-b53a-4e00-a86d-74ab1a0d4d3b.pdf>. On this reading, the condition of citizen agenda control seems to imply a requirement for robust devices of direct democracy, such as initiative, referendum and recall. Dahl himself seems to have considered the scale of the modern nation-state an impediment to direct democracy. In his view, the most that could realistically be attained by such polities was a sub-ideal sort of democracy, "polyarchy," featuring elected legislative institutions (*On Democracy*, 84-86).

[62] Dahl, "Procedural Democracy," 106-107; *Democracy and its Critics*, 113-14. Niko Kolodny's initial characterization of democracy in his influential "Rule Over None I" and "Rule Over None II" mirrors Dahl's weaker, disjunctive formulation: "[A] political decision is democratically made when it is made by a process that gives everyone subject to it equal … opportunity for informed influence *either* over it *or* over decisions that delegate the making of it" ("Rule Over None I," 197 (emphasis added)). However, the balance of Kolodny's discussion suggests that, in fact, he has substantive rather than procedural non-favoritism in mind, e.g., his subsequent emphasis on equal opportunity for influence simpliciter at ibid., 208, 223, 228-29.

[63] Dahl, *Democracy and its Critics*, 114 (emphasis added).

[64] Dahl, "Procedural Democracy," 97-108.

> I shall ever use a respectful frankness of communication with you [Burke's Bristol constituents]. Your faithful friend, your devoted servant, I shall be to the end of my life: A flatterer you do not wish for. *On this point of instructions* [as to how the elected representative may vote], *however, I think it scarcely possible, we ever can have any sort of difference.*[65]

Any such defense (or criticism[66]) of the representative's independence of judgment that invokes the procedural preferences of the represented coheres with the Dahlian impulse to explain an unequal say over policy alternatives in terms of citizens' ultimate political equality.

Of course, there remain significant questions about what, exactly, would qualify a given set of procedures as popularly preferred, and what, in turn, might count as good evidence. In this, the challenge of elucidating and applying the principle of procedural non-favoritism is no different to that facing advocates of substantive non-favoritism.[67] Crucially, however, unlike the latter, procedural non-favoritism is as consistent with the operation of an elective autocracy as it is with that of a parliamentary or plebiscitary democracy.

Suppose that, in Hobbesian fashion, the people of some state install an autocrat, *A*, for an indefinite period. Certainly, it is true that, from the point at which *A*'s reign becomes unpopular, the conditions of procedural non-favoritism would no longer be met. As Dahl himself noted, "what begins as delegation might end as alienation."[68] But "dictatorship for life" is not the only problematic scenario. The rule of a regularly elected autocrat might well respect citizens' political equality as understood in such terms.[69] Even so, the very notion of a sole-member legislature—even one whose identity depended on citizen preferences—might seem somehow undemocratic:

> [I]f a people chooses to establish a dictatorial regime according to which a single individual is granted full legislative and constitution-making powers, it does not follow that this regime would be *democratic—e*ven if it was democratically created … . These people would not simply have supplanted one set of institutions for another. Such a regime would be violation of the very idea of democracy: it would preclude the possibility of "rule by the people?[70]

Even the ruler whose status as such remains wholly in the gift of her people has been said to possess at best a "degenerate" democratic character.[71] Whatever the circumstances, it would seem a stretch to consider a state ruled across multiple generations by the same individual a paradigm of

[65] Burke, "Speech to the Electors of Bristol," 12.

[66] Rousseau's antipathy to electoral democracy has been attributed to his assumption that citizens would never prefer a decision rule which privileges the judgment of an entity of which they are not members (e.g., Manin, *Principles of Representative Government*, 9; Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires* (Cambridge: Cambridge University Press, 2000), 157-58).

[67] Consider, for instance, theorists' disagreements on what counts as the most popular alternative, notably, whether it is the one that a majority prefer to every other (e.g., Macartan Humphreys and Michael Laver, "Spatial Models, Cognitive Metrics, and Majority Rule Equilibria," *British Journal of Political Science* 40 (2010): 11-30; D. Austen-Smith, "Economic Methods in Positive Political Theory," *Oxford Handbook of Political Economy*, ed. B. Weingast and D. Wittman (Oxford: Oxford University Press, 2006); Kenneth Shepsle, "Congress is a 'They,' not an 'It': Legislative Intent as an Oxymoron," International Review of Law and Economics 12 (1992): 239-56) or that preferred by a notional "tie-breaking" voter (Donald Saari, "Capturing the 'Will of the People,'" *Ethics* 113 (2003): 333-49; similarly, Michael Dummett, *Voting Procedures* (Oxford: Oxford University Press, 1984); Gerry Mackie, *Democracy Defended* (Cambridge: Cambridge University Press, 2003), and on whether a typical vote outcome expresses legislators' majority view (Bernie Grofman, "Public Choice, Civic Republicanism, and American Politics: Perspectives of a Reasonable Choice Modeler," *Texas Law Review* 71 (1992): 1541-87; J. Godfrey, et al., "Applications of Shapley-Owen Values and the Spatial Copeland Winner, *Political Analysis* 19 2011): 306-24) or instead just a combination of the operation of arbitrary agenda controls (e.g., William Riker, *Liberalism Against Populism* (San Francisco: W.H. Freeman, 1982); Daniel Farber, "Positive Theory as Normative Critique," *Southern California Law Review* 68 (1995): 1565-93) and strategic voting (William Riker and Barry Weingast, "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures," *Virginia Law Review* 74 (1988): 373-401; Allan Feldman and Roberto Serrano, *Welfare Economics and Social Choice Theory*, 2d ed. (New York: Springer, 2006)).

[68] Dahl, "Procedural Democracy," 108.

[69] Joel Colón Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge: 2012), 58-59.

[70] Ibid., 59 (emphasis in the original).

[71] Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), 76; and similarly Arrow, *Social Choice and Individual Values*, 90; Waldron, "The Concept and the Rule of Law," 19; Wilson, *Democratic Equality*, 85. At one point, Kolodny questions this consensus: "If there is, in general, no social inequality in a group's being related as principal to a single person related as agent, then there need be no social inequality in a representative legislature consisting of a single official" ("Ruling Over None II,", 319). Elsewhere in Kolodny's analysis, though, the notion of an equal opportunities monarchy is deployed as a reductio: "[I]f individuals had interests in control [in their judgment being decisive over a wide range of changes in the judgments of others], then that would seem to argue not for democracy, but instead for a lottery for control." ("Ruling Over None I," 208).

democratic politics. A theory that would allow for this possibility would appear to be at a considerable disadvantage. Notably, in its emphasis on citizens' inalienable right to recall issues for direct consideration, Dahl's own later work would seem to exclude such a scenario.[72]

Unlike its underinclusive counterpart, procedural non-favoritism accounts for the possibility of responsible representative democracy by locating the requisite balance between public policies and citizen preferences not in preferences over policy itself but rather in preferences over how to resolve policy disagreement. Conversely, we have seen that this same feature also threatens to render the principle overinclusive. In the result, the proceduralist is left with the hard choice of recognizing either *both* Burkean legislation and elective monarchy as potentially democratic or *neither*. By contrast, in relating democracy not merely to political equality but also to substantively sound decision-making, it is open to the rationalist to define political equality in terms of substantive non-favoritism without thereby excluding scope for Burkean legislation.

It is instructive to consider the distinction between democratic rationalism and the view that the legitimacy of a form of government depends on its tendency to deliver superior results.[73] On the latter, instrumentalist view, the value of political equality is contingent; there is nothing by which to choose between democracy and, say, dynastic monarchy but the quality of their respective outputs. In contrast, democratic rationalism privileges political equality in and of itself, thereby excluding dynastic monarchy, however enlightened. Likewise, in conceiving of non-favoritism substantively, that is, in terms of citizens' say over outcomes, rationalism might require that the balance between citizens' opinions and policy decisions be mediated by a collective legislature whose members are elected by discrete popular constituencies rather than by a sole legislator elected nationally. Similarly, rationalism can invoke substantive non-favoritism to explain why legislators might be obligated to keep manifesto commitments no matter how earnestly—and wisely—their views might change, and why legislators might likewise be subject to a standing obligation to seek out and to assign weight to their constituents' judgments in deciding how to vote. Finally, and crucially, rationalism also valorizes outcomes' quality. Associating democracy with the potentially conflicting demands of political equality and of public reason, rationalism admits of the possibility that legislators might legitimately sacrifice the former for the latter. Notably, there might be circumstances in which the legislature that "over-represent[s] virtue" exercises its "own reason and judgment" and departs from public opinion without thereby acting undemocratically.[74] Accordingly, on a rationalist account, it is surprising neither that Burkean legislation might be acceptable nor that a sole legislator would not.

IV. CONCLUSION

Conflict with intuitions need not be fatal. But the assumption that a theory of democracy might come to be judged in part on whether it can explain an elected legislator's scope to exercise an element of autonomous judgment is not really in doubt. It is this thought, after all, that prompts proceduralists to develop the defensive strategies of deflating, respectively, the extent of such autonomy and the extent of the legislative sphere to which the principle of political equality actually applies. Our criticism of these strategies motivated, in turn, an exploration of an alternative approach that promised to explain the legitimacy of Burkean legislation without reliance on such qualifications. The further failure of the Dahlian alternative suggested that the essential Burkean challenge to proceduralism has the intractable character of a dilemma: acceptance either of the curtailment of representative government or of the admission of elective dictatorship. It is a virtue of rationalism that it avoids this apparent dilemma.

Our conclusion raises two related questions: how certain are we anyway of the intuition that legislators might sometimes defy the views of their constituents, and why, precisely, is rationalism's failure to "pick[] out" laws "without reference to inherently arguable claims"[75] actually

[72] See text accompanying note 48, above.

[73] Richard Arneson, "Defending the Purely Instrumental Account of Democratic Legitimacy," *Journal of Political Philosophy* 11 (2003): 122-32.

[74] Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), 150-52.

[75] Barry, "Is Democracy Special?," 195.

problematic? Ultimately, claims about what is intuitive fall within the ambit of the burgeoning experimental philosophy movement.[76] From this standpoint, the question of which implication counts as a bullet to be bitten—be it the delegates-or-monarchs dilemma or, alternatively, the residual contestableness of a law's authority—is, partly at least, an empirical matter. Experimental data might ultimately support a proceduralist position, but, on this score, it seems there is no scope for complacency. For one thing, there is evidence that citizens value a legislator's voting decision not simply for its content but also for its trustworthiness and integrity[77]; for another, empiricists have begun to examine legal positivism's invocation of the corresponding intuition about the necessary impartiality of legal guidance.[78] Early indications are that, contrary to the traditional assumptions of many philosophers, a text's legal validity may be popularly understood to depend not only on political circumstance but also on its substantive value.[79] The possibility of a moralistic folk concept of law raises the question of whether the folk concept of democracy might analogously ascribe policy commitments by reference to standards of substantive justice. Such an eventuality would seem to potentially undercut the case for theories of democracy that abjure appeals to substantive standards, and, by extension, reinforce the ostensible disadvantage of foregoing the simple explanation of Burkean legislation that such appeals would make possible.

[76] N. Mukerji, *Experimental Philosophy: A Critical Study* (London: Rowman and Littlefield International, 2019); M. Alfano, D. Loeb, and A. Plakias, "Experimental Moral Philosophy," in E. Zalta (ed.), *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/experimental-moral/.

[77] Campbell, et al., "Legislator Dissent as a Valence Signal."

[78] Kevin Tobia, "Experimental Jurisprudence," *University of Chicago Law Review* 89 (2022): 735-802.

[79] Brian Flanagan and Ivar Hannikainan, "The Folk Concept of Law: Law is Intrinsically Moral," *Australasian Journal of Philosophy* 100 (2022): 165-79.

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