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Abstract

The chapter considers the contributions made by democratic legitimacy and social justice to the question of what may permissibly be enforced. According to the conventional view, democratic decisions forfeit their claim to permissible enforceability only when they are gravely unjust. That view is rejected here as unduly restrictive, with a “balancing” view proposed instead, according to which the two considerations need to be balanced on a case-by-case basis. Both the provenance and the content of decisions yield pro tanto reasons: which determines the permissibility of enforcement depends on whether we have greater reason in any given case to advance legitimacy or justice. A democratically legitimate law or policy need not be gravely unjust for it to be wrong to enforce it.

Keywords

democracy, legitimacy, justice, enforceability, injustice, social equality

Dethroning Democratic Legitimacy

Zofia Stemplowska and Adam Swift

1. INTRODUCTION

Democracies adopt many questionable policies. Some allow parents to opt out from vaccination for their children without medical consultation, even though mass vaccination is needed for herd immunity. Some devote more tax revenue to protecting affluent neighbourhoods from crime than they allocate to poor ones. Some make no serious legislative efforts to tackle pay gaps among citizens who differ only in gender or ethnicity. Some make no effort to tackle anti-immigrant hatred or demonization of single mothers in the press. We consider these to be cases of social injustice.

Of course, no real state has democratic procedures that are entirely free of corruption and other democracy-undermining distortions. But suppose such a state existed, and suppose it decided to adopt any of these policies. Would the coercive enforcement of such policies be permissible? Or could those at the receiving end claim they were wronged? Suppose, further, that you had the power not only to resist the coercion but coercively to impose an alternative policy on others. Perhaps you have some control over police budgets and can secretly divert resources from some neighbourhoods to others. Perhaps you are the clerk to a legislature and can amend legislation without anybody noticing ([Overland and Barry, 2011](#)). Could it be permissible for you to do so?

The conventional view in the philosophical literature holds both that it would be impermissible for you to do so and that it would be permissible for the state to coerce you. In

what follows we focus mainly on the latter: the permissibility of state coercion. The conventional view is that democratic decisions are permissibly enforceable unless they are *gravely* unjust—perhaps when they blatantly violate basic human rights—but we assume that none of the cases we have outlined meets that standard. In cases of less serious social injustice, it is generally thought that their democratic provenance suffices to render the decisions permissibly enforceable.¹ One may, of course, seek to change the decision by democratic methods. But the fact that a democratically approved policy is unjust does not undermine the permissibility of the state coercion.

We question this conventional view. We agree that whether it is permissible to enforce a decision depends on both its provenance—the procedure by which it was made—and its content—the extent to which the decision delivers social justice. But we hold that social injustice does not need to be grave in order to render impermissible the enforcement of the decision with the democratic provenance. Rather, whether it is the democratic provenance or the just content of the decision that determines the permissibility of its enforcement depends on whether, on a case by case basis, we have a greater reason in any given case to advance (i.e., to respect or promote) justice or legitimacy.

Let us fix some terminology. When we say that a decision is or is not just we mean to evaluate its *content*. Decisions are just in this sense when people get what they are due

¹ Something is permissibly enforceable, let us say, when enforcing it (in line with any further requirements of proportionality and status of the enforcer) does not wrong anyone. A decision may be permissibly enforceable without there being any reason to enforce it: the fact that the decision was made in a given way may make it permissibly enforceable without there being a good reason to enforce it all the same. That said, in what follows we assume that there is a reason to enforce the permissibly enforceable decisions in question. We are grateful to David Estlund and Andrew Williams for discussion.

(which, depending on the understanding of justice one favours, might mean various things: that they get what they are historically entitled to, what they need, what they deserve, what they would be entitled to in a society regulated by principles that would have been agreed to under certain idealized conditions, etc.).

In addition to their content, decisions also have some *provenance*. We assume that democratic procedures should be set up in polities to reach at least some coercive decisions. We refer to coercive decisions that, in appropriate contexts, have such democratic provenance as legitimate. The outcomes of legitimate procedures are therefore legitimate only in the sense that they are the outcomes of the right procedures for making those decisions, which in the case we present here amounts to their being democratic.

Our use of “legitimate” differs from that in some of the philosophical literature. Sometimes the question of whether a decision is legitimate is simply that of whether it is permissible to enforce the decision. (Sometimes the question of legitimacy is substituted for, or taken together with, the further question of whether the decision has authority; i.e., whether those subject to coercion have a duty to comply with the coercion, or even the duty to obey.) The issue of permissible enforceability is generally thought to depend on both the content and the provenance of the decision; the conventional view holds that democratic decisions are not permissibly enforceable in cases where their content is gravely unjust.

We, by contrast, restrict the term “legitimate” to the issue of provenance, to the procedural aspect. Whether a coercive decision is legitimate, for us, depends entirely on how it was made; it is a further question whether it is in fact permissibly enforceable. One can thus accept that a procedure—and the decision it has produced—is perfectly legitimate, while insisting that the injustice of its content would make it impermissible to enforce that decision. The dethroning of democratic legitimacy we aim to achieve in this chapter is a weakening of the contribution that legitimacy in our sense makes to legitimacy in the other sense.

We have said that the justice of a decision is a matter of its content rather than its provenance. But of course ways of making decisions can themselves be evaluated as just or unjust, and so we could have framed our argument in terms of the familiar contrast between “procedural” and “substantive” justice. If citizens have a right to an equal say in the procedures by which their laws are made, then justice itself—procedural justice—requires that the laws be made that way. Indeed, we might have followed Pettit (2015) in framing the “content/provenance” distinction as being between “social justice” and “political justice”: the latter, for him, coincides “with what is often described as the legitimacy as distinct from the justice – I would say, the social justice – of the structure” (11). For Pettit, then, what we are calling “legitimacy” is labelled, in the political context, “political justice.” We have no objection to analyses of legitimacy that invoke procedural (or political) justice. The justice of a procedure may be the right way to understand what confers legitimacy on its decisions. This still leaves conceptual space between the justice of a decision-making procedure and the justice of the content of its outcomes. And it raises the question of how the two kinds of justice relate to each another when it comes to assessing the normative status of particular decisions.

Our dethroning of democratic legitimacy will unfold as follows. We shall first—in section 2—set out in greater detail the conventional view that we dispute. In section 3, we outline our alternative, which we call the balancing view. Section 4 sets out our positive case for that view and our negative case against the conventional view. Section 5 considers further objections to the balancing view. We conclude with section 6, which broadens the picture to explore the implications of our analysis for non-ideal circumstances.

2. THE CONVENTIONAL VIEW

According to the conventional view a law or policy is permissibly enforceable if it was decided by a proper democratic procedure, even if the law or policy is somewhat unjust.² When it is gravely unjust, however, it is not permissibly enforceable, even if it was decided by that same procedure. The view, then, has two elements. First, it holds that democratic provenance can bestow permissible enforceability on a decision. This claim is widely accepted and has gained recent support from David Estlund (2008), Niko Kolodny (2014a and b) and Daniel Viehoff (2014). Second, the conventional view holds that democratic provenance of the right type fails to ground permissible enforceability only if the content of the decision is gravely unjust.³

Here is Rawls (1993, 428), setting out what we take to be the conventional view:

A legitimate procedure gives rise to legitimate laws and policies made in accordance with it; and legitimate procedures may be customary, long established, and accepted as such. Neither the procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust.⁴ At some point, the injustice of the outcomes of a legitimate

² The conventional view is also often claimed to establish authority, or is ambiguous between the two claims; we put this aside.

³ We put aside some complications, such as that in circumstances of emergency permissible enforceability could be grounded in other ways. In addition to Rawls, this view is endorsed by Thomas Christiano (2004, 2008), Philip Pettit (2015), Jonathan Quong (2010), Thomas Sinclair (forthcoming [and private correspondence]), Laura Valentini (2012), and, as we suggest in §4.5, possibly Daniel Viehoff (2014). More generally, we think that most Rawlsians are supporters of the view and possibly also most Kantians, though the latter may deny that justice and democracy can come apart. Estlund (2008:111) is carefully non-committal on the limits of democracy's ability to permit enforcement.

⁴ Notice that Rawls talks about the case when procedures or laws are "*too* gravely unjust" (our italics). For him, apparently, there can be grave injustices that are not "too grave" and which do not thereby corrupt the

Commented [AS1]: We have now added Kolodny 2014a to the bibliography so it needs a link added.

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democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice, even granting that justice is not specified procedurally. Legitimacy allows an undetermined range of injustice that justice might not permit.

This passage is somewhat obscure. When he says “At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy” he seems to suggest that the gravity of injustice in an outcome deprives not only that outcome but also the procedure itself of legitimacy. Perhaps, though, Rawls means that the legitimacy that is “corrupted” is only that of the gravely unjust outcome: i.e., in our terminology, the outcome is not permissibly enforceable. (This would be the natural reading if he had written “At some point, the injustice of the *outcome* of a legitimate democratic procedure corrupts its legitimacy” (our emphasis.)) On this interpretation, a legitimate procedure may yield an outcome the legitimacy of which is corrupted by its gravely unjust content. In that case the decision lacks legitimacy in the sense that it is not permissibly enforceable, even though it issued from a legitimate procedure. We interpret Rawls’s position here as one according to which avoidance of grave injustice⁵ is necessary and sufficient for permissible enforceability.

legitimacy of the procedure. We will ignore this complication, henceforward taking him to hold that “grave” injustice is grave enough to “corrupt” legitimacy. An alternative reading of the phrase is also possible, according to which Rawls holds an implicit balancing view.

⁵ Assuming the absence of less gravely unjust alternatives.

However, if a decision is not gravely unjust, then the legitimate provenance of the decision is sufficient for permissible enforceability.⁶

Before presenting and defending our alternative view, let us acknowledge—in order to put aside—that there will be many points of overlap between decisions that are democratically legitimate and those that are socially just. We are happy to accept that what is democratically legitimate might be a complex matter: a procedure might qualify because of its purely procedural properties or because, say, of its tendency to produce given—perhaps just—outcomes (Estlund 2008). We do not set out the conditions for democratic legitimacy but we accept that it can make distributive demands and that for a procedure to count as democratic it may have explicitly to rule out, or in other ways make impossible, certain outcomes.⁷ We are also happy to accept that what social justice requires may itself include procedural elements. Political rights may be requirements of social justice and, further, perhaps certain ways in which citizens meet one another's justice claims qualify as "social justice" only if they are put, and kept, in place by democratic procedures (Petit 2015). All this can be granted while retaining the crucial point that the demands of social justice, fully and properly understood, may differ from, and conflict with, the demands that result even from perfectly legitimate democratic procedures.

⁶ Whether or not it is necessary is left unclear, given Rawls's views on global justice, which we put aside. We dispute both the sufficiency and the necessity claims.

⁷ This can be done by stipulating the conditions for a genuinely democratic process (e.g. that all participants see their co-citizens as their moral equals). Such a move might also ensure that we could always locate some value in the democratic process. We are sympathetic to such a stipulation but insist that, while it may rule out some substantively unjust outcomes from being decided by the demos, it cannot plausibly rule out all of them.

3. THE BALANCING VIEW

Our alternative proposal is that both democratic legitimacy and social justice ground pro tanto claims to permissible enforceability; these claims have to be weighed or otherwise taken into account on a case-by-case basis. We say “weighed or otherwise taken into account” since we are not committed to a simple view of weighing (though we refer to weighing throughout for simplicity). Perhaps in some contexts one consideration can preempt or otherwise eliminate the need to consider the other: what matters is whether, taking into account what can be achieved, there is greater reason to advance legitimacy or justice in any given case.⁸ The two ideals at stake invoke different normative considerations; they embody and advance (that is, respect or promote) different values. Even with grave injustice off the table, we see no reason to regard the considerations invoked by the former as invariably weightier or more forceful than those invoked by the latter.

In terms of our proposed analysis, the conventional view can be regarded as a claim about a particular case: it holds that only injustices of a particular level of severity—those deemed “grave”—are unjust enough to outweigh or otherwise block the pro tanto permissible enforceability conferred on them in virtue of their having been produced by procedures that realize or promote legitimacy values to a certain degree. That degree need not be 100%—recall Rawls: “A legitimate procedure gives rise to legitimate laws and policies made in

⁸ It might be doubted that democratic procedures always give even a pro tanto reason for its being permissible to enforce a decision. Unlike our balancing view, the conventional view can deny that the fact that a gravely unjust outcome was the outcome of an otherwise ideal procedure does anything to support the view that that outcome is permissibly enforceable. We find this position implausible: if the value of the procedure does not depend solely on the outcome it delivers, it is unclear why the mere fact that an outcome is unjust, even if gravely so, deprives the procedure of all value.

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accordance with it; and legitimate procedures may be customary, long established, and accepted as such. *Neither the procedures nor the laws need be just by a strict standard of justice*, even if, what is also true, they cannot be too gravely unjust” (our emphasis). For us, casting the conventional view in this light—bringing out the scalarity in both components of the judgement about proper enforceability—reveals an arbitrariness in judging only “grave” injustices to lack permissible enforceability. In our view, less-than-grave injustice may also lack that property even if it enjoys democratic provenance. Thus not only can there be no general presumption that only grave injustice prevents democratic provenance from conferring permissible enforceability on a decision, it is also the case that the need to avoid even less-than-grave injustice sometimes grounds the permissible enforceability of outcomes rejected by the democratic process. We think that this relationship holds whether we are interested in what is right and wrong relative to the facts or relative to the evidence available.⁹

More schematically, the balancing view holds that the avoidance of (more) grave injustice is necessary and sufficient for permissible enforceability: it is permissible to enforce the outcome that avoids (more) grave injustice than the alternative, and it is impermissible to enforce any alternative. So the avoidance of (more) grave illegitimacy is neither necessary nor sufficient for permissible enforceability. But we also deny that full justice is necessary for permissible enforceability: sometimes the imperfectly just legitimate decision will be permissibly enforceable.

4. DEFENDING THE BALANCING VIEW

⁹ On “fact-relativity,” and distinctions between it and “belief-relativity” and “evidence-relativity,” see

Parfit (2011, 150–62).

Our negative case for our balancing view is to point out the problems with the conventional view, which is either vague or implausible. It is vague if it amounts to the view that anything that outweighs legitimacy should count as grave injustice. If so, then the conventional view may even collapse into the balancing view on the quiet. If, on the other hand, the view invokes some independent account of what counts as grave injustice then it is implausible. There is no good reason to think that democratic legitimacy should generally outweigh social justice when the two values conflict, even with grave injustice off the table. The conventional view gains credibility when the value of legitimacy—democratic procedures—is not properly analysed. Once it is (and our analysis is mostly offered in §§4.3–4.5) we see that the credence-giving value of democratic procedures is not unique to them while the remaining value or values—variously articulated as non-subordination or treating people as equals, or with equal respect—cannot ground the conventional view.

But let us begin with our more positive case. We have already pointed out that there are values on both sides of the question—democratic legitimacy and social justice. While we frequently hear why democracy might be valuable, the value of justice is often taken for granted, making it less clear what is at stake in decisions' being just or unjust. In what follows we attempt to say a bit more about the latter.

4.1. Justice Judgements Can Go Beyond Mere Recommendations

What is at stake in judgements of social justice? One way to make sense of the conventional view is to see judgements of social justice (except those of grave injustice) as necessarily conditional: “This is what social justice demands but I do not regard that fact as making a claim about its permissible enforceability unless further conditions are met. The correctness of my judgement about social justice is not in question. But it matters also what others think.” Judgements about justice are rather, as [Pettit \(2015:16\)](#) nicely puts it, “recommendations”;

their claim to permissible enforceability is provisional on further conditions—conditions of legitimate decision-making (or political justice)—being in place (16). Similarly [Valentini \(2012: 600–1\)](#), who agrees that in ideal circumstances the permissible enforceability of judgements of justice is “conditional on democratic approval,” sees them as having “fragile normative status.”

All this is compatible with regarding judgements of social justice as correct or not; true or false. A legitimate decision may thus be mistaken about what arrangements people are owed as a matter of justice, and acting on that mistaken decision means failing to enforce the arrangements that citizens would, in fact, be right to demand as a matter of justice. But the fact that a judgement is correct about what it would be right to demand does not change the fact that the permissible enforceability of the demand is conditional on its being democratically decided.¹⁰

This is a coherent view but it comes at a cost. To see the cost consider the following three cases, in which citizens vote on (a) whether to paint the public lamp posts purple or magenta, (b) whether to enact legislation to protect an area of outstanding natural beauty, and (c) whether to devote some resources to tackling a less than gravely unjust gender pay gap.

When, as part of what I accept to be a legitimate decision procedure, I vote for magenta because it’s a colour that I like, there is no difficulty in my accepting that what is permissibly enforceable should depend on, for example, what is the majority view. In this case, let us

¹⁰ That said, the view that judgements of justice are mere recommendations could not hold that a vote for X means “X ought to be enforced if and only if it is democratically decided.” That view is satisfied even if nothing is democratically decided, since then the conditional has not been violated. A vote surely means more than “don’t enforce this unless it is democratically passed.” We are grateful to David Estlund for this point as well as for making us clarify our argument in this section.

suppose, the outcome derives its permissible enforceability entirely from its being the outcome of the procedure, because there is no procedure-independent reason to enforce one colour over the other. If so, my vote cannot even represent an independent judgement of what colour it would be permissible to enforce.

When I vote on whether to protect an area of outstanding natural beauty I may believe that there is a procedure-independent reason to enact such coercive legislation—this area of natural beauty ought to be protected no matter what everyone thinks. But I may also think that the decision is not one of justice and in such cases only the procedure can confer permissible enforceability on the decision.

But we can also imagine cases where in voting for a given outcome, I am making an independent judgement about what just outcome it would be permissible to enforce. Put differently, we can imagine cases where I am making a judgement about what justice demands about what should be decided and enforced. In such cases if I lose, and the fact that I lose does not lead me to change my mind, I believe that we have made a mistake somewhere along the line when we enforce the outcome I voted against.

At this point we can consider two possibilities. First, we might hold that the mistake occurred at the point of decision-making but, once the wrong decision was made, it became permissible to enforce the wrong decision: only the procedure—and not the correctness of the judgment—confers permissible enforceability on the decision. This is compatible with seeing judgements of justice as provisional recommendations.

Second, we might hold that the mistake occurred both at the point of decision-making and at the point of enforcement of the (wrong) decision. We could accept that a democratic body should decide X and enforce what it decided, without being committed to believing that the body should enforce what is decided if it did not decide X. We could further hold that X is so important that it should be enforced even if X was not decided by the democratic body.

If so, when voting, we could be inputting our judgement about X precisely as a judgement about what permissibly enforceable claims people have, and the judgement about what those claims are can be made on grounds independent of the collective procedure to which they are inputting their judgement. On this view, the question others are getting the wrong answer to when they do not vote for X is precisely *what it would be permissible to enforce on grounds independent of the procedure for collectively deciding that question*, rather than the question of what should be provisionally recommended for enforcement.

The “recommendation” view rules out the very possibility that individuals’ inputs to democratic procedures could be understood by them (and others) as judgements about citizens’ claims against one another that are permissibly enforceable on procedure-independent grounds. Our claim is not that we must, on pain of conceptual incoherence, accept that some judgements of social justice take this unconditional form. Rather, we hold that seeing some claims of justice this way confers special importance on them, or rather, in our view, captures the importance they already have. They are claims that deny others the normative power to block their enforcement. These claims are so important, in other words, that others lose the standing objection to coercion they enjoy in other cases.

Proponents of the “recommendation” view could insist—and we will say more to develop this argument in §4.3—that their view captures the fact of disagreement about what these claims are, the need for a method for resolving it, and the way in which that method can bestow normative force on its outcomes. But our “balancing” view does not deny any of that: it readily acknowledges that the values promoted or respected by disagreement-resolving procedures can confer considerable weight on the outcomes they produce. We simply add to the picture in emphasizing the fact that the object of disagreement is citizens’ claims of justice against one another, and we insist that getting that right must be weighed against whatever value attaches to outcomes in virtue of their issuing from legitimate procedures.

The proponents of the “recommendation” view could also claim that, when voting, we should always ask only what would be permissibly enforceable if it were decided by a legitimate procedure for making such a decision—after all why have a vote at all? But there could be many reasons to see the democratic procedures as a desirable way of making decisions about enforcement. For example, we could care about the stability that having democratic procedures is more likely to bring about.

But, finally, note that the conventional view itself cannot hold that judgements of justice are always merely recommendations if it is to allow that it may be permissible to go against the democratic decision when grave injustice is at stake. This brings into focus the puzzling nature of the conventional view: it allows that considerations of grave injustice can block the ability of legitimate procedures to confer permissible enforceability on democratic decisions but denies this power to all other justice considerations. But unless all grave injustice, and only grave injustice, undermines the democratic nature of democratic procedures—which is implausible—it is unclear how this trick can be pulled off. We will argue that it cannot.

4.2. Justice Judgements Can Be Inclusive

First, however, let us further defend the status of individuals’ judgements about social justice by pointing out that they need not result from parochial, sectarian, or blinkered reasoning. Democratic procedures can bolster their credentials for conferring permissible enforceability on their decisions by appealing to the fact that they combine the preferences or judgements of different individuals into a collective decision. At its most general, perhaps, the idea is that, to be legitimate, decisions must be, in the right way, *inclusive*. They must satisfy conditions that in one way or another include the preferences or judgements of those subject to the decision. Our response is to point out that individuals’ judgements about justice can also be inclusive in important ways. What is distinctive about democratic procedures is *what* they

include: the actual votes of actual citizens. But including and responding appropriately to the views and preferences of others may well be important to the correct identification of what social justice requires *as that identification is attempted by each individual*.

To avoid confusion, let us call such procedures undertaken by an individual, in contrast to the democratic ones, processes.¹¹ Such a process may be needed because for one to have any confidence that one's input to the legitimate decision-making procedure correctly identifies social justice, one must have, and be able to offer to others, certain kinds of reasoning or considerations as relevant. As an individual making one's own judgement about what social justice requires, it is likely to be helpful to engage with others, consider their reasoning, see if their reasoning undermines one's justifications, and so on. But one must also satisfy an internal justificatory process, have subjected it to critical reflection, and so on (Goodin 2000). Thinking about what people would or would not agree to, or what could be justified to them under certain idealized conditions, or would emerge from a certain kind of procedure, were it undertaken, may be part of that process. In some senses the individual's own process will be "collective" or "inclusive" in that it is likely to incorporate, or at least in some ways respond to, the views of others. But this concerns the individual forming her judgement about the correct input to the legitimating procedure. It does not concern the sum of those individual inputs being combined into a collective decision through an actual procedure for combining them.¹²

¹¹ We thank David Estlund for pressing us to clarify this.

¹² For a similar suggestion, presented as a criticism of Forst (2014), see Caney's (2014: 156) insistence on the importance of distinguishing between "the justification required for *political legitimacy* (political justification) and the justification required for a view to be *philosophically correct* (philosophical justification)" (his emphases).

Crucially, then, it is possible to distinguish between (i) processes to which we as individuals (albeit perhaps through deliberation with others) must subject candidate principles in order to assess them correctly as principles of justice and (ii) procedures that individuals' judgements about principles of justice must go through in order for that combined or collective judgement to be legitimate. Any contractualist approach to questions of justice will involve a variant of the idea that one arrives at correct answers to questions of justice by thinking about what would be agreed to by people, specified a certain way, in circumstances specified a certain way. As Estlund (2008, 16) says: "Contractualism...is a family of views that understand justice or rightness as constituted by facts about what would be agreed to in a certain imaginary collective choice situation." Rawls's original position is the paradigm case here, of course. This is a claim about (i). It does not require conceiving justice as the outcome of any actual agreement between—or any "combined" or "inclusive" or "collective" judgement based on the input of—different people, but it allows justice to be inclusive in other important ways.¹³ This is not to deny the possibility that actual inclusive procedures can

¹³ Amartya Sen (2009, 326) risks running the two modes—(i) and (ii)—together: "If the demands of justice can only be assessed with the help of public reasoning, and if public reasoning is constitutively related to the idea of democracy, then there is an intimate connection between justice and democracy, with shared discursive features." The thought here is that the way one goes about identifying justice, if one is doing it right, involves a kind of reasoning (which Sen calls "public reasoning") that will itself play a role in any properly democratic way of making a collective decision. Even if that is true, we are not sure that Sen always holds on to the distinction between the two distinct elements in the picture. His emphasis on "social choice theory," which is "deeply concerned with the rational basis of *social* judgments and *public* decisions" (95, our emphases), seems to involve a slide from the first to the second. An individual's judgement can be "social" in being about social matters and it can be "public" in the sense of being about public matters (or publicly available, or based on public reasoning). But talk of "public decisions," and indeed the

sometimes have epistemic advantages over the processes that individuals alone can undertake. But non-democratic processes can make use of at least some of the benefits (while also avoiding some of the pitfalls) of “inclusive” decision-making.

4.3. Reasonable Disagreement Does not Ground the Conventional View

Perhaps, however, we underplay the importance of reasonable disagreement. The presence of such disagreement may mean that we owe respect to others’ views (and we discuss this in §4.4) but it may also suggest that our own views—even those that went through the process described in §4.2—are less worthy of respect. The suggestion here is that the fact of disagreement—and in particular reasonable disagreement—should reduce confidence in one’s judgement to a level below that which, absent grave injustice, would justify acting on it in the face of a democratically legitimate decision. Put differently, the proponents of the conventional view can appeal to the fact of reasonable disagreement to ground the conclusion that, whatever may in fact be the just decision, evidence will always warrant the conclusion that, except in cases of grave injustice, the legitimate decision is the permissibly enforceable one.

We do not need to deny that acknowledging reasonable disagreement about a judgement could appropriately lessen one’s confidence in it.¹⁴ We could concede that one’s commitment

very idea of “social choice,” takes us across the analytical divide into the (for us) entirely distinct business of combining individuals’ judgements into a collective decision. The legitimacy of such a decision may well depend on its democratic provenance (including perhaps considerations concerning the kinds of reasoning that citizens may properly engage in when deciding on public matters), but it remains a distinct question whether that decision is right about social justice.

¹⁴ For discussion of the problem see [Christensen, D. \(2009\)](#). We are grateful to David Estlund for the reference.

to one's views should be reduced by the recognition that reasonable people can and do disagree, or that other views pass a "reasonableness" threshold. But this line of thought must have limits. One problem is that it becomes hard simultaneously to assert that such confidence is justified in cases when the injustice at stake is grave. That is, if one's confidence should track the views of others then it is difficult to see why we should make exceptions in the case of grave injustices. Unless grave injustice stood for "obvious injustice," there is no good reason why one's confidence would track gravity. If denying economic migrants settlement visas is unjust it is unjust, or if denying free access to life-saving drugs in order to use the resources for quicker epidural access on maternity wards is unjust, it may well be gravely unjust, but we may not be certain that it is unjust. By contrast, if stealing a pencil is unjust, it is not gravely unjust, but we may be justified in confidently believing it unjust—and "obviously" so.

Moreover, the thought that democratic decisions outweigh just ones because of lack of confidence in justice judgements can be met by analogous appeals to lack of confidence in judgements about legitimacy. If disagreement about justice should lead people to lack the confidence in their beliefs about what justice requires, then why shouldn't disagreement about legitimacy lead them to lack confidence in their beliefs about what legitimacy requires? To be sure, in some instances people will disagree merely on what social justice requires rather than on what is the right procedure for deciding the matter (though note that on many accounts of reasonable disagreement what matters is not whether the disagreement exists but whether it could arise¹⁵). But in other cases, we should expect people to be less confident about what would be legitimate than about what would be just. The view that, society's resources permitting, children with weak immune systems have the right that mass vaccinations be compulsory for the sake of herd immunity, or that social justice requires that

¹⁵ Jonathan Quong (2010).

proper resources be spent on protecting poor citizens from crime, or that a 5% pay gap between citizens who differ only by gender or ethnicity is unjust, can be held with greater confidence than a view about what would be the legitimate procedure for deciding those questions. These doubts can take the form of disagreement over the specific democratic procedure that ought to be adopted or, more radically, whether a given issue should be decided by democratic procedures at all.

4.4. Equal Respect Does not Ground the Conventional View

Epistemic and credence considerations are, of course, not the only ones that may be invoked to motivate the need for inclusive democratic procedures. Some think that democratic procedures are needed to respect people's general presumptive right or standing objection against coercion.¹⁶ Such a right or objection is notoriously difficult to establish. It is not clear that there is any wrong in coercing someone not to do evil. Nonetheless, in the words of Kolodny (2014b: 316):

...[I]t is a common view, perhaps the dominant view, in political philosophy that even the fact that the decision is substantively ideal is not enough to make it legitimate [permissible to implement]. There is, according to this view, some Further Objection to political subjection as such, even to substantively ideal decisions. For all the insistence on a Further Condition, however, it is elusive what Further Objection it is supposed to answer. When clearly stated, many of the candidates for this Further Objection seem weightless or confused. If a residual worry remains, as I argued elsewhere, it is that in being subjected to

¹⁶ See Fabienne Peter (2016) for discussion of how procedures could ground permissible enforceability because they deliver “sufficiently justified beliefs about normative authority” and/or “adjudicate between conflicting wills.”

political decisions, we are somehow subordinated to other people: namely, those who make the decisions.

In what follows we do not pursue the objection from coercion but consider two more promising attempts to capture similar worries: the appeal to the need for equal respect and, in the next section, the objection to subordination acknowledged by Kolodny.

Advocates of the conventional view might argue that our view fails to recognize that disagreement is not simply an unfortunate fact—something for which, for practical purposes, we need an effective solution—or grounds for reducing one’s confidence in one’s own judgement. The disagreement warrants a particular kind of response, one that treats each citizen as equally a source of authority. Unlike the individual judgements that are their inputs, the outcomes of democratic procedures may permissibly be enforced—even where they are mistaken—because those procedures are the way of responding to disagreement that accords citizens equal respect.

Of course, the conventional view holds that the outcomes of otherwise legitimate procedures lack permissible enforceability when those outcomes are gravely unjust. So that view does not always prefer the “equally respectful” procedure to the just outcome; it allows content-reasons to outweigh procedure-reasons when the former reach a particular level of seriousness. In addition, many who ground the normative force of democratic decisions in citizens’ disagreements with respect to matters of content confine their concern to that subset of disagreement which is deemed “reasonable.” What demands this particular moral response—this particular manifestation of “equal respect”—is not the fact of disagreement as such, it is the fact that some of the disagreement is reasonable. These two points might be connected: one might think that any citizen who would vote for a gravely unjust outcome is unreasonable, or vice versa, but neither version of the connection is necessary.

Even with these two qualifications in mind, we do not find this challenge persuasive. In the first place, it is a mistake to think of our view as altogether neglecting the fact of (reasonable) disagreement. As we have explained, the balancing view can acknowledge that individual judgements about the content of social justice may themselves depend for their validity on deliberative procedures that give proper weight to the judgements of others. The assessment of a principle as a correct principle of justice, as that assessment is conducted by each individual, may well involve consideration of whether it meets certain justificatory criteria, whether it can offer the right kind of response to those who disagree, or who reasonably disagree, and so on. So the difference between us and our opponent is not about whether disagreement demands proper acknowledgement and normatively appropriate response, it is about what constitutes that acknowledgement and response.

Second, the appeal to the notion of “equal respect” fails to ground the conventional view. While allowing that justice is also a way of articulating that idea, [Valentini \(2012: 598\)](#) insists that it is the procedural ideal of legitimacy that is its relevant articulation in contexts where there is disagreement about justice: “what we typically call ‘justice’ articulates the demands of equal respect under the so-called circumstances of justice,” while “what we call ‘legitimacy’ articulates the demands of equal respect under the circumstances of ‘political justice.’” [Christiano’s](#) justification of democracy as a legitimating procedure involves a similar claim. According to him ([2004: 271, 273](#)): “Each citizen has fundamental interests in being able to see that he is being treated as an equal in a society where there is significant disagreement about justice. There is a deep interest in having one’s moral standing among one’s fellows clearly recognized and affirmed.” Like Valentini, too, he frames this as a claim about justice:

democratic decision-making is a publicly just and fair way of making collective decisions in the light of conflicts of interests and disagreements

about shared aspects of social life. Citizens who skirt democratically made law act contrary to the right of all citizens to have an equal say in making laws when there is substantial and informed disagreement. Those who refuse to pay taxes or who refuse to respect property laws on the grounds that these are unjust are simply affirming a superior right to that of others in determining how the shared aspects of social life ought to be arranged. Thus, they act unjustly.

(*ibid.*: 286)

Let us grant that there is a kind of injustice when a decision about social justice is enforced that differs from that which would have emerged from a procedure that equally respected people's judgement, or that publicly treated them as equal members of society. There is also a kind of injustice when a decision about social justice is enforced that fails to treat people equally with respect to those properties or capacities that would have been treated equally had the correct decision been enforced. Christiano (*ibid.*: 286) insists that "The interests involved in being publicly treated as an equal member of society are the *preeminent* interests a person has in social life..." (his italics). We accept that those interests are weighty. But the idea of "interests involved in being publicly treated as an equal member of society" does not deliver the conclusion that procedural interests take priority over all other interests (subject to the not-too-grave-injustice clause)—after all, being publicly treated as an equal could involve both. Or, or if the phrase is meant to denote merely the procedural interests, the claim is unpersuasive. People's (non-procedural) interests are equally respected when people get what they are owed as a matter of social justice, and these interests are also important.

How should we compare these two different aspects of what might be involved in respecting people equally, or treating them justly? Is it worse to be denied (i) that procedure for deciding social arrangements which treats those subject to it with equal respect, or (ii)

those social arrangements that would result from the correct identification of the implications of each person's claim to equal respect?

We might think about this by contrasting the different properties or capacities at stake. On the one hand are those properties that are equally respected by the democratic procedure. Examples here would be the capacity to make judgements about which distributions should be enforced, or having that capacity recognized and affirmed by one's fellow citizens. On the other hand are those properties equally respected when the correct, socially just, decision is enforced. For example, the correct decision about allocation of resources to health care or education can respect people's capacities to lead autonomous lives: democratic publics can decide to devote disproportionate resources to end-of-life care, or to university education, to the relative neglect of health care and education for young children. We see no reason to suppose that the capacities respected by the democratic procedure are so much more important than the capacities respected by the socially just education or health care policy as to make only grave mistakes grounds for denying the permissible enforceability of collective misjudgements. When we reflect on what we ourselves care about, we readily accept that it may sometimes be more important to cater to our capacities for health than our capacities to decide on how much to devote to the health budget.

It is, moreover, far from obvious that one treats someone one with respect by "respecting" their mistaken judgements about justice. When people vote for what they believe to be the just decision, we may assume that at least part of what matters to them—even in their role as democratic citizens, and putting aside their interest in being subject to just rather than unjust laws—is indeed achieving a just outcome. If they could see that they were mistaken, then they would want their mistake corrected; after all, what they care about is justice, not having their mistaken view about justice given equal weight with other, correct, views. If they do not see that they are mistaken, then overriding their view may indeed lead

them to feel disrespected, and certainly their capacity to identify the right answer about justice, on this occasion at least, will be regarded as inferior to that of others. But if what they are trying to achieve through their democratic input is indeed a just outcome, then it is not obvious that the kind of respect that matters is accorded by putting aside knowledge of the very thing they were themselves seeking.¹⁷

We do not deny that there can be weighty reasons to enforce democratic decisions even when they are mistaken. We can grant that there is indeed a kind of disrespect involved in substituting one's judgement for that of one's fellow citizens. One might even conceive it as manifesting a kind of contempt for their views, and as importantly fracturing our relationship of democratic citizenship with them—though even this can go hand in hand with acknowledging, indeed publicly acknowledging, that those who made the incorrect decisions are generally good judges. But there is also a kind of disrespect involved in failing to grant people what they are, in fact, owed as a matter of social justice. We may not be warranted in seeing those who fail to grant people what they are owed as intentionally disrespectful; after all, by assumption, all our disagreement may be reasonable. But the disrespect involved in failing to see the democratic process as bestowing permissible enforceability on the collective decision need not involve any troubling intentionality either: we may simply think that on some issues people were given too little time to decide.¹⁸

4.5. Avoiding Subordination Does not Ground the Conventional View

Do we take the disrespect involved in substituting one's judgement for that of one's fellow citizens too lightly? What is at stake, perhaps, is not merely which capacities are more worthy

¹⁷ We are grateful to Victor Tadros for this suggestion.

¹⁸ We are grateful to an anonymous referee for making us clarify this.

of respect but the fact that, as Niko Kolodny and, separately, Daniel Viehoff have recently suggested, democratic procedures are necessary to sustain relations of social equality.

Social equality, roughly put, means that people are neither socially superior nor inferior to each other. More precisely, according to Kolodny (2014b), social equality is missing—there is “subordination”—when some people have greater relative opportunity for power or de facto authority over others and are not “resolutely disposed to refrain from exercising it” (295).¹⁹ For Viehoff (2014), social equality requires that “none of us has more of a say than any other” about the relationship at stake, e.g. marriage or citizenship in a democracy (340). People must “set aside, and not act on, unequal power advantages in shaping [their]... interactions and the norms and expectations governing them” (352); there must be “rough equality of power over the interactions that make up the relationship” (355) and the parties must be “committed to having equal power” (356).

The two accounts differ but both Kolodny and Viehoff argue that it is the role that democratic procedures play in sustaining relations of social equality that explain why those procedures can be the source of permissible enforceability.²⁰ Social equality itself requires some social justice²¹ which means that some socially unjust decisions would advance neither social justice nor legitimacy. But both authors accept that social equality and democratic decisions, on the one hand, and social justice, on the other, can conflict.²²

¹⁹ There is a further sufficient condition but we put this aside.

²⁰ For Viehoff they are also a source of authority.

²¹ Though Kolodny’s caveat (2014b: 299) is that this is required only if we assume ongoing social interaction.

²² As Viehoff (373) plausibly points out, the value of social equality would conflict with social justice not only if the socially just decision was enforced despite a different democratic decision but also if

That said, Kolodny's account of the value of democratic procedures does not bolster the conventional view. He is explicit that his account is intended merely to capture the *reason* that democratic procedures may offer for the permissible enforceability of their decisions even when those decisions are substantively mistaken. But, as he adds, "...when a decision has substantive defects, what positive reason remains to overcome my objection? To this challenge, the answer is that if the decision was democratically made, then that is a positive reason that at least countervails against, *even if it does not ultimately prevail* over, my objection" (316; emphasis ours). He goes on to say that the reasons "weigh" against the objection.

Viehoff may well be defending the conventional view, though his position is ambiguous.²³ But even if his account were a version of that view, his endorsement of the value of social equality is not coupled with a defence of the value (since his main aim is rather to articulate how social equality, if accepted, bolsters the authority of democracy). As a

someone merely threatened to enforce it (or even simply threatened to disobey the democratic decision).

²³ Viehoff explicitly offers a defence of democratic authority where citizens have a duty to obey (and, as we interpret him, where the decision is permissibly enforceable). He allows that "...an egalitarian procedure may lack authority [and, we think, the ability to confer permissible enforceability on a decision] because it is insufficiently likely to reach the correct conclusion... The benefits of submission to the democratic authority, measured in terms of relational equality, may be insufficient to justify the expected costs measured in justice or the common good" (372). One passage suggests that he allows the injustice that takes precedence over the democratic decision to be merely more than "somewhat unjust" (373) but another suggests that the degree of injustice that can prevent democratic decisions from being authoritative should be decoded in terms of "severe injustice" (374).

result, he does not offer reasons why legitimacy should outweigh social justice when the two conflict (353).²⁴

Whether it is Viehoff's view or not, we can consider whether avoiding social inequality must take precedence over the advancement of social justice (once grave injustice is off the table) when the two conflict. We are told that social inequality can arise simply because some (genuinely) have superior knowledge to that of others. Suppose, then, that some people have more time and capacity than others to research some policies (perhaps they do it for a living), and thereby acquire superior knowledge. Suppose they know that the democratic decision would unjustly deny additional life-saving treatment for the sake of extra pain relief on maternity wards. It is unclear why the value of equal social relationships among citizens must take precedence over the importance of providing the additional life-saving treatment.

Of course, in this case it may matter whether the extra power is being wielded secretly or visibly, how often it is wielded, and whether the sources of the extra power are themselves innocuous or troubling; all these factors potentially bear on how deeply the wielding of the power undermines social equality. Thus the fact that we may accept as permissible the occasional enforcement of social justice, when it conflicts with the democratic decision, does not commit us to accepting that enforcement if it were to be widespread. Nonetheless, it is implausible that the disvalue of subordination must always, except when grave injustice is at stake, take precedence over the value of greater social justice. Once our opponents accept that the value of social equality is to be weighed (or otherwise assessed) against the value of greater social justice in any given case, the position that one will invariably outweigh or take priority over the other becomes untenable. Not being ruled by others—standing as a social

²⁴ He does suggest that only social equality can ground authority, which may count in favour of his account. To treat this as a reason why legitimacy should trump justice would, however, be to put the cart before the horse.

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equal with others—is indeed valuable. But why think it should defer only to the avoidance of grave injustice? There may be no grave injustice, we assume, if some vaccination is not researched and provided, but some social inequality should be accepted, if necessary, for the sake of having it.

5. IS THE BALANCING VIEW TOO FRIENDLY TO LEGITIMACY?

We have focused on the implausibility of legitimacy always outweighing less-than-grave injustice, but we also claimed that legitimacy may sometimes weigh against the advancement of justice. This last claim will come as no surprise to the proponents of the conventional view but it may be that both the conventional view and the balancing view are mistaken on this score. To see the force and the exact target of this worry, suppose that the democratic body that decides on the unjust policy is also the enforcer of the policy.²⁵ There is something troubling in holding that it may be permissible for this body to enforce its unjust policy because of the value of legitimacy. Rather, it should have adopted the just policy to begin with. Put differently, we might think that a third party may have a greater reason to bow to the fact that a policy has the right provenance than the party whose decision it is. By way of analogy, consider that your friend may have a greater reason to help you advance your autonomous decision to do something mildly stupid than you yourself have, since you should instead abandon the decision.

This line of thought correctly suggests that the permissibility of enforcing less-than-just decisions may depend on whether the body that makes the decision is also that which enforces it. There will be cases where it will be impermissible for the body to enforce the

²⁵ We are grateful for discussion to Matthew Clayton and Andrew Williams.

decision when the same decision could permissibly be enforced by a third party on the grounds that it was democratically made.

Nonetheless, we resist the conclusion that legitimacy can never outweigh justice in cases where the decision-maker and the enforcer are the same; it may be permissible for the body that made the unjust decision to enforce it. Why? Recall that we have so far been focusing on ideal legitimacy. We have been assuming that the democratically legitimate decisions have been made by the best available procedure. That procedure need not, perhaps, be the best way of getting the decision right but it is, all things considered, the best way of deciding. Given this, we can see the unjust decision as nonetheless a reasonable decision to reach. This may be because the injustice is only fact-relative (rather than evidence-relative) or because, say, the demos had so little time to reach the decision that the injustice is evident only to those who have had a longer time to consider the issue. In such cases we should think of the body as being in a similar position vis-à-vis its decision as a third party would: although the decision is unjust, the demos did not fall short in any of its duties when reaching it. If the loss in justice of enforcing the unjust decision is smaller than the loss in legitimacy of not enforcing it, it may still be permissible, all things considered, to enforce the unjust decision.²⁶ We do not mean by that, of course, that the fact that no one failed in their democratic duties or obligations in reaching a decision makes the decision permissibly enforceable; this would contradict the balancing view. Rather, we are saying that the fact that no one failed means that appeals to the value of enforcing the legitimate decision are not blocked by the response: “if you wanted to enjoy legitimacy, you should have acted better than you have done.”

²⁶ Things might look different if, having taken the reasonable but mistaken decision, the demos learns of its injustice prior to enforcement. Even if the demos could not now reverse the decision, it may be that it should absorb some costs of the injustice it now knows itself to have decided upon.

Thus, just as long as the demos is not falling short in its democratic duties and obligations, legitimacy can weigh in favour of permissible enforceability. But this qualified defence of legitimacy might be thought to weaken our case for the balancing view, because it suggests that those subject to the injustice *have no grievance or complaint*. If the best possible procedures have been followed, then nobody has done anything wrong, nobody has failed to act on any obligation owed to anybody else. One might say that, although the result is social injustice, nobody has acted unjustly, perhaps even that nobody has been treated unjustly. Perhaps all that citizens are owed—as a matter of justice—is the establishment of, and sincere and conscientious participation in, the best procedure for reaching political decisions.

Though attractive, that doesn't seem right. Consider the permissible enforceability of a criminal justice decision rather than a democratic decision. Imagine an innocent convict who accepts that all concerned in reaching the verdict that convicted her deliberated and acted precisely as they should have done—except that they got it wrong (Estlund 2007; Overland and Barry 2011). She may have no complaint against the procedure; neither against those who decided what the procedure should be nor against those involved in it. But it is counter-intuitive to think that the lack of complaint means she has not been wronged by the conviction and imprisonment. The mere fact that the decision was entirely legitimate may excuse its enforcement but it does not necessarily outweigh the reasons to secure a just outcome; enforcement of the just outcome may be permissible while enforcement of the legitimate one is impermissible.

The analogous thought applies in the political case. If the content of a democratically legitimate decision has indeed misidentified what people owe one another, and what should in fact be enforced, then the absence of any complaint against those responsible for the misidentification does not mean that what has been misidentified no longer qualifies as

“social justice.” And it does not neutralize or annul the reasons to enforce the correct judgment.

6. DEMOCRATIC LEGITIMACY IN THE REAL WORLD

We have articulated a “balancing” view on which both the legitimacy of procedures and the justice of outcomes are pro tanto considerations relevant to the question of permissible enforceability—and observed that the conventional position, whereby gravely unjust decisions reached by democratically legitimate procedures may not properly be enforced, itself relies on that view without justifying why the view applies only in the case of grave injustice. We have rejected that conventional position as unduly restrictive: a democratically legitimate law or policy need not be gravely unjust for it to be wrong to enforce it.

But there is a further reason to be wary of claims that legitimacy trumps justice in all but grave injustice cases. Our discussion so far has been concerned with the case in which perfectly democratically legitimate procedures produce unjust laws and policies. Like much of the literature, we have simply assumed that the procedures in question fully respect or promote the values that render their outcomes legitimate. But one of our motivations for articulating the “balancing” view is that this assumption is wildly false. Much has been written about whether—and in what way—“ideal” theories of justice have practical significance (Simmons 2010; Stemplowska and Swift 2012; Gaus 2016). That significance is usually understood in terms of such theories being action-guiding; action-guiding not merely in principle but in practice; i.e., for us, here and now, in our own, far-from-ideal, circumstances. The fact that our circumstances also fail to meet the demands of any plausible conception of “ideal” legitimacy, and the action-guiding implications (if any) of that second deficit, have received far less attention. If our ways of making political decisions are no more

legitimate than the content of those decisions is just, then procedural solutions to problems of injustice are as practically irrelevant as the ideal theories of justice they sometimes seek to replace.

Even if the conventional view were right that, and even if, as Valentini and Pettit argue, “political justice” demands that decisions about what societal arrangements are implemented should be made democratically, none of that tells us how to weigh the competing considerations in polities, like the US and the UK, that fail to meet any plausible criterion of ideal legitimacy: polities whose decision-making procedures do not respect those very capacities or qualities of those subject to the decision that are appealed to by accounts of democratic legitimacy.²⁷

For considerations of legitimacy to be properly taken into account here and now, we need non-ideal theories of legitimacy. What conditions must a decision procedure meet in order for it to permissibly enforce its somewhat mistaken judgements about social justice, even when that procedure does not measure up to a plausible specification of the value of, say, “equal respect” or “social equality”? Acknowledging the imperfections implied by feasibility constraints of various kinds—constraints that are often discussed in relation to

²⁷ Pettit (2015, 11–12) tantalizes the reader by promising to consider how “social and political issues...ought to be weighted in relation to one another,” asking “Should you be prepared to pay a cost in one form of justice for a benefit in another? And if so, how should the trade off go?” But he fails to offer any kind of answer to those excellent questions. The main kind of “priority” he accords the political—“The very activity of proposing an ideal or theory of social justice presupposes under those assumptions that there ought to be politically just, suitably democratic procedures in place in the society targeted”—gives us no guidance. His discussion of “political justice” (aka “legitimacy”) is itself too idealized to give us any traction.

justice but less so in relation to legitimacy—how much and what kind of democracy should be demanded as a condition for making the enforcement of injustice permissible?

We might, that is, factor all the non-idealness into the concept of legitimacy itself.

Perhaps what it *means* for a procedure to be “legitimate” is precisely that it is *legitimate enough* to make its decisions permissibly enforceable. That would allow us to say things like: “The way laws are made in the UK fail miserably to realize the values we might hope to see realized by a political procedure, the values in virtue of which enforcing somewhat unjust political decisions would be permissible. Still, all things considered, it realizes them enough.”

Appeals to the legitimacy of flawed procedures—where some cannot register to vote or lack basic literacy, where election promises are unreasonably broken, where bills do not get adequate scrutiny, where policies respond to media scares, where money can buy influence, where politicians knowingly mislead—need to establish that such compromised legitimacy should still trump the pursuit of social justice by other means.

We find no argument that would offer a blanket ruling in favour of non-ideal legitimacy in, say, the UK, over and above all instances of apparent injustice. Thus the job centre official who adds someone to the list of approved benefits claimants against the rules, the teacher who helps her under-resourced students “cheat” in tests, the local politician who secretly diverts police resources to deprived and unsafe neighbourhoods may not only be promoting social justice; it may be impermissible to coerce them into acting in accordance with democratically approved outcomes and, indeed, their use of coercive means to advance their own views of justice may itself be permissible. These matters will depend partly on the correct balancing of the relevant kind of (in)justice vis-à-vis the actual, non-ideally legitimate procedure that issued in a different decision. As we have said, both judgements of injustice and illegitimacy, and the confidence with which such judgements can be held, are scalar.

It should go without saying that none of this licenses the unilateral promotion of one's favoured conception of justice. The fact that the (less or more) legitimate procedure cannot be relied on always to produce laws or policies that are permissibly enforceable, does not mean that anything goes. It just means that there is no avoiding difficult judgements²⁸.

²⁸ We thank Matthew Clayton, David Estlund, Annabelle Lever, Victor Tadros, Andrew Williams, and an anonymous reviewer for discussion and detailed comments. We are also grateful for comments on more or less distant cousins of this chapter to audiences at Barcelona, Braga, Budapest, Edinburgh, Geneva, Manchester, Nuffield College, Oxford's Centre for the Study of Social Justice, and Warwick's Centre for Ethics, Law and Public Affairs.

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