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Law's Legitimacy and 'Democracy-Plus'

WOJCIECH SADURSKI*

Abstract—Is it the case that the law, in order to be fully legitimate, must not only be adopted in a procedurally correct way but must also comply with certain substantive values? In the first part of the article I prepare the ground for the discussion of legitimacy of democratic laws by considering the relationship between law's legitimacy, its justification and the obligation to obey the law. If legitimacy of law is seen as based on the law being justified (as in Raz's 'service conception'), our duty to obey it does not follow automatically: it must be based on some additional arguments. Raz's conception of legitimate authority does not presuppose, as many critics claim, any unduly deferential attitude towards authorities. Disconnection of the law's legitimacy from the absolute duty to obey it leads to the second part of the article which consists in a critical scrutiny of the claim that the democratically adopted law is legitimate only insofar as it expresses the right moral values. This claim is shown to be, under one interpretation ('motivational'), nearly meaningless or, under another interpretation ('constitutional'), too strong to survive the pressure from moral pluralism. While we cannot hope for a design of 'pure procedural democracy' (by analogy to Rawlsian 'pure procedural justice'), democratic procedures express the values which animate the adoption of a democratic system in the first place.

It is often said that a democratic state, in order to be fully legitimate, must not only issue its laws in a procedurally correct way but must also ensure that they comply with certain substantive values. Democracy, it is said, not only requires designing and following the correct procedures but its laws must in addition comply with certain values, such as human dignity, liberty, equal concern for all etc., in order to be fully legitimate. In this article I will subject this understanding—which, for the sake of brevity, I will call the 'democracy-plus' conception—to critical scrutiny. However, my main purpose will not be so much to refute this view, but rather to reflect on what such a call for the alignment of democracy with certain values really means—what plausible interpretations can be given to this demand. More specifically, my main concern will be with the links between 'value-enhanced' democracy (democracy that is not 'merely'

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procedural but rather claims to have been infused with the 'right' values) and judgments concerning the legitimacy of democratically enacted laws. Just as the principle of the rule of law can be understood in a purely procedural or in a more substantive way (that is, either that government is subject to *all* laws, whatever they may be, or that it is only subject to those laws that can be viewed as 'right' or 'just'), so the democratic rule can be understood in a similar manner. Can those laws that have procedurally democratic credentials but diverge from our views about the right 'substantive' values still be said to be legitimate? This is a somewhat simplified way of asking the question of central concern to me in this article.

As the above question immediately suggests, a great deal depends on how we understand the concept of law's 'legitimacy'. In preparing the ground for the discussion of the legitimacy of 'democracy-plus' that will occupy the second part of this article, I will first attempt to elucidate the notion of law's legitimacy by disentangling it from two other contiguous concepts: the justification of law and the obligation of citizens to obey it. I will take, as my starting point, a leading (and perhaps currently the most influential) theory in this area, namely Joseph Raz's so-called 'service conception' of legitimate authority. This choice is informed not merely by the huge critical resonance that this theory has found in recent jurisprudential writings, but, more relevantly from our point of view, by the fact that it has frequently been charged with displaying insufficient respect for the importance of procedurally democratic law-making as a significant factor in judging the legitimacy of laws, and also with underestimating the importance of promoting a critical, reflective attitude in citizens towards the law to which they are subject. The discussion of Raz's conception of legitimacy therefore brings us directly into the heart of the relationship between democratic law-making and the legitimacy of law. Even if, as I will argue, Raz's conception may be unsatisfactory in some regards, this is *not* due to its alleged disregard for the importance of democracy nor the idea, which it allegedly promotes, that citizens should always defer to authority. The reason that such a suspicion may have arisen in the first place is related to the ambivalence of the very notion of 'legitimacy', and its location *vis-à-vis* the justification of the law on the one hand and the citizens' obligation to obey on the other. I will argue that if legitimacy is understood as relating to the question of a given law's justification, then the objections of Raz's critics are groundless; if, however, legitimacy is viewed as creating or supporting the citizens' duty to obey, then a different, separate argumentative step is required to show that it is legitimate, in addition to being justified. Therefore, even if a justification-based understanding of legitimacy does not *require* that a law have certain procedural, democratic credentials (although, of course, the two are perfectly compatible), this is not necessarily the case when legitimacy is viewed as obligation-inducing.

This clears the conceptual ground for a more substantive argument, in the second part of this article, concerning the relationship between legitimacy and

democracy, and, more specifically, for critical scrutiny of the demand that law, in order to be legitimate, must embody certain substantive values. Here, I will look at the warnings against 'democracy without values', and suggest that the best way of understanding the 'democracy-plus' precept is to try to imagine what a democracy devoid of substantive values might look like, and what the advantages and disadvantages (if any) of such a system might be. To the extent that 'democracy without values' is inconceivable (given that the very choice of a democratic design is inevitably and strongly value-based), the warning against 'democracy without values' is meaningless. However, I will argue that, beyond this foundational stage, the infusion of democracy with values may be seen as an important and meaningful demand, particularly since, as I will seek to demonstrate, a resort to the concept of 'pure procedural democracy', by analogy to Rawlsian 'pure procedural justice', is not readily available to us. We cannot be sure that, once the democratic procedure has been put in place, the values that inform its design will be replicated in the actual functioning of the system.

In what way, then, can we plausibly understand the call for 'democracy-plus'? I will suggest two possible understandings: one 'motivational', the other 'constitutional'; and I will show that both exhibit a problematic, troublesome relationship to society's moral pluralism. I will conclude by drawing together the two parts of this article, through an analysis of the findings of the second half in the light of the discussion of the notion of 'legitimacy' contained in the first.

1. *Justification, Legitimacy and the Obligation to Obey*

A. *Legitimate Authority and the 'Service Conception'*

When is a state justified in issuing authoritative directives to its citizens? And if it is justified in doing so, does it follow *eo ipso* that its directives—its laws—are necessarily legitimate, leading to the creation of a duty to obey on our part? These three ideas: the justification of law, its legitimacy, and the obligation of citizens to comply with it, are often conflated with each other in an unhelpful manner. In this first part of this article, I will attempt to disentangle them in an attempt to clear the conceptual field for the later discussion of the legitimacy of democratic authorities.

A good starting point is Joseph Raz's so-called 'service conception of authority', if only because it is currently so influential, both among its supporters and its detractors. The 'service conception' consists of three theses: the dependence thesis, the normal justification thesis and the pre-emption thesis. Here, I will paraphrase each of these in a stylized manner. According to the first thesis, authoritative directives should only be adopted for reasons which apply to their intended subjects (and not, for example, for reasons relevant to the authorities themselves). The second holds that directives are authoritative when it is the case that desired outcomes (i.e., the outcomes desired by the addressees of the

directives) will be best achieved if the subjects allow themselves to be guided by the directives of the authority rather than acting on those reasons directly. The third states that such authoritative directives supersede, rather than complement, the reasons for their own adoption.

This conception is, at first blush, vulnerable to the objection that it cannot be squared with the idea that citizens should have a critical, reflective attitude towards the authorities that govern them; a critical attitude characteristic of a democratic society in which it should be generally accepted that, as H.L.A. Hart had famously put it, ‘however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny’.¹ Even though Raz had anticipated objections along these lines and protested in advance that ‘[n]o blind obedience to authority is here implied’,² nevertheless the charge *has* been laid. Ronald Dworkin, for one, has observed rather caustically that ‘[t]his account of the nature and point of authority insists on a certain attitude toward authority’,³ namely, ‘a degree of deference toward legal authority that almost no one shows in modern democracies’.⁴ It is worth looking more closely at Dworkin’s argument:

We do not treat even those laws we regard as perfectly valid and legitimate as excluding and replacing the background reasons the framers of that law rightly considered in adopting it. We rather regard those laws as creating rights and duties that normally trump those other reasons. The reasons remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law’s trump should not prevail.⁵

Dworkin then goes on to elaborate this point by giving the example of President Abraham Lincoln who, during the Civil War, suspended the writ of habeas corpus even though the US Constitution denies such a power to the President acting on his own, instead assigning it to Congress.

Dworkin’s criticism, however, misses the point, and his Lincoln example actually seems to confirm rather than undermine Raz’s conception. Raz is not suggesting, as far as I understand him properly, that citizens are advised to follow the authority’s directives instead of following their own reasons for action; rather, he is saying that *if they do so*, then the authority is, for them, legitimate. This is a conceptual analysis of the notion of legitimate authority rather than a normative view about the scope of subjection of citizens to the authorities. The language that Dworkin uses to describe the status of the original reasons of the subjects after the law has entered into the scene actually confirms this: rights and duties created by the law ‘trump’ the original reasons—which is exactly what

¹ H.L.A. Hart, *The Concept of Law* (1961) at 206.

² Joseph Raz, *Ethics in the Public Domain* (1994) at 215

³ Ronald Dworkin ‘Thirty Years On (Book Review of *The Practice of Principle* by Jules Coleman)’, 115 *Harvard Law Review* 1655 at 1671 (2002).

⁴ *Ibid* at 1672.

⁵ *Ibid*.

Raz describes by using the language of 'pre-emption'. 'The reasons remain', Dworkin observes, but this does not mark any difference between the (Razian) pre-emption thesis and Dworkin's own account, because the reasons 'remain' only in the sense that they inform us whether, under the circumstances, we should comply with the law's directives, or perhaps contemplate some extra-legal, even illegal, course of action. This residual role of the original reasons after law has entered the stage is perfectly compatible with—indeed, supports—Raz's pre-emption thesis, because on his account the limits to the pre-emption are at the same time the limits of law's legitimacy. When the law's 'subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend'⁶ then the law, at this point, is no longer a legitimate authority for them because it does not fulfil the role of mediating between people and the practical reasons upon which they act—a 'mediation' central to Raz's account.⁷

Dworkin's example of Lincoln and his suspension of habeas corpus seems to confirm this: 'Most of us treat the Constitution as both legitimate and authoritative. But many commentators nevertheless think both that Abraham Lincoln was morally right to suspend habeas corpus during the Civil War and that he acted illegally'.⁸ Expressed in Raz's terms, what Lincoln did was to revert to the original reasons for action rather than to act on the Constitution's authority: the perceived emergency inclined him into an illegal but politically and morally preferable solution. Far from undermining Raz's pre-emption thesis, Dworkin's argument actually confirms Raz's account in his own parlance: legal rights normally 'trump' our various extra-legal considerations (e.g. of utility), but extra-legal considerations may 'trump' the law's authority when compliance with law's directives is morally or politically indefensible. This becomes even clearer when Dworkin adds:

Lincoln did not deny the Constitution's authority in making his decision; he simply weighed that authority against competing reasons of the kind the Framers had also taken into account which retained their vitality. Lincoln found that the latter were, under the circumstances, strong enough to outweigh the former.⁹

It is puzzling why Dworkin sees this account of Lincoln's unconstitutional but morally and politically justified action as contrary to Raz's account of what constitutes legitimate authority. The point of Dworkin's account is as follows: the Framers of the US Constitution had contemplated various reasons that the President and/or Congress might have for suspending the writ, and in the end had decided that the reasons for the President to act alone were not compelling

⁶ Raz, above n 2 at 215.

⁷ Ibid at 214: '[The dependence and the normal justification theses] regard authorities as *mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason' [emphasis in original].

⁸ Dworkin, above n 3 at 1672.

⁹ Ibid at 1672.

enough to grant him this constitutional power. Those reasons (ultimately discarded by the Framers) ‘retained their vitality’ nevertheless (though in an extra-legal realm, so to speak), and Lincoln acted on them, in contrast to what the Constitution provided; hence, he acted illegally, but, in the eyes of Dworkin and ‘many commentators’ with whom he aligns himself, morally correctly. This is perfectly compatible with Raz’s account: in Raz’s terminology, on this particular issue, Lincoln decided that it was better to revert to his own reasons for action (which, we may imagine, had something to do with the most efficient way of avoiding great national disaster in a situation of emergency, and which mandated his unilateral action to suspend the writ) rather than use the authoritative directives contained in the Constitution as the best way of giving effect to those original reasons. So in this particular case, he denied the legitimacy of the Constitution, which is just another way of saying, as Dworkin himself admits, that Lincoln acted ‘illegally’ and at the same time in a ‘morally right’ fashion.

There is one way in which the above defence of Raz’s conception *may* be challenged, and its consistency with Dworkin’s account of the Lincoln example questioned. It may be argued that the property of legitimacy applies to the authority across the board and not to its specific directives, so that a subject may disregard one or another specific directive of an authority (or, in Raz’s terminology, act on her own reasons for action rather than allow the authoritative directives to preempt them) and still recognize the legitimacy of the authority as a whole. Such an interpretation seems to be offered by Dworkin when he states that, in his example, ‘Lincoln did not deny the Constitution’s authority in making his decision’, and yet that ‘he acted illegally’. This, however, seems to be a pedantic gambit. The fact that Lincoln ‘acted illegally’ on this particular issue means that, *on this particular issue*, he denied the legitimacy of the Constitution as applying to him. The recognition of legitimacy may be a matter of degree: Raz actually mentions that a legal system’s legitimate authority ‘may not be as extensive as it claims’.¹⁰ We may, of course, adopt by definitional fiat a convention whereby legitimacy applies only to the authority as a whole rather than to its particular directives, but then we would need another language to describe the situation in which a subject recognizes the general authority of a given entity, but refuses to recognize a specific directive as properly incorporating the right reasons relevant to himself. Nothing is lost by saying that such a specific directive held to be ‘illegitimate’ by this subject, and nothing is gained by attributing the notion of legitimacy only to authority in general, and denying it to specific authoritative directives.

B. *Authority and Identification of Valid Law*

Raz’s pre-emption thesis seems therefore to be a useful enough account of what it means for subjects to treat an authority as legitimate. What is more problematic,

¹⁰ Raz, above n 2 at 215.

however, is the account of the law as necessarily and always identifiable without regard to the original reasons that the law-makers have amalgamated, so to speak, into the legal directives. It is one thing for Raz to insist on the conceptual truth about 'legitimate' authorities pre-empting the citizens' appeal to non-legal reasons insofar as they recognize the legitimacy of a given directive; it is another thing altogether to claim that the law must be fully identifiable by its subjects without ascertainment of the original reasons for action that it is now meant to displace. The latter claim is not a necessary condition of the intelligibility of the former.

We can say that, insofar as we recognize the law's legitimacy, we disregard the competing, non-legal reasons for action (in the sense that if those non-legal considerations outweigh the legal directives, then this is just another way of saying that the law's legitimacy has reached its limits), *and also* that in order to ascertain the correct meaning of the legal directives, we must appeal, at times, to the very reasons that the law seeks to translate into the language of legal rules. The latter statement may upset the architectural elegance of Raz's construction in the sense that the original reasons for action may appear twice in the process of the compliance with law: first, at the stage of the translation of citizens' reasons into legal rules by legal authorities; and secondly, at the stage of ascertaining the meaning of those legal rules by those to whom they are addressed. This, however, is not as problematic as it may at first seem: it is not contradictory to claim, at the same time, that (1) to treat the law as a legitimate authority means to surrender the appeal to the original (non-legal) reasons in deciding about one's action, on the basis that the law effectively translates those reasons into its directives, and that (2) in order to identify the meaning of the legal directives we need, at times, to refer back to those original (non-legal) reasons. Simultaneous acceptance of these two propositions, untidy though it may seem, has the advantage of saving the concept of law from patently counter-intuitive conclusions, according to which a number of legal standards would have to be denied the quality of law precisely because in order to ascertain their meaning, the subjects need to resort to the reasons that triggered the elevation of these standards to legal status in the first place.

This, indeed, is the meaning of 'standards' in those contexts when, in legal theory, they are contrasted to 'rules' (not to be confused with Dworkin's principles/rules distinction).¹¹ When, for instance, the law denies enforceability to those contracts that 'unreasonably' restrain trade, or prohibits 'establishment' of a religion, etc., then it calls upon its subjects to replicate in their minds the reasons for action that it now purports to 'pre-empt'. In order to fix the meaning of those standards (and therefore, of the authoritative directives of law) its subjects

¹¹ See, in particular, Duncan Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* 1685 (1976); Kathleen Sullivan 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards', 106 *Harvard Law Review* 22 (1992); Jeremy Waldron, 'Legal and Political Philosophy' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook on Jurisprudence and Philosophy of Law* (2002), 352–81 at 354–6.

must go back to the original reasons for enacting them in the first place. To be sure, it is not a simple replication of the process of translation of the original reasons into directives, because the very fact of already having those (and other) legal directives in force introduces some important constraints upon the meanings that can be given to them (and this is the point of Dworkin's theory of constructive interpretation in law).¹² An enforcer of a legal standard does not have the same freedom of interpretation as the legislators and voters had when they argued for the introduction of the rule in the first place. If a legal standard prohibits, for example, the establishment of a religion, then there are limits as to which actions, under the interpretative conventions of a given legal order, may be viewed as the unconstitutional establishment of religion. However, within those constraints, in order to ascertain exactly what is and is not prohibited (for instance, whether state financial aid to religious schools counts as 'establishment' or not), an enforcer of this legal directive will have to enquire into the underlying purposes, principles and/or policies that it is supposed to implement. We know that the law mediates between the background principles and specific authoritative decisions, and at times to identify the meaning of the mediating directives we need to look back to the original reasons that inspired them.

Indeed, law-makers may justifiably intend, in some circumstances, to force us to do just this, for instance in order to introduce some necessary flexibility into the law at the stage of its application (because flexibility at the point of law-making may often be politically unfeasible), or to avoid incidences of substantive injustice caused by the scrupulous application of a by-and-large justified rule, or to reduce the levels of over- and under-inclusiveness that necessarily occur when the background policies and principles are 'translated' into rough-and-ready rules, or for a whole host of other reasons.¹³ We (i.e. the subjects and enforcers of those directives) will then need to engage in the ascertainment of the meaning of those background principles and policies, and also in a rather complex balancing of the values at stake, thus largely replicating the moral balancing (though within the constraints of valid interpretative conventions) that initially led to the adoption of the directive. We may express this proposition in the language of Dworkin's 'constructive interpretation', or in the language of theorists of so-called 'inclusive positivism' who claim that law, at times, incorporates moral standards into the meaning of its authoritative rules. Either way, Raz's view that essential to the very notion of authority is the idea that the meaning of authoritative directives should be identifiable without recourse to the original reasons that the directives supposedly pre-empt cannot be squared with the pervasive presence of 'standards' (as opposed to 'rules') in legal directives. Nor can it be squared with the fact that the distinction between standards and rules is a more a matter of degree than of a sharp divide: many directives, which at first blush look

¹² Ronald Dworkin, *Law's Empire* (1986) at 62–8.

¹³ Including to promote civic deliberation in the process of adjudication, see Sullivan, above n 11 at 67–9.

like straight rules, may be 'corrupted by exceptions'¹⁴ to the point at which they more closely resemble standards.

C. Legitimate Authority and Democracy

Raz's conception of legitimate authority is not a *normative* thesis about how legitimacy should be generated but rather a *conceptual* analysis of what it means for authority to be legitimate. The source of misunderstanding about Raz's conception may be that Raz himself is not quite clear about this distinction between the possible aspirations of his project. Recently, one of his critics, Scott Hershovitz, claimed that the 'normal justification thesis' neglects the importance of the procedural mechanisms of democracy:

If a government's electoral system favors some interests in society, or appears corruptly financed, or causes portions of the population to be marginalized and voiceless, we are quick to judge it illegitimate, or at least less legitimate than it might be otherwise. Where these deficiencies are present, it counts for little that a government may produce substantively good decisions, decisions that the normal justification thesis [of Raz] would hold authoritative. . . . This shows us one way in which the normal justification thesis is incomplete as a theory of legitimacy for political authorities: Governments that fulfill it may fail to be legitimate on procedural grounds.¹⁵

The source of the confusion is that, in offering his conception, Raz is apparently less interested in the problem of legitimacy than in that of authority: his avowed aim is to tell us what it means for one person or entity to have authority over another. But to construct the concept of authority, Raz chooses to take as a point of departure the notion of *legitimate* authority. It is only once we learn what legitimate authority means that we can discover what a less-than-legitimate authority is, by identifying what features it lacks in comparison with a legitimate one. And so we learn from Raz that 'the law either claims that it possesses legitimate authority, or is held to possess it or both', and that even if the law fails to possess legitimate authority, it is a conceptual truth that it must at least 'claim' to do so.¹⁶ (As Dworkin has observed, this is in many respects a bizarre proposition, but we may leave this matter to one side here).¹⁷ So it is not the case that, according to Raz, we first develop a concept of authority and then add to it the conditions of its legitimacy; rather, the converse seems to be the case, as the very concept of authority is not intelligible without a prior notion of legitimate authority. (It is rather as if we defined 'postage stamps' by defining 'valid postage stamps' first, and only then explained that there are also stamps which lack some conditions of validity—but the very idea of a 'postage stamp' is unintelligible without knowing first

¹⁴ Ibid at 61.

¹⁵ Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority', 9 *Legal Theory* 201 at 216 (2003).

¹⁶ Raz, above n 2 at 215

¹⁷ Dworkin, above n 3 at 1666–7.

what a valid stamp means).¹⁸ This is confirmed when Raz says that '[a]uthority in general can be divided into legitimate and *de facto* authority. The latter either claims to be legitimate or is believed to be so'.¹⁹ Either way, any authority, whether legitimate or not, derives conceptually from the property of legitimacy.

Legitimacy, or the lack thereof, is in the eyes of the critical observer: a *de facto* authority either commands 'legitimacy' by virtue of the beliefs of its subjects, or at the very least claims to be legitimate, even if it fails to engender this belief among its subjects. Under Raz's definitional proposal, an 'authority' that neither claims legitimacy nor is believed to be legitimate is a contradiction in terms. This seems acceptable: indeed, we have a different vocabulary for a political power that does not even try to create pretensions of legitimacy: tyranny, occupation force, etc. The use of the language of 'authority' carries a modicum of an honorific acknowledgement of a (real or at least claimed) connection between the exercise of the authority and certain facts about the subjects of the authority (namely, about the reasons for action that they have independently of the existence of the authority itself). 'An authority' that did not even pretend to respect such a connection, and yet were successful in controlling the behaviour of its subjects, would not be even an 'illegitimate' authority; it would not be an 'authority' at all, representing nothing but naked power. Whether the 'authority' is legitimate or not is a matter of its degree of success (in the eyes of a critical observer) in establishing a close connection between its directives and the background reasons that would otherwise guide the actions of the laws addressees—in Raz's terminology, 'reasons which apply to the subjects of those directives'.

Viewed in this way, Raz's theory is immune to the criticism that it neglects the importance of procedural devices of democracy. His project is to suggest a concept of authority that necessarily relies upon a prior concept of legitimacy, rather than to propose a normative political theory about what are the necessary and sufficient conditions of legitimacy. But the concept of authority he outlines lends itself well to the democratic interpretation suggested by Hershovitz: it is only a matter of interpreting the meaning of 'the reasons which apply to the subjects' of authoritative directives. We may recall that Raz claimed in his 'dependence thesis' that the very concept of (legitimate) authority requires that directives be based 'on reasons which apply to the subjects of those directives'; the whole point of the 'service conception' is to place the (legitimate) authorities in the position of mediating between the subjects and 'the right reasons which apply to

¹⁸ Another analogy may be drawn from an argument in the House of Lords' decision *Anisminic Ltd and Foreign Compensation Commission and Another* [1969] 2 AC 147 at 199 *per* Lord Pearce, in which one of the questions concerned the meaning of the word 'determination' as in the 'determination by the Foreign Compensation Commission' in the text of the Act of 1950 establishing the Commission; the judgment established that only 'a real determination, not a purported determination' was to be construed as a 'determination'. Otherwise an absurd situation would be reached, according to Lord Pearce, in which the court deliberating on the Commission's decision would not be able to inquire as to 'whether a purported determination was a forged or inaccurate order which did not represent that which the commission had really decided'. To paraphrase, for the purposes of our argument, the notion of 'purported' or 'forged' or 'invalid' determination is derivative of the notion of a valid, or proper, determination.

¹⁹ Raz, above n 2 at 211.

them'.²⁰ But what reasons can 'apply to the subjects' other than those that they *actually have*? To be sure, one can suggest that paternalistic non-democratic authorities (perhaps in the idealized version offered by Rawls when he described decent and well-ordered, though illiberal, societies)²¹ can better identify the reasons that 'apply to the subjects' than can the subjects themselves. This, however, is a matter of normative political philosophy; manifestly not what Raz engages in when describing his 'service conception'. So it is perfectly compatible with Raz's theory to claim that *the only* way for the authorities to ascertain 'the reasons that apply to the subjects' of authoritative directives is by asking those subjects themselves, through democratic elections, representative bodies, referenda, etc. Combining such a (very plausible) normative political philosophy with Raz's 'service conception' brings about precisely what Herschowitz claims (although he presents his claim as a criticism of Raz's thesis), namely, that the only authority that can be legitimate under the service conception is one that is procedurally democratic.

The fact that Raz's conception can be reconciled *also* with a non-democratic, paternalistic theory (according to which the authorities are legitimate if they properly discern the reasons relevant to their subjects without asking the subjects themselves what they take those reasons to be) is not an argument against the service conception, because Raz might simply retort that, as a matter of normative political philosophy, he considers the paternalistic conception deeply implausible. Therefore, while Raz's understanding of legitimate authority is broad enough to accommodate various democratic and non-democratic political theories alike, the use of this concept does not reveal indifference towards democratic procedures. This is quite simply a separate debate (about how to go about identifying the reasons relevant to the subjects of authority), and Raz is free to claim that democracy offers the only plausible solution.

D. *Justification and Obligation*

At the start of this part of the article, I stated that I would deal here with justification, legitimacy and the obligation to obey the law, but thus far I have focused exclusively on legitimacy; it is now time to consider the other two categories. Let us begin with the relationship between the legitimacy of law and the obligation to obey it. There is an understandable temptation, at a commonsense level, to draw a tight conceptual connection between the two: while there is no reason to obey a law which is illegitimate or the legitimacy of which is in doubt, what is the point (the argument may go) of ascertaining the legitimacy of a given law other than to identify our obligation to obey it? As in Shakespeare's 'Henry IV', when Glendower boasts, 'I can call spirits from the vasty deep', and Hotspur retorts: 'Why, so can I, or so can any man;/But will they come when you call for them?',²²

²⁰ Ibid at 214.

²¹ John Rawls, *The Law of Peoples* (1999), esp at 59–88.

²² William Shakespeare, *Henry IV*, Part I, Act 3, Scene 1

a finding that a law is legitimate may *appear* pointless unless it is necessarily connected to the validation of the duty to obey it. Indeed, it may be even argued that we may have at times an obligation to obey laws that are perhaps less-than-legitimate, and so, *a fortiori*, have an unquestionable obligation to obey the legitimate law. Consider John Finnis's proposition that 'if an unjust [legal] stipulation is, in fact, homogeneous with other laws in its formal source, in its reception by courts and officials, and in its common acceptance, the good citizen may (not always) be morally required to conform to that stipulation to the extent necessary to avoid weakening 'the law', the legal system (of rules, institutions, and dispositions) as a whole'.²³ This is because, in the case of a disobedience of a particular unjust law that is an aberration in an otherwise reasonably just system, we should be concerned about not undermining the effectiveness of the legal system as a whole in pursuing the common good. Hence it may seem that in the case of a law that we consider to be legitimate (by our own criteria, whatever they may be) our moral obligation to comply must be all the stronger.

The connection, however, is not as close as it would seem at first sight, and it is significant that for a number of legal theorists the obligatory nature of laws does not necessarily follow from their legitimacy. Kent Greenawalt, for one, identifies a number of different correlates of the idea of a legitimate political authority, and the proposition that the governed should obey the directives of those with authority is only one among a number of others possible, such as that those with political authority are justified in issuing certain kinds of directives to those they govern, or that they are justified in using force to induce compliance, or that the governed should not interfere with such uses of force, etc.²⁴ Similarly, Robert Ladenson has suggested that 'The right to rule is ... a justification right ... [which] by itself implies nothing about either the subject's duty of allegiance to the state or of compliance with the law'.²⁵ Indeed, the view that the notion of legitimate authority merely connotes that the authority is *justified* in issuing directives to the subjects, but not that the subjects have a corresponding duty to comply with these directives, seems to be quite widespread in current legal theory.

To see clearly why this disconnection of legitimacy and obligation to comply is eminently persuasive, it suffices to consider again Raz's understanding of legitimate authority (the 'service conception'). According to this conception, as we have seen, those subject to the authority are more likely to comply with directives founded upon reasons relevant to them. This means that these original reasons that people espouse identify important aspects of their well-being, broadly understood, and that they are more likely to attain this well-being if they comply with the authoritative directives rather than attempting to achieve it unilaterally (or, in Raz's terminology, through acting on those reasons directly). The *only* implication of this conception is that it is rational, or wise, or prudent, for the

²³ John Finnis, *Natural Law and Natural Rights* (1980) at 361–2.

²⁴ R. Kent Greenawalt, *Conflicts of Law and Morality* (1987) at 50–1.

²⁵ Robert Ladenson, 'In Defense of a Hobbesian Conception of Law' in J. Raz (ed.), *Authority* (1990) at 36–7.

subjects of an authority to follow authoritative directives (which already, under a legitimate authority, correctly incorporate the original reasons) rather than try to find their own way of attaining those aspects of their well-being. No-one, however, has a *duty* to be rational, or wise, or prudent.²⁶ To establish such a duty requires some additional normative argument. If I choose to ignore the directives issued by legitimate authorities (directives that, by definition, better reflect the reasons which apply to me than any unilateral action I could take), I may make my life more difficult, and fail to attain most efficiently the goals identified by my original reasons—but I have not breached any obligation. I *would* have breached an obligation if, for instance, by disregarding the authoritative directives and acting on my own reasons directly, I failed to discharge duties of fairness to my fellow-citizens (who *do* follow the authoritative directives in a way that pre-empts their own, original reasons for action), or if I undermined the law's effort to provide the optimal coordination of individual actions in pursuit of public goods, or if I reneged on an implied promise to obey the law, which others might have legitimately read into my conduct and relied on in their actions, and so on. However, each of these grounds for alleging a breach of obligation requires an *additional* theory about the foundations of my obligation: that, for example, the law parallels the schemes of cooperation that generate reciprocal duties of fairness; or that law is generally efficient in coordinating individual actions to deflect collective-action problems and that when it is certified as such, we all have a duty to contribute to such an efficient outcome; or that our continued presence in the society can be viewed as analogous to an implicit promise to be bound by a legitimate law, etc. Each of these theories may or may not be persuasive—and, as we know, entire libraries can be filled with literature arising from the disputes and disagreements over these, and other, proposed grounds for a political obligation. One thing, however, is clear: these are *additional* theories that are necessary to provide a moral basis for a duty to comply with a legitimate law, and that a concept of legitimate authority, such as that proposed by Raz, evidently does not ground, *per se*, such a duty.

However, the matter is more complicated than that, and Raz's is not the only theory of legitimate authority around. It is worth looking at those theorists who, in contrast to Greenawalt,²⁷ Ladenson and others, draw a strict connection between legitimacy and the duty to obey. Perhaps the most interesting version of

²⁶ This is consistent with what Raz had claimed well before he has formulated his 'service conception of authority', namely that there is no general moral obligation to obey the law; more specifically, he showed that such an obligation does not follow from our undeniable duty to support and uphold good institutions (and so, in the later language, the institutions that properly translate our original reasons into authoritative directives). The duty to support good institutions, Raz says, gives birth to an obligation to obey only those laws that guarantee the functioning of a democratic government, while 'It provides reasons to obey other laws only to the extent that by doing so one sets a good example or that by failing so to act one sets a bad example: that is, only to the extent that obedience to these other laws strengthens or prevents weakening the laws on which the democratic character of the government is founded', Joseph Raz, *The Authority of Law* (1979) at 241.

²⁷ To be sure, one of Greenawalt's seven possible 'correlates' of state's legitimacy is a duty to obey it by its citizens. I have here, and in my next reference to Greenawalt, taken into account only those 'correlates' where no such implication is proposed.

such a conception was recently proposed by A. John Simmons who describes (what he calls) a 'Lockean account' (which is also his, Simmons', preferred one) of state legitimacy in the following way:

A state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. Accordingly, state legitimacy is the logical correlate of various obligations, including subjects' political obligations. A state's 'legitimacy right' is in part a right held specifically against the subjects bound by any state-imposed duties, arising from morally significant relations—in Locke's case, consensual relations—between state and subject.²⁸

Simmons goes on to elaborate on the last point in this quotation, namely on the nature of the 'special moral relationship with any particular subject'²⁹ that gives the state a moral legitimacy, which in turn creates a duty to comply on the part of the subjects. His discussion, inspired by Locke, is complex and I do not propose to summarize it here, but the main point (for our purposes) is this: for Locke, as for Simmons, the moral justification of a state is one thing, the validation of its legitimacy quite another. Moral justification is a matter of identifying, and applauding, the general quality of a state, such as its unique ability to solve various coordination problems, to institutionalize and enforce rights, to suppress violence, etc. To justify states we need to show that they are beneficial, and of course not all states are beneficial; hence, not all states are justified. If a state *is* justified, this fact may, at best, ground our duty not to undermine it and perhaps even positively to support it—but not necessarily to obey it. Obedience is another matter: it requires some special relationship between the state and a particular subject, because '[t]he fact that a state or a business has virtues that can be appealed to in order to justify its existence cannot by itself argue for its having special rights over particular individuals'.³⁰ Those 'special rights' constitute the state's legitimacy—and they have to be defended on some other grounds (which Simmons characterizes as 'morally significant relationship' between the state and a particular individual) than merely the net benefits of having a state (or *that* state) that justify its existence.

Thus far I have been dealing with legitimacy without making any distinction between the legitimacy of particular rules and the legitimacy of a system of legal rules as a whole. Indeed, as I suggested earlier, legitimacy may be a matter of degree, and the legitimacy of a system may be seen as emerging from the recognition of the legitimacy of a great many specific legal directives that it contains. From the citizens' point of view, however, which is that of the legal obligation to obey, disobedience can normally be expressed only with regard to specific legal rules, not to the system as a whole. In such circumstances, as John Finnis noted,

²⁸ A. John Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739 at 746.

²⁹ *Ibid* at 748.

³⁰ *Ibid* at 752.

'your allegiance to the whole system ('the law') is put on the line: either you obey the *particular* law, or you reveal yourself . . . as lacking or defective in allegiance to the *whole*, as well as to the particular'.³¹ It would appear, therefore, that there is an important asymmetry between the problems of the legitimacy and the obligatory nature of the law: the former crystallizes only at the level of particular law, while the latter does so at both the particular and systemic level. This distinction between the particular and the systemic needs not concern us, however, because the asymmetry just noted does not affect the relationship between legitimacy and obligation in a way damaging to the argument here. After all, if legitimacy is based, as in Simmons' work, on special grounds that link the state with the individuals, then these grounds may equally concern specific laws or the system as a whole. And if legitimacy is based upon 'dependent reasons' being correctly encapsulated in legal directives, as in Raz's understanding, then legitimacy is even more readily identifiable at the level of particular rules. Similarly, repeated disobedience to a great number of particular laws amounts to a general habit of disobedience, which may or may not be based on a citizen's refusal to grant legitimacy to the legal system as a whole. However, there is no reason that we cannot say that someone may accord general legitimacy to the system as a whole, while at the same time refusing to obey a particular law on the basis that she finds it illegitimate.³²

Simmons' conception nicely demonstrates a general proposition that I want to make at this point, in bringing together the three concepts that I referred to at the start of this section: justification, legitimacy and the obligation to obey. The general proposition is this: either justification and legitimacy are taken to be substantively the same thing (or, to be more precise, rely on substantively the same arguments) and then the obligation to obey requires separate moral arguments than those used to support the other two (as in Raz, Greenawalt and Ladenson), or justification and legitimacy are two different things (each requiring different sorts of moral arguments) but then the obligation to obey follows necessarily from the validation of a state as legitimate (as in Simmons). To simplify, within the trichotomy of justification/legitimacy/obligation to obey, the notion of legitimacy is strategically central: either we align it with justification (and have a reasonably weak notion of legitimacy, equivalent to the state being justified in issuing directives) or with an obligation to obey (and then we have a strong concept of legitimacy, equivalent to the duty of compliance). What we *cannot* have is the alignment of all three concepts with each other because we then lose sight of

³¹ Finnis, above n. 23 at 317, emphases in the original.

³² Consider Dworkin's proposition: 'A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them. An argument for legitimacy need only provide reasons for that general situation. It need not show that a government, *legitimate in that sense*, therefore has moral authority to do anything it wants to its citizens, or that they are obligated to obey every decision it makes', Ronald Dworkin, *Law's Empire* (1986) at 181, emphasis added. The italicized words indicate the availability of yet another 'sense' of legitimacy, namely pertaining to *specific* legitimacy of particular laws.

the crucial fact that we do not have a duty to obey a state merely on the basis that it is properly doing what it is supposed to do. Whether we conceptualize the fact that the state is performing well its proper functions in the language of Raz's service conception of legitimate authority (and say that the state is correctly incorporating the dependent reasons into its authoritative directives, thus giving its subjects rational reasons to suppress their own independent reasons for action and to act on the state directives directly), or in the language of Simmons' moral justification of a state, is ultimately unimportant, and may be seen as a matter of definitional fiat. What *is* important is the awareness that in the chain of reasoning: 'justification—legitimacy—duty to obey' we always have *two* separate argumentative steps, not just one; and that we should avoid the non-sequitur of moving directly from a moral justification of a state to the political obligations of citizens.

2. 'Democracy-Plus'

A. 'Democracy Without Values'

A few years ago, speaking before the Polish Parliament ('Sejm') Pope John Paul II urged his audience—the parliamentarians of a newly democratized State—not to ignore the importance of the right moral values: 'Whilst the autonomy proper to the life of a political community must be respected, it should also be borne in mind that a political community cannot be seen as *independent of ethical principles*'.³³ He then went on to quote his own Encyclical, *Veritatis Splendor*, of 1993: 'As history demonstrates, a *democracy without values* easily turns into open or thinly disguised totalitarianism'.³⁴ As we can see, the late Pontiff phrased the questions of the conditions of democratic legitimacy in a remarkably similar way to that in which I framed the issue at the start of this article: namely, that democracy must be enhanced with values—'democracy-plus', in my proposed vocabulary—in order to provide a strong basis for the legitimacy of democratically established legal directives.

'A political [democratic] community cannot be seen as independent of ethical principles'; 'a democracy without values easily turns into open or thinly disguised totalitarianism'. What is the meaning of these warnings? The only way we can make sense of them is, I believe, by imagining what the negatives would be like: what a democratic community 'independent of ethical principles' or a 'democracy without values' might look like. Just as we can sometimes articulate intelligibly the shape of a positive precept (say, 'wealth with wisdom') only by realizing the shape, and the consequences, of its negative counterpart ('wealth without wisdom'), so we can give a proper meaning to the call for infusing

³³ John Paul II, 'Address to the Polish Parliament', 11 June 1999, available at http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_spe_11061999_warsaw-parliament_en.html part 5, my emphasis.

³⁴ *Ibid.*, part 5, quoting Pope John Paul II, *Veritatis Splendor*, 6 August, 1993, my emphasis.

democracy with values only by thinking about what 'democracy without values' would be like, and *what would be wrong with it*.

However, such a thought experiment is less easy than it may at first appear. For one thing, democracy as a system is based on particular, strong (and, by implication, controversial) moral values. The very choice of a democratic system, and a commitment to the maintenance and defence of democracy against the alternative institutional systems, is not in itself value-neutral. Perhaps the most obvious moral value that is necessarily presupposed by a democratic system is that of equal moral agency of every human being in terms of influencing decisions about public arrangements. What other reasons would we have to adopt a majority-rule based institutional design (which is, subject to all possible caveats and reservations, the irreducible hard core of any democracy)³⁵ if we had not adopted, as an overarching political value, some precept about the equal moral agency (or dignity) of all? After all, under many plausible and empirically testable conceptions, the conferral of an equal vote upon every adult citizen, on matters of common concern, is deeply irrational and arbitrary. People vary widely in terms of their intelligence, knowledge, experience, moral integrity, honesty, contributions to public welfare, courage, and so on. Each of these properties (and many others) could be shown to be relevant to the exercise of a right to affect public decisions; hence, each could constitute a ground of reducing or enhancing one's 'vote' on public issues, for instance, in parliamentary elections. If, intuitively, we find such a proposed radical departure from a 'one person—one vote' principle objectionable (as, I take it, we usually do) then it must be because there are some powerful moral values that would be offended by such a departure. Of course, we may be hesitant to embark upon such a path also for non-moral reasons: we might think, for instance, that it will be increasingly costly to test and assign the vote based on any of such proposed criteria; or that it might increase the potential for corruption and moral hazard; or we may reject it because any agreement to such a proposed re-assignment of votes would itself have to be subject to a justifiable re-weighing of votes, which runs us into an infinite regress, etc. But while each of these objections is serious, taken together they would not be weighty enough if we sincerely thought that the principle of one person—one vote was fundamentally *morally* flawed; furthermore, we would be much more determined than we currently are about finding a more morally justified system, and only then start worrying about the practical difficulties of putting the alternative into practice.

³⁵ There is of course a major and deliberate simplification in this account: there is no single, canonical conception of democracy, and the implications for the equality of voters are different if we opt for a purely majoritarian-procedural theory of democracy, or a constitutional conception with strong substantive rights limiting the scope of the majority decision, or a deliberative democratic conception that attempts to overcome the procedural-constitutional distinction and identifies the main criterion of democracy in deliberation among the citizens with the aim of justifying their collective decisions to one another. For this trichotomy of procedural, constitutional and deliberative democracy, see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (1996) at 26–51. At this stage of my argument, however, all that matters is that, regardless of where, how, and to what extent the majority rule operates, it inevitably relies on some prior egalitarian presuppositions.

So it is like ascertaining the existence of a planet not by observing it directly but rather by drawing inferences from the puzzling behaviour of other, visible planets: the fact that we intuitively reject, on moral grounds, suggestions for apportioning the vote on the grounds of, for example, intelligence implies the assumption of a powerful value (or a set of values) that trumps these, otherwise *prima facie* plausible, grounds for differential assignment of the right to vote. What might this other, powerful value be? Not surprisingly, democratic theorists disagree among themselves about its specific articulation, and the different approaches towards it are a direct reflection of different conceptions of democracy that we support. Any attempt to identify a single value or a set of values accepted by all those who espouse democracy is ultimately futile: democracy is, to use Ronald Dworkin's characterization applied to political ideals in general, both an 'interpretive' and an 'integrated' ideal.³⁶ It is, first, interpretive in the sense that people not only disagree about the value of democracy but also disagree about what democracy really is, and no 'Archimedean' standpoint is available in order to establish, in a descriptive manner, the meaning of democracy before we get on with the debates about its worth. And, second, it is an 'integrated' (rather than a 'detached') ideal in the sense that the meaning and value of democracy are only revealed through their place in a larger constellation of values, which mutually reinforce and confer worth upon each other.

One might think that this characterization of democracy as both interpretive and integrated (in the Dworkinian sense) detracts from the argument that there is a 'foundational' value behind democracy, such as that of equal moral agency. It does not, however; indeed, it only *strengthens* the view that democracy is value-based in a sense that renders the concept of 'democracy without values' largely meaningless. For we may disagree over what specific account to give of the values that justify democracy in the first place: some will discern irreducibly theological grounds for such values,³⁷ while others will insist that they are based upon equal rationality free from any transcendental presuppositions.³⁸ These different articulations of democracy-justifying values will yield somewhat different conceptions of democracy itself, and there is nothing puzzling or embarrassing about this. What matters is that there must be *some* values that have to be adopted and defended, and whose general contours are by-and-large egalitarian, in order to counter and outweigh the *prima facie* rational arguments for elitist, aristocratic, or technocratic models of collective decision-making. These by-and-large egalitarian values must be powerful enough to disarm the arguments from the rationality of apportioning the power of the vote as a function of one's competences as measured by a person's intelligence, education, etc. They must

³⁶ See Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *OJLS* 1 at 7–9 and 14–16.

³⁷ See, e.g. Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (2002) at 44–82; Larry Siedentop, *Democracy in Europe* (2000) at 192–8.

³⁸ See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000).

be able to convince us that when it comes to fundamental decision-making about, for example, which major political party should govern for the next four or five years, or what should be the nation's choice on joining a major international alliance, or whether abortion should be punished by law or not, each adult citizen's qualification to make an informed choice (or, more precisely, the qualifications of each person who cares to go to vote) is as good as that of any others'. Indeed, our intuitive acceptance of the one person-one vote system shows, through something rather like a reflective equilibrium analysis,³⁹ that we do accept the background values that render the democratic system of voting a 'fixed point' in our commonly accepted constellation of values.

The precise nature of these background values is, of course, a matter that notoriously divides various theorists of democracy. To say that it is a form of equality may be seen as not particularly illuminating because the 'one person-one vote' rule is egalitarian only in a formal and admittedly objectionable sense: for one thing, it ignores the unequal resources that various voters have at their disposal to persuade others in a particular way; also, it ignores the unequal intensity of preferences that particular voters espouse. Consequently, the rigorous application of the 'one person one vote' rule may lead to drastically unequal results that offend against the principle of equal concern, substantively understood: the result of a majority decision (with a one person one vote principle respected) may, for example, lead to an unequal treatment of members of a minority.⁴⁰ But this just goes to show that there is no one canonical standard of political equality, and that a 'one person one vote' principle is *an* egalitarian principle, one among many. It is egalitarian in an undisputed sense that, when employed in the process of decision-making by majority, it 'attempts to give each individual's view the greatest weight possible ... compatible with an equal weight for the views of each of the others'.⁴¹ If we intuitively choose the 'one person one vote' principle as regulative of our democratic procedures it is *not* because of its less egalitarian character than a substantive principle of equal concern, but because, in a pluralistic community, we would not agree on the common criteria as to which outcomes are substantively equal (that is, which express, in their substance, the principle of equal concern).⁴² We adopt democratic rule on the grounds that are egalitarian through and through, but it is there where our egalitarian consensus ends. It does not detract from the fact that the very adoption of a democratic procedure reveals a prior acceptance of a strongly (though not uncontroversially) egalitarian premise the contours of

³⁹ See John Rawls, *A Theory of Justice* (1971) at 19–21.

⁴⁰ For this argument, see Charles Beitz, *Political Equality* (1989) at 64. The distinction between equality as expressed in an equal vote and equality revealed in the substance of the decision corresponds to Dworkin's distinction of a 'detached' and 'dependent' interpretations of democracy (focused, respectively, on the input and the output of political decisions), see Dworkin, above n 38 at 185–90.

⁴¹ Jeremy Waldron, *The Dignity of Legislation* (1999) at 148; for a general argument linking the principle of equal consideration of interests with an equal vote, see Thomas Christiano, *The Rule of the Many* (1996) at 53–71, and, more recently, Thomas Christiano, 'The Authority of Democracy' (2004) 12 *Journal of Political Philosophy* 266.

⁴² See similarly Waldron, above n 41 at 162; see also Dworkin, above n 38 at 189.

which cannot be further discussed within the confines of this article;⁴³ a premise weighty enough to override the arguments for a non-democratic system of government.

B. *Pure Procedural Democracy?*

It may be objected that the remarks above apply only to *'politique politisante'* rather than a *'politique politisée'*: that even though, at the level of the general design of a democratic system, its legitimacy is assured by a strong value-based justification, nevertheless at the level of the actual application of the design in everyday political life, the connection between democracy and values cannot be taken for granted. The urge to infuse democracy with values—a democracy-plus conception—can be located at the level of the everyday workings and implementation of the design, rather than the design itself. It is there (so the argument may go) that the danger that democracy will become disconnected from substantive moral value is real, and it is there that the warnings (including those quoted above by John Paul II) against 'a political community independent of ethical principles' maintain their force and validity. To think otherwise would be a sign of naïve faith in the self-perpetuating force of the moral values that underlie the choice of a democratic system in the first place: the groundless hope that the values that justify the adoption of democracy would reveal themselves at each 'use' of the system.

This would be akin to what John Rawls dubbed 'perfect procedural justice': an institutional system that guarantees that any outcome of the institutional response to a challenge is always and necessarily just, *in terms of standards of justice independent of the procedure itself*.⁴⁴ With regard to democracy, it would express a hope that once we put a democratic system in place (justified, as it is, by certain values), each outcome of the democratic game will express those very values. However (the argument might continue), just as in real life we do not have the luxury of 'perfect procedural justice' at work (other than some hypothetical examples invented to illustrate the concept itself, such as—in an example provided by Rawls—a system in which the person who divides a cake will be the last to pick up his slice),⁴⁵ so in real life we cannot hope for democratic procedures that will always and necessarily give effect to the values that justify the system as a whole. Just as the best that we can hope for in the area of distributive justice is to set up systems of 'imperfect procedural justice' (which maximize the likelihood of achieving procedurally just outcomes), so in the case

⁴³ For an interesting recent attempt to derive (in a qualified way) the principle of equality of voting power from the principle of equal respect for individual autonomy, see Andrei Marmor, 'Authority, Equality and Democracy', University of Southern California Law School Public Policy Research Paper No. 03-15, <http://ssrn.com/abstract=424612>, accessed 20 October, 2004. I am grateful to Professor Marmor for his permission to refer to this unpublished paper.

⁴⁴ See Rawls, above n 39 at 83-7.

⁴⁵ *Ibid* at 85.

of the democratic legitimacy of political systems we can hope, at best, for institutional designs that will maximize, but never guarantee, the achievement of outcomes that are legitimate by virtue of their congruence with the values that justified the choice of system in the first place.

There is a temptation to give a quick answer to the objection described in the preceding paragraph, which should be resisted. The temptation is to appeal to the concept of 'pure procedural justice', which is different from the perfect and imperfect concepts in that it dispenses altogether with outcome-based criteria of justice: pure procedural justice obtains whenever the correct procedure is strictly adhered to (as in sports or gambling, in which we do not have any outcome-based criteria to judge whether the result is just). In contrast, perfect and imperfect variants of justice use outcome-based criteria, and the only difference between imperfect and perfect justice is that the latter guarantees, whereas the former merely maximizes, the congruence of the outcome with our standards of justice. The quick response that I have in mind (but eventually reject) would be to suggest that the problems raised by democracy are more akin to the *problématique* of pure procedural justice than to that of (im)perfect procedural justice, in that the only democratic game in town is procedural and we should not concern ourselves with the 'fit' between the outcome of a democratic game and the outcome-based standards of democracy, but only with the compliance of political (including legislative) procedures with purely procedural rules.

This temptation, as I said, should be resisted: the 'answer' provided here is decidedly too quick. Even in Rawls' initial introduction of the three-way division between forms of procedural justice, serious doubts can be raised about its 'pure' manifestation: do we really refer to the outcomes of sports competitions or gambling as 'just' merely because they comply with the rules of procedure? To my (admittedly, non-native-English) ear, such a characterization is out of place in such situations; the conferral of the status of 'justice' in these cases is contrary to the semantic intuition many of us have. This would suggest that the language of procedural justice is always and necessarily a reflection of the justness of the outcome.⁴⁶ This impression is only strengthened upon consideration of the problems of democratic legitimacy. To say that, once a democratic system is in place, any outcome will be, by definition, democratic because we do not have an independent outcome-based notion of democratic legitimacy seems contrary to our intuitions. Rather, the opposite is true: we feel that if the democratic majority, in accordance with a democratic procedure, were to (for example) deprive members of an ethnic minority of their fundamental rights, then the outcome would be illegitimate because contrary to the foundational values of democracy itself. So we *do* have criteria of a democratically legitimate outcome after all; if we support democracy it is not because we believe that *by*

⁴⁶ For more on this, see Wojciech Sadurski, 'Social Justice and Legal Justice' (1984) 3 *Law and Philosophy* 329 at 346–53.

definition anything that such a system produces is legitimate, but rather because we believe that a democracy, more than any other system, maximizes the attainment of values that we endorse. It is not by virtue of a definitional identification of legitimacy with the scrupulous observance of procedural rules but rather through our real-life experiences of how different systems connect with values that we may endorse democracy: to do so merely by definitional fiat would be weak and unconvincing.

Thus, the easy way out of invoking pure procedural justice is not available to us, meaning that the best we can do is to uphold democracy as a device similar to imperfect procedural justice: a system that maximizes the achievement of democracy's foundational values, although it falls short of guaranteeing that each and every instance of a democratic procedure will perfectly reflect those values. The distinction between '*politique politisante*' and '*politique politisée*' therefore stands, and the fear that a political community will render itself 'independent of ethical principles' cannot be easily dispelled, it appears, by a general appeal to the ethical principles foundational of democracy itself.

So we need to think a little harder about what the opposite of a democracy-plus would look like, and what dangers may accompany a 'political community independent of ethical principles'. There are two main ways in which a disconnection of democracy from moral values can possibly be imagined to occur, and reflection upon these two *negative* scenarios may bring us closer to a *positive* idea of what democracy-plus might be. The first way in which such a disconnection could take place may be understood at the level of the motivations of political actors in a democracy (both voters and their representatives in the parliamentary assemblies): if their decisions are motivated not by value-based considerations but by some other grounds deemed antithetical to an infusion of democracy with values. Let us call this aspect 'motivational'. The second manner in which such a disconnection may be imagined is when political decisions acquire validity solely by virtue of being adopted in a procedurally proper way, regardless of the degree of congruency between these decisions and the foundational values of democracy. This, as we have seen, would be a sign of adopting a 'pure procedural justice'-like approach to democracy, and seems unsatisfactory as it ignores the fact that we construct democratic legitimacy in a way more akin to *imperfect* procedural justice. The gap between perfect and imperfect justice raises the spectre of decisions that are procedurally correct and based on a system that, by and large, maximizes the attainment of democracy's foundational values but that may, in particular instances, be inconsistent with those values. Let us call this dimension 'constitutional' (for reasons that will become obvious later). These two examples of apparent disconnection of democracy from values should be kept apart, because they generate different problems for the issue of democratic legitimacy in the face of society's value pluralism.

C. *Values at the Motivational Level*

The first level at which we may (theoretically) perceive and deplore 'value-free democracy' is that of the motivations of voters and their representatives. Here a short aside is in order: for the purposes of democratic theory as discussed here, the distinction between individual citizens and political actors, such as the members of legislative bodies, is irrelevant: we must assume a full continuity between the motivations, intentions, preferences, etc., of the individual voters and their representatives in parliament (a point to which I will refer below as the 'continuity thesis'). Of course, we know that this assumption is naïve and not very realistic, but as a matter of a normative democratic theory it does not make any difference whether we consider the motivations of the institutional actors or of individual citizens. Or, to put it differently, a citizen *qua* voter is also a political institution, and only as such is considered relevant for the purposes of democratic theory.⁴⁷

At this motivational level, the separation of democracy from values can be discerned in the reliance of voters and their representatives upon their interests rather than values and ideals. Democracy is eroded of values, it can be said, when public decisions are motivated by the calculus of interests rather than by ideals, and when the 'input' to political decision-making consists of our own perceptions of our interests rather than ideals about the public good. To take an example, if my motivation in voting for a particular taxation scheme (or voting for a party on the basis of its taxation programme) is guided only by the question: 'Which of the alternative tax schemes will be the best for me?', then this results in a deplorably value-free democratic process because the right question should have been: 'Which of the alternative tax schemes best corresponds to a defensible idea of justice in taxation?'

This particular example shows, incidentally, that a 'motivational' understanding of the democracy-plus claim is immune to the possible charge that it adopts an illiberal stance in the controversy between perfectionism and anti-perfectionism, in the context of a debate over the proper limits of state action in enforcing moral values. 'Democracy-plus', in this version, may be but need not be illiberally perfectionistic. If perfectionism is understood in a broad, and not necessarily illiberal, way, as the proposition that the role of the state includes the strong commitment to personal autonomy (which requires a high degree of respect for individual choices of ways of life and which is well captured by the 'harm principle'),⁴⁸ then the democracy-plus' call for acting on values rather than on interests is perfectionistic but in a non-objectionable manner—from the liberal standpoint at least. It may simply mean nothing more than that a polity should

⁴⁷ On this last point, see Christopher L. Eisgruber, *Constitutional Self-Government* (2001) at 50; Bruce Ackerman, *We The People: Foundations* (1991): 232–43 and 297–314.

⁴⁸ For such a 'perfectionistic' understanding of autonomy and of the harm principle, see Joseph Raz, *The Morality of Freedom* (1986) at 412–20; see also, generally, Vinit Haksar, *Liberty, Equality, and Perfectionism* (1979).

aim at the implementation of some notions of the social good, and that the accommodation of particular interests should be informed by some public ideals of justice. If, however, perfectionism is taken to mean that the state should enforce some ideals of private morality that express some controversial notions of individual virtue (i.e., that the state should identify and coercively promote superior ideals of human excellence),⁴⁹ there is nothing in the call to act on values rather than on interests (whatever it may mean, as will be discussed shortly) that creates a necessary bias in this direction within democracy-plus. The demand, for example, that in the debate on redistribution through taxation we should be guided by our ideals of public good rather than by our particular interests is evidently not illiberally perfectionistic: it takes no stand in the dispute about the role of the law in shaping private morality (the notion of ‘the good’ as contrasted to ‘the right’, in Rawls’s parlance) of the citizens.

But the continuity thesis, suggested in the first paragraph of the present section, can be challenged in a way that resonates with the debates concerning ‘perfectionism’, that is, by appeal to the notion of neutrality of legislation towards competing moral conceptions. It can be claimed that, even if we adopt the ideal of ‘moral neutrality’ of the state, and attempt to discern the indicia of this neutrality in the motivations of the legislators, it cannot go all the way down; we must not expect individual voters to be neutral on issues of private morality.⁵⁰ It is one thing, it may be argued, for the state to attempt to be as neutral as possible on the controversial issues of private morality; it is quite another to expect citizens to reflect such neutrality in their decisions and conduct. While the former ideal may be a useful way of articulating the liberal political ideal, the latter demand (addressed to individuals) can be seen as absurd.⁵¹ This ‘absurdity’, however, can only arise if we confuse the perspective of individual as a private person and an individual as a citizen-voter. Being ‘neutral’ in our private capacity on moral issues is just a fancy and somewhat pretentious manner of saying that we are uncertain, or agnostic, about some controversial moral matters. But being neutral when we act in our public capacity as voters has no air of absurdity or confusion: it simply means that we act on a distinction between our notions of private morality and our notions of the public good. Naturally, the distinction itself is controversial and open to challenge, but *if* we accept that the distinction can be made, then it can be drawn equally well in the mind of an individual voter as in the minds of the legislators, and in consequence relied

⁴⁹ For this understanding of ‘perfectionism’ see, *inter alia*, Carlos Santiago Nino, *The Ethics of Human Rights* (1991) at 132–6, 142–3; see also Tim Gray, *Freedom* (1991) at 167. The *locus classicus* of a liberal rejection of perfectionism is, of course, in Rawls, above n 39 at 325–32, restated in John Rawls, *Political Liberalism* (1993) at 194–5, 292–5.

⁵⁰ While a discussion of that point is beyond the scope of this article, it should be acknowledged that for some liberals, including William Galston and Joseph Raz, even the notion of political neutrality as addressed only to lawmakers is incoherent; see William Galston, *Liberal Purposes* (1991) at 79–97; Raz, *Morality of Freedom* at 108–22. For my critique of Raz’s criticism of the principle of neutrality see Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (1990) at 99–111.

⁵¹ See Jeremy Waldron, *Liberal Rights* (1993) at 154.

upon by the collective legislator in its law-making. Therefore, the continuity thesis seems immune to this criticism.

The distinction between these two types of motivations, interests and values, corresponds to a classical debate between adherents of a 'pluralistic' conception of democracy and those preferring a Rousseauian one. The former—taking their inspiration from Jeremy Bentham—find it both empirically plausible and normatively acceptable that people vote on the basis of their interests, and the aggregate public decision that tries to accommodate those various and divergent preferences is the only matrix of a 'public good' that we can have. The latter, following Jean-Jacques Rousseau, reject interests-based decisions as inappropriate in a democracy; they claim that whoever (whether a voter or a representative) tries to gauge his or her interests as the basis for their decisions, answers the wrong question—the one that should not be addressed in the public forum. The only relevant question to ask is: 'which of the alternative proposals is most congruent with my view about the public good?' (i.e. which best tracks the idea of general will, in Rousseau's parlance); even though we know, *contra* Rousseau, that we will encounter fundamental disagreements among members of the society in answering this type of question, it will be a *different* disagreement from that generated by conflicts of interests.

A call for 'democracy-plus', under this account, amounts therefore to a rejection of a Benthamite vision and endorsement of a Rousseauian democracy in which people vote on the basis of ideals rather than interests.⁵² Why would such a choice provide us with a step towards morally legitimate democracy, in the sense of its infusion with moral values? The best answer I can think of is by linking the interests/values distinction to the liberal principle of legitimacy: the principle that the use of coercive powers against a person can be legitimate only if that person can accept the reasons that stand behind the law or policy that authorizes this coercive use. There is an important strand in liberal thinking that links legitimacy with the consent of the governed.⁵³ Not the actual consent, of course, because such a requirement would undercut the whole search for the principles of political legitimacy; we would end up with the anarchistic idea that each individual is bound only by those laws to which he has agreed. But consent, hypothetical at least, is needed in order to confer some degree of legitimacy upon the laws which, after all, can never enjoy the unanimous support of all the citizens. In a weak but plausible version, the liberal principle of legitimacy postulates that only those laws that are based upon arguments to which no members of the society have a rational reason to object can boast political legitimacy, and as such be applied coercively even to those who actually disagree with them.

⁵² On this contrast, see the excellent discussion in Jeremy Waldron, *Liberal Rights* (1993) at 392–421; see also Rawls, *Political Liberalism*, above n 49 at 219–20 (endorsing Rousseau's view of voting as 'ideally expressing our opinion as to which of the alternatives best advances the common good', and contrasting it with the view that 'people may properly vote their preferences and interests').

⁵³ See Waldron, above n 51 at 45–50.

A contemporary *locus classicus* of this liberal principle of legitimacy is Rawls's *Political Liberalism*: 'Our exercise of political power is fully proper only when it is exercised in accordance with the constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason'.⁵⁴ Rawls further elaborates upon this conception in his discussion of the concept of 'public reason', that is, publicly recognizable standards of right and wrong. He also suggests that, as a test, we might inquire as to whether a particular argument for a new law belongs to the category of 'public reason' by considering whether it could be used in a written opinion of a supreme court.⁵⁵ The implication is clear: some arguments, even if actually present in the minds of legislators or policy-makers, are not qualified to figure in the public defence of a law: the law must be defensible in terms that belong to a 'forum of principle' rather than an arena of political bargains and plays of naked interest.

This last point suggests that the liberal principle of legitimacy operates, more often than not, in a negative (or weak) fashion, namely, to discard illegitimate laws:⁵⁶ a law cannot claim any legitimacy towards me if it is based upon arguments and reasons that I have no reason to accept. For instance, if the best (or the most plausible) justification that can be given for a law is in terms of a religious sectarian creed, and I happen not to espouse that creed, then I have no rational reason to recognize the law as legitimate. Or if the law is based upon an argument that casts me out from the political community (for example, an argument that considers my racial group as inherently inferior to other groups), then there is no moral reason why I should recognize this law as legitimate: I cannot identify with the reasons that triggered the adoption of this law in the first place. The denial of legitimacy to such a law is based on the view that there must be some connection between the law and myself *qua* subject of the law—a connection that establishes some rational reasons to identify the good for myself in the law. The connection must be between the substance of the law and the preferences, desires, convictions or interests of each individual subjected to it. If, even under rational examination, no such connection can be detected, then I have no reasons to accept the law as legitimate. If, however, I disagree with the wisdom of a given law, but would agree if I examined it rationally that it is based upon arguments that I can recognize as valid, then a *necessary* condition for its legitimacy has been met. This point has been well expressed by Jeremy Waldron: 'If there is some individual to whom a justification cannot be given, then so far as *he* is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to *his* allegiance'.⁵⁷

⁵⁴ Rawls, above n 49 at 137. A broader wording of 'the ideal expressed by the principle of legitimacy' is: 'to live politically with others in the light of reasons all might reasonably be expected to endorse', *ibid* at 243.

⁵⁵ *Ibid* at 254.

⁵⁶ As Rawls admits, 'public reason often allows more than one reasonable answer to any particular question', *ibid* at 240.

⁵⁷ Waldron, above n 51 at 44, *emphases in the original*.

As it stands, the formula is fraught with ambiguity: from the fact that a justification *can be given*, it does not follow that it *will be accepted* as framed in terms of public reason, just as, to return to Rawls's formula, it does not follow from the diagnosis that citizens 'may be expected to endorse' the constitution that they actually endorse it. The actual acceptance requirement would turn the hypothetical consent test into a real consent (a clearly unreasonable requirement) but, on the other hand, the hypothetical acceptance standard makes the test both manipulable and difficult to apply. There is a space between what the citizens can be reasonably expected to accept and what they actually accept, and the liberal principle of legitimacy reflects the tension between these two poles: an insufficient pole of hypothetical, rational consent and an unrealistic pole of an actual (even if only tacit) consent. This *tension*, however, is not a *contradiction*, and does not render the liberal principle of legitimacy chimerical—for two reasons. Firstly, the subject matter of the consent is not the wisdom or justness of the law, but only a certification that the reasons that may be rationally supplied for its defence belong to 'public reason': that is, that they are not 'sectarian' but belong to the category of reasons that may properly be cited in defence of a law. Arguably, it is easier to elicit consent that the reasons provided for adopting a law fall into this category than to seek universal agreement with the specific justification of a particular law: the former is a more lenient test than the latter. Secondly, and more importantly, it does not particularly matter that the criterion of acceptance is discerned in a hypothetical rather than a real consent because what we are concerned with is the *legitimacy* of the law rather than the citizens' *duty to obey*, and for this reason we may well identify the locus of legitimacy in the eyes of a critical observer rather than in the eyes of the citizens themselves. This distinction, between a critical-observer perspective and that of an actual citizen corresponds to a distinction drawn by Simmons between generic and transactional evaluations in political philosophy: the former correspond to the general moral virtues of political arrangements, the latter, to the specific, actual interactions between individual persons and their polities.⁵⁸ Here we can content ourselves with the former because our aim is to ground the system's legitimacy (understood as its justification) rather than the obligation of citizens to comply with its directives. Hypothetical consent becomes, then, merely an 'expository device' of a critical observer's reasoning (just as in Rawls, the original position is an expository device of our individual reasoning about justice),⁵⁹ leading to the conclusion that the law indeed is legitimate (that, in Raz's language, it properly incorporates in its directives the reasons which apply to its subjects).

This is perhaps most clearly viewed in the case of Dworkin's conception of legitimacy, based as it is upon 'the model of principle': our institutions are legitimate if they operate within a community that genuinely takes 'integrity' as central to

⁵⁸ Simmons, above n 28 at 764. But note that Simmons uses different notions of 'justification' and 'legitimacy' from the ones adopted here.

⁵⁹ Rawls, above n 39 at 21.

politics, and which therefore ‘expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations’.⁶⁰ At first blush, there is very little room in this version of the liberal principle of legitimacy for any consent by citizens, hypothetical or otherwise, and the certification of the institutions as legitimate (and of the community as principle- or integrity-based) results from a judgment as to how well they fare under the standards of the group that generated the proper associative obligations. In these cases, ‘the members of a group must by and large hold certain attitudes about the responsibilities they owe one another’,⁶¹ including that they ‘must suppose that the group’s practices show not only concern but an *equal* concern for all members’.⁶² This judgment (that the group treats all with an equal concern) need not necessarily be actually shared by those who are on the receiving end of coercive action, but, on the other hand, if even the *other* members of the group cannot reasonably attest to the institutions’ attitude of treating all with an equal concern then those institutions lack a threshold condition of legitimacy.

It can now be seen that the values/interests distinction is a very imperfect and crude proxy for the distinction between those justifications of laws that are properly part of public reason, and hence that can be accepted as valid by all those to whom they apply (even if, in practice, some will not agree with the substance of the laws), and, on the other hand, those justifications that cannot be given to citizens because they violate the liberal test of legitimacy. The first distinction (values versus interests) is not well correlated with the second (proper justifications of law in terms of public reasons versus justifications that not everyone can be expected to accept), and it is the *latter* distinction that is crucial to the issue of legitimacy, the main question that has occupied us here. The first distinction is secondary, and, to the degree that it does not track the latter distinction, it is of no special relevance for us.

Why would someone have thought that the interests/values distinction was important for the legitimacy of law and policy under something like a liberal principle of legitimacy? The reason might be this: it could be claimed that if the best justification for a particular law is that it meets the interests of a group *X*, then if I am not a member of a group *X*, I have no reason to accept this law. But it is enough to articulate this argument in this way to see how implausible it is. For one thing, not every interest-based argument must be ‘sectarian’ in this way: there may be laws that implement the interests of everyone or nearly everyone by providing solutions to coordination problems. They will still be justified in terms of interests but nevertheless they may figure as ‘public reason’ in that they are justifiable to (almost) everyone. Second, even if a law’s main justification is that it implements the interests of group *X*, as a non-*X* member I may still recognize the importance of meeting this group’s interests, on the basis of my notions of

⁶⁰ Dworkin above n 32 at 216.

⁶¹ *Ibid* at 199.

⁶² *Ibid* at 200, emphasis in the original.

fairness, compensatory justice, etc. It may be argued, of course, that then the best justification for this law is in terms of justice rather than in terms of *X*'s interests, but this only serves to illustrate how uncertain and unreliable the very distinction between interests and values is in the first place.

This is confirmed by common sense. When a particular person votes, for example, for a particular tax scheme which in fact will make her richer, does she vote on the basis of her interests, or of her sense of justice (she genuinely believes that she deserves it), or on the basis of her view about the public good (she believes that it is the most efficient scheme, which will, incidentally, also make her richer)? It is difficult to separate these different justifications from each other, and the most sensible observation would be that, usually, we make our public decisions on the basis of a complex mix of such, and other, justifications.⁶³ Matters become even more complicated if the example does not refer to a law that has clear material benefits and costs to the voters (such as a tax scheme), but rather concerns complex moral judgments about the rightness or otherwise of a particular practice, and the law's proper reaction to it. What would it take to vote on the basis of one's 'interests' on issues such as abortion, euthanasia or capital punishment? A 'Benthamite' picture would probably be that a vote based on interests would mean that someone who feels that she is likely to terminate her pregnancy, or terminate her life, or be punished for murder, will vote, respectively, for a liberal regime of abortion and euthanasia, and against the death penalty. But such a preposterous supposition would be an obvious travesty of any realistic account, ignoring what we know about why people support or oppose such laws. The subject-matter of these laws simply does not lend itself to an interest-based motivation although, arguably, we *could* think of arguments in favour of them that would not pass the public-reason test. In these areas, calls for value-based motivations (and, more broadly, for a value-enhanced democracy) simply sound redundant.

We may generalize this point. A society does not have normativity-free zones: it is, so to speak, normatively saturated. Some subject-matters—*most* subject-matters belonging to the public area—yield individual choices based on values. In this sense, a call for a value-based democracy (understood in the first, motivational, sense discussed here) is empty: it is not the case that democracy *should not* be value-free but rather that it *cannot* be so. That the motivations of citizens and their representatives in taking public decisions will not be free of values is not a *real* problem: what is, however, real is that they will differ, often fundamentally,

⁶³ Another way of expressing the same thought would be by using the language of a mix of 'personal' and 'external' preferences, the latter being indistinguishable from personal affirmations of the common good. This was nicely expressed in the classic polemic by H.L.A. Hart regarding Ronald Dworkin's theory, based upon the personal/external preferences distinction; consider Hart's focus on those 'cases where the external preference is *favourable* to, and so supports, some personal preference or want for some good or advantage or liberty'. Hart further gives the following example: 'Suppose . . . the issue is freedom for homosexual relationships, and suppose that . . . it was the disinterested external preferences of liberal heterosexuals that homosexuals should have this freedom that tipped the balance against the external preferences of other heterosexuals who would deny this freedom', H.L.A. Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 828 at 842, emphasis in the original.

as to the choice of values. This is therefore a ‘problem’ of moral pluralism and not of value-free democracy. The warnings of the adherents of democracy-plus against ‘a political community . . . *independent of ethical principles*’ are therefore either very weak, or they are a proxy for a warning against a community ‘independent of *the right* ethical principles’. The very weak interpretation amounts to a warning against moral indifference or apathy: against citizens and their representatives ignoring all moral values when voting on public issues. But such a fear is unfounded, as we have seen, and the warning is for this reason practically meaningless. If, however, the warning is understood in the latter sense (as a warning against a community independent of the right principles), then it is incompatible with the liberal-democratic order that attempts to create legitimate law for people who differ greatly over the moral values they believe to be right. The strong interpretation amounts to a plea for a polity that enforces morality in the strongly ‘perfectionist’ manner identified earlier in the article: it is a political community that coercively imposes ideals of individual good and virtue upon those who do not necessarily share them.

D. *Values at the Constitutional Level*

The second level at which the legitimacy of democratic laws might be seen to be contingent upon their incorporation of the right values is of a different nature. It concerns not the motivations of the decision-makers (voters and legislators alike), but the value-laden limits upon the substance of democratically adopted decisions; it therefore concerns the ‘output’ rather than the ‘input’, so to speak. The idea here is that democratic decisions, in order to be legitimate, must comply with certain substance-related requirements, or that they cannot transcend certain substance-related constraints. I will call this dimension ‘constitutional’ for the obvious reason that the identification of the substantive limits that a legislator is not permitted to overstep is widely seen to be one of the main functions of constitutions, and in particular of constitutional charters of rights.

I will be brief in discussing this aspect of democratic legitimacy—not because it is unimportant but because it has been dealt with so expansively in the literature in constitutional theory. For my present purposes, it is important only to indicate that this second dimension of the ‘democracy-plus’ raises different problems in the face of moral pluralism than the first, ‘motivational’ dimension. The issue here is not so much that a fear of moral indifference or apathy is generally unfounded (as was the case with the motivational dimension) but rather that, in the process of the articulation of the meaning of vague constitutional pronouncements, actual moral disagreement over moral values is merely replicated rather than deflated. We may well accept, as a starting point, that the legitimate exercise of authority in a democratic state requires us to assume that there are *some* limits to what the authorities can decide. Indeed, the acceptance of the principle of respect for human rights itself necessarily means that there are

substantive limits to what authorities can do to individuals. (There may also be other implications of the human rights principle: for example, that there are some opportunities that must be provided to citizens, and the language of opportunity does not translate easily into the language of limits, except trivially. However, human rights include also, amongst other things but necessarily, the idea of limits). The 'problem' is that, faced with moral disagreement in society, even if the constitution is accepted consensually (which is a presupposition adopted only for the sake of argument), the actual articulation of the general constitutional rights translates the general moral disagreement into a disagreement as to whether a particular authoritative directive transcends the limits imposed by the constitution.

This is not the weak observation that, at the margins, people will disagree about the specific 'penumbra' of a particular vague concept implicated in various constitutional rights. Rather, it is that the disagreement will often be fundamental and central to the meaning of a right-as-limit. For example, whether freedom of speech mandates or prohibits limits on paid political advertisements, or whether the right against discrimination prohibits, permits or mandates affirmative action in university admissions, or whether the right to life requires or prohibits assistance in terminating the life of a terminally ill patient on demand—these and a myriad other controversies can easily be understood in terms of constitutional rights but our disagreements in the interpretation of these constitutional rights will simply replicate the prior disagreement over the moral issues that these rights were supposed to resolve. We will not only disagree over whether a proposed law transcends a substantive limit imposed by a constitutional right, but, even more fundamentally, over what interpretation of a right constitutes a limit on the exercise of state authority in the first place. Is a ban on euthanasia a limit on what can be done to a person (with the subsequent discussion about where exactly this limit lies), or is a legal opportunity of terminating one's life with the help of a doctor a limit on what can be prohibited and enforced against a person? The answers, of course, will be a direct reflection of prior and more fundamental moral disagreement. Thus, while we may well all agree that there should be *some* limits to what the state can do to individuals, once we start debating what constitutes a limit, not to mention where the limits should properly lie, the constitutional pronouncements of rights will turn out to be singularly unhelpful.⁶⁴

This is not to say that rights provisions are irrelevant, or without significance. On the contrary, we know that they play a very significant role politically in providing, in various legal systems, judicial or non-judicial bodies with the grounds for decisions that may invalidate, or re-interpret, the laws adopted by legislatures. There is, however, no reason to adopt a position of institutional fetishism, and to assume that a constitutionally identified institution that has the power to

⁶⁴ More on this, in my 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *OJLS* 275 at 294–6.

displace the choices of other bodies with its own is, *eo ipso*, 'right' in the articulation of the meaning of a controversial constitutional provision. Indeed, a disagreement between two bodies, for example between a parliament and a constitutional (or a supreme) court (or to be more precise, between the majorities of these collective bodies), will more often than not merely reflect a moral disagreement existing in the society as a whole about what, in terms of a vague constitutional provision, constitutes a limit on state action, and where that limit should properly lie. The power of such an extra-parliamentary body to pronounce on the decisions of the parliament simply adds one step to the constitutionally prescribed procedure that has to be followed in order for the decision to be final and legitimate; however, it remains a procedure-based legitimacy, not a value-based one. The statute as corrected in a process of judicial review is not necessarily more within the limits defined by constitutional rights than a statute without such a correction, but the review does make a difference in terms of what counts as a legitimate procedure for the issuing of legal directives. As a judge of the US Supreme Court famously observed: 'We are not final because we are infallible, but we are infallible only because we are final'.⁶⁵ The conferral on a particular institution of the power to strike down laws on the basis of their (alleged) inconsistency with constitutional rights is a matter of institutional fiat which adds (rightly or wrongly—this is beyond the scope of this article) one additional step to the correct procedure to be followed. The decisions that emerge from such a procedure acquire democratic legitimacy, just as those that issue from a procedure where no such possibility of review exists, acquire democratic legitimacy. There may be good substantive, political arguments related to the institutional competence of various organs for creating or removing such a power—but the argument about enhancing legitimacy by injecting the right values into the decision is *not* one of them. 'Democracy-plus' cannot build upon the notion of substantive, value-based constitutional limits on democratic procedures.

3. Conclusions

The upshot of the second part of the article may seem disappointing and perhaps upsetting. It seems to go against the current popular disenchantment with purely 'procedural' democracy which, as the experience of the twentieth century shows, is not a panacea for all social ills, and often lacks sufficient self-defence mechanisms against those who would use democratic procedures to pursue inhuman, oppressive and discriminatory goals—and demolish democratic institutions in the process. But such a reading of my conclusions would be unwarranted: I do not call for indifference as to 'values' and for exclusive concern with the proper 'procedures'. If anything, my conclusion is the opposite: that our

⁶⁵ *Brown v Allen*, 344 US 443, 540 (1953) (Jackson J, concurring). It should be noted, however, that Justice Jackson made this remark not in the context of the Supreme Court striking down a congressional act, but in the context of reversing a state court's decision.

values are normally and routinely engaged with democratic procedures, and any scepticism about purely procedural democracy can be properly read as a disappointment that a particular democratic system gives effect to some values other than our own. This sense of disappointment is hard to reconcile with the acceptance of moral pluralism and disagreement as a pervasive, persistent and significant feature of contemporary societies.

Disappointment of this sort, in particular, should not lead one to deny legitimacy to laws that have been adopted in accordance with proper democratic procedures. This, however, is not a recipe for blind obedience to democratically adopted laws; as I argued in the first part of this article, each individual is not necessarily obliged to comply with every legitimate law. The disconnection of legitimacy from the duty to obey—a disconnection advanced for reasons discussed earlier—has the consequence of deflating the apparent drama of what to do about laws adopted in a procedurally correct manner in a democracy and yet which strike us as morally wrong. A democratic and liberal legal system can and should provide room for disobedience to legitimate law, but this question is beyond the scope of this article: what is important is that a finding that a given law is legitimate does not necessarily lead to the conclusion that it must be always complied with by those who disagree with it. However, we need a language in which to express the combination of recognition of legitimacy and refusal to obey on moral grounds, and if we were to incorporate the 'right' values into our test for the legitimacy of law, then this possibility would no longer exist.