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# **The Constitutionalist Debate: A Sceptical Take**

Kyle Murray

MJur Thesis

Durham Law School, Durham University

2015

### **Acknowledgements**

With thanks to my parents, for encouraging me to form my own views, argue and never to shy away from disagreeing, and especially for putting up with the consequences; to Gavin Phillipson and Alex Williams, for their guidance and encouragement throughout my studies at Durham and their helpful comments and discussions on what follows; and, finally, to everyone who has disagreed with me, and to all those who will.

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## Chapter 1

### Introduction

The constitutionalist debate - over where decision-making authority in society should lie, and how it should be exercised - is one which is of fundamental importance not only in academia and constitutional theory, but in society generally. Involving issues of morality and political morality, particularly acute where rights are concerned, the constitutionalist debate is also one controversial beyond academia; the issues involved go to the heart of the current political controversy over Conservative plans to replace the UK's Human Rights Act with a British Bill of Rights, an approach generally viewed negatively within the UK legal academy.<sup>1</sup>

The debate is characterised by opposition between two main groups as to how decision-making power should be distributed and exercised in society: political constitutionalists and legal constitutionalists. In general terms, political constitutionalists argue that controversial issues should be resolved by those who are politically accountable, through the political decision-making and legislative processes. Members of this school oppose measures which attempt to take rights-issues out of the political arena (or at least limit its influence) and into the courtroom; they characterise such issues as political disputes through-and-through, which should be left for political resolution by electorally accountable bodies.<sup>2</sup> Thus, there is a tendency among political constitutionalists to favour principles such as Parliamentary sovereignty (the right of the elected legislature to 'make or unmake any law whatever'),<sup>3</sup> described by Bellamy as the 'crux' of a political constitution,<sup>4</sup> and to oppose Bills of Rights, either generally, for the reason that they (according to one commentator) inevitably have the effect of transferring 'too much power...to an unelected judiciary',<sup>5</sup> or particularly those that come with a legal strike-down power against legislation deemed incompatible (the specific target of Jeremy Waldron's case against judicial review).<sup>6</sup> In contrast, legal constitutionalists turn primarily to the legal institutions and processes to resolve issues over rights and their implementation. Politics is often characterised as a potentially dangerous arena, which effectively

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<sup>1</sup> See, for example, H Fenwick, 'The Human Rights Act or a British Bill of Rights: creating a down-grading recalibration of rights against the counter-terror backdrop?' [2012] PL 468.

<sup>2</sup> The classic account of the inescapably political nature of rights-issues comes from JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1. See also his *Public Rights and Private Interests* (Academy of Legal Publications Trivandrum 1981) and *The Politics of the Judiciary* (5<sup>th</sup> edn, Fontana 1997).

<sup>3</sup> AV Dicey, *The Law of the Constitution* (5<sup>th</sup> edn, Trollope Press 2009) 38.

<sup>4</sup> R Bellamy, 'Legislative Comment: Political constitutionalism and the Human Rights Act' (2011) 9(1) ICON 86, 89.

<sup>5</sup> J Allan, 'An Unashamed Majoritarian' (2004) 27 Dalhousie LJ 537, 544.

<sup>6</sup> See, for example, J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346.

leaves issues of fundamental importance to the mercy of temporary majorities.<sup>7</sup> With this in mind, legal constitutionalists tend to favour devices limiting the power of the political institutions, such as Bills of Rights, and the institution of judicial rights-review of legislation.<sup>8</sup>

The main aim of this thesis is to critically examine the above debate. The examination will take place from a particular, sceptical philosophical perspective, one which questions the possibility of convincingly defending moral premises in a way which does not merely amount to the questionable assertion and question-begging reassertion of a particular individual or group. This claim will be set out and defended in detail in **Chapter 2** via a pragmatic anti-realist and anti-foundationalist approach, drawing on aspects of the sceptical work of the legal theorist Arthur Leff, and the pragmatic approach of the philosopher Richard Rorty. For reasons of space, not all (nor even a substantial amount) of the legion of philosophical arguments concerning the defence of moral premises and claims can be considered. The discussion will therefore be limited to some of the most influential approaches, and those which have the most significance for the issues raised here. Thus the work of Alan Gewirth in particular will be considered in some detail because of the interest of the method relied on, which offers the possibility of defending moral and normative claims, placing them beyond question, in a way which avoids the criticisms of other approaches made by the anti-realist and pragmatic argument put forward here. John Rawls' arguments are considered (in detail in **Chapter 4**) due to his wide-ranging influence and status as, perhaps, the pre-eminent liberal political philosopher of modern times. The relevance of the perspective defended here will become clearer as the thesis goes on to apply it to issues and arguments within the constitutionalist debate, and a large part of **Chapter 3** directly responds to arguments that the issues on which this perspective takes a stance are in fact *irrelevant* to that debate and the issues within it. These arguments must be given careful consideration given that they effectively question the very purpose of this thesis. In particular, the irrelevance argument put forward by Jeremy Waldron will be considered in detail, because of the strong influence of his work in the constitutionalist debate. It will be contended, however, that Waldron's argument amounts to an incoherent and self-contradictory implicit attack on a particular side of a debate which is claimed to be irrelevant; Waldron himself ends up taking a stance on the philosophical issues which it is the whole point of his argument to show are irrelevant to the issues within the constitutionalist debate. Here, some more general, and (the author believes) original, thoughts regarding the (in)consistency of Waldron's philosophical stance - in particular on

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<sup>7</sup> See, for example, R Dworkin, *A Bill of Rights For Britain* (Chatto & Windus 1990) esp. 35-6; WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007) esp. 163, 258; TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44(1) CLJ 111, 116.

<sup>8</sup> For examples see: Dworkin, *ibid*; C Fabre, 'The Dignity of Rights' (2000) 20(2) OJLS 271; 'A Philosophical Argument for a Bill of Rights' (2000) 30 British Journal of Political Science 77.

the realism/anti-realism issue - will also be offered via a close analysis and comparison of his various comments (**section 3.3.1**). Having rejected the argument that the philosophical perspective taken in this thesis is irrelevant to key issues within the constitutionalist debate, its *relevance* and consequences will be considered in relation to that debate in the remainder of this work.

**Chapter 3** goes on to consider instrumentalist approaches to the question of the distribution and exercise of decision-making authority in a constitution, commonly put forward. In essence this approach views the (lack of) justification for an arrangement or distribution of decision-making authority in terms of the quality of the substantive outcomes it is likely to reach. It will be argued that once the realist assumptions behind this approach, the justification advanced for it, and its defences to critics are challenged, it can be seen as misguided. As such, it will be argued that a consequence of the perspective taken and defended in this thesis is that instrumentalist approaches to the constitutionalist debate are of no assistance. This chapter will finish with a critique of Waldron's direct argument - put forward in the context of his own rejection of instrumentalist approaches - against the justification of leaving issues concerning rights and morality to be decided by the courts exercising rights-based legislative review. This argument - based on the idea of participation as the "right of rights" - will be argued to rest on a moral premise - concerning the dignity inherent in the individual and the respect due as a result - that cannot be shown to rest on anything more than question-begging assertion and reassertion.

In **Chapter 4**, the thesis will consider another popular argument in the constitutionalist debate. Arguments from democracy - claiming democratic legitimacy for a particular constitutional setup, and criticising opposing constitutional models and their justifications as incompatible with democracy and its requirements - put forward by many different sides of the debate will be considered in detail. It is for this very reason - the popularity of, and reliance on, democratic arguments among constitutional theorists - that this method of argument is considered in such detail. The deconstruction of these arguments will reveal the particular conception of "democracy" and "democratic legitimacy" relied on. It will be demonstrated that, depending on the particular conception one starts from, "democracy" is capable of supporting many different *opposing* constitutionalist models and arguments. In particular, it will be shown that both legal and political constitutionalist approaches are capable of "democratic" justification. As a result, it will be argued that unless the particular conception of "democracy" relied on can first be set up as superior to those relied on by opponents in their own constitutionalist arguments, arguments from "democracy" are of little use in the constitutionalist debate, as capable of simultaneously supporting many incompatible arrangements. It will be contended that demonstrating such superiority is not

possible. Drawing on the “essential contestability” argument of Gallie, underpinned via the philosophical perspective taken in this thesis, it will be argued that the conception of “democracy” one sees as most justified or “true” depends on the particular values and moral preferences of the individual or group engaged in the assessment. It will thus be argued that arguments from “democracy”, ultimately amounting to such ungroundable assertions and reassertions of the values and moral preferences of particular individuals - convincing to those who agree, but merely begging the question against those who hold alternative values – are of little use in the constitutionalist debate.

Following this critical (admittedly negative) discussion of the current constitutionalist debate and the key approaches within it, this thesis will, perhaps unsurprisingly, conclude that this debate is unsatisfactory. That is, it will contend that the underlying assumptions on which current approaches to this debate rely are, from the perspective defended here, misguided and indefensible. Finally, some brief comments will be made as to the way forward following this negative argument in **Chapter 5**. The argument of this thesis raises the question of what approach and what arguments *would* be compatible with its perspective; what *would* a sceptic’s constitution look like, and how *could* it be justified? For reasons of space (this thesis being a (relatively) short one), and scope (its immediate aim being to examine the *current* debate from a philosophically defended perspective), these are not questions which can be answered here in any detail. This thesis, therefore, will not offer concrete thoughts on what the substantive outcome to the constitutionalist debate should be, for example whether a system of political supremacy should be preferred over a system of legal constitutionalism, or vice versa. However, having identified the direction to which the argument presented here points, the author will proceed to take it, taking the present arguments and conclusions as a starting point, and consider the questions raised in detail, by means of a PhD programme.

Questions may be raised regarding the nature and style of the sceptical arguments made here. Given that the tone of the argument will be overwhelmingly negative, and destructive, it may be asked why the arguments presented here should be taken seriously at all. Are they not themselves subject to the very destructive criticisms this thesis makes of others - for example that the premises on which they rely can amount to nothing more than the questionable assertion and question-begging reassertion of the author - thus rendering them self-defeating, or just plain unconvincing? Such questions go to the very heart of the perspective underlying this thesis, and, as a philosophical matter, this criticism is responded to directly when setting out and defending this perspective in **Chapter 2 (section 2.3.4)**. In addition to that defence, some explanation for the argumentative

strategy used at specific points will be offered here. Regarding the critique of Gewirth's supreme moral principle (**section 2.4**), the argument is not a direct attack on that principle as "wrong" or inferior to some alternative; it takes place *within* Gewirth's dialectical method to show that, *on his own terms*, the principle does not have the justification or status he claims for it. The point is to demonstrate that Gewirth does not successfully establish the claim *he* makes. Similarly, the argument against Waldron's irrelevance thesis (**Chapter 3**) is that, *taken on his own terms and definitions*, Waldron does not prove the point *he* sets out to establish. Furthermore, the internal inconsistencies *in his own arguments* turn out to undermine his case. Regarding Waldron's "right of rights" argument, the point is not that the moral premise on which it relies (the dignity and respect inherent in the individual) is "wrong" or defective, but that Waldron fails to establish the fundamental status he appears to give it; *he* fails to show its superiority over alternative premises, or that it can withstand questioning. This is also the argument presented against both Rawls' *Theory of Justice* and *Political Liberalism* arguments (**Chapter 4, sections 4.5 and 4.6**); that in each case the original position does not establish the points *he* claims it does. Likewise, following the deconstruction of democratic arguments in **Chapter 4** to reveal the premises relied on, the point is that, from the perspective defended here, they cannot be shown as superior to their alternatives, or their sceptical denial.

It may be noticed that underlying these argumentative strategies is a burden of proof issue, which, in the interests of clarity will be made explicit. The theories at issue make a claim, either directly, or by relying on a particular premise. The arguments offered here merely seek to show that those claims turn out to be unsupported; they are vulnerable to questioning and what arguments are offered are similarly questionable and thus do not provide support for the claims they seek to establish. This negative style of arguing, while likely to be seen as unsatisfactory by some, is, it is submitted, consistent with the philosophy which this thesis brings to the constitutionalist debate; a philosophy which, it is hoped, the reader will come to see as cogently argued for in the next chapter.

## Chapter 2

### The Problem of Defending Normative Claims

#### An Anti-Realist and Anti-Foundationalist Perspective

##### 2.1. Introduction

The purpose of this chapter is to set out and defend the philosophical perspective that will lie behind the rest of this thesis' examination of the constitutionalist debate and some key issues and arguments within it. In brief, the perspective denies that normative and moral claims can be grounded in more than what Leff described as 'the quicksand of bare reiterated assertion'.<sup>1</sup> There are no objective constraints on which claims must, or should, be accepted, and which must, or should, be rejected by a subject. Moral and normative claims ultimately amount to nothing more than the questionable assertion and question-begging reassertion of a particular individual or group.

In setting out this perspective, the problem of defending normative judgements will first be identified as that of defending claims against Leff's sceptical "sez who?" critique (**section 2.2**).<sup>2</sup> Having set out the problem, two methods of dealing with it will be considered. First, the possibility of establishing which claims correspond best to "reality", grounding them in "the way things are", or the "intrinsic nature" of notions such as "morality", "right", "justice" etc, in an attempt to give them objective authority – that is, authority independent of an individual and hence immune from the sceptical "sez who?" critique - will be rejected via an anti-realist and anti-foundationalist argument (**section 2.3**). This argument will draw on aspects of the pragmatic work of Richard Rorty, presented in contrast to a realist foundationalism holding on to the possibility of escaping belief to reach a position from which those beliefs can be independently assessed. A common criticism of anti-realist perspectives, the self-refutation critique, will be considered and responded to (**section 2.3.4**).

The chapter will then consider the influential dialectical argument of Alan Gewirth as a possible means of giving particular normative claims authority, while avoiding making the claims criticised by the anti-foundationalist and anti-realist approach supported here (**section 2.4**). Lengthy consideration is given to Gewirth's argument in particular due to the nature of the method relied on, and the possibilities it offers for the task of defending moral and normative propositions. Gewirth

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<sup>1</sup> A Leff, 'Memorandum' (1977) 29(4) Stanford Law Review 879, 880.

<sup>2</sup> On the "sez who?" critique and its relevance to moral and normative claims see, as well as the discussion in **section 2.2** below, A Leff, 'Unspeakable Ethics, Unnatural Law' (1979) 6 Duke LJ 1229 (the classic statement of this question, and Leff's sceptical conclusion). See also SW Calhoun, 'Grounding Normative Assertions: Arthur Leff's Still Irrefutable, but Incomplete, "Sez Who?" Critique' (2004-2005) 20(1) Journal of Law and Religion 31.

argues that particular normative and moral claims can be set up as authoritative, not because they correspond to some kind of fact of the matter grounded in “reality” or “the way things are”, independent of the perspective or beliefs of an individual or group (ideas which, as will be argued below, are problematic), but because they correspond to the requirements of a supreme moral principle derived through logic all agents categorically *must* accept from *within their own perspective*. The significance of this is that, if successful, Gewirth’s argument will have managed to provide a means of grounding normative claims in something more than the *questionable* assertion of an individual or group in a way which avoids the anti-realist criticisms of this chapter. Gewirth’s argument will, however, be rejected as unsuccessful on its own terms in that it fails to rely only on necessary entailment from one judgement to the next, as his dialectically necessary method requires. It will thus be concluded that Gewirth fails to show that his supreme principle of morality is anything more than *optional*, with the result that its implications and use as a means of adjudicating between competing normative and moral claims remain questionable.

This chapter will therefore consider and reject two possible sources of authority for normative claims; correspondence to “objective reality”, and correspondence to a principle derived through subjectively unavoidable logic. From this, it will be concluded that neither approach resolves the problem of giving particular normative or moral claims authority over other competing claims, leaving such claims open to question.

## **2.2. The Problem of Grounding Normative Assertions**

The problem of grounding a normative assertion is the problem of defending a proposition such as “It is right to do X” or “X ought to be”.<sup>3</sup> That this is actually a problem to be considered becomes clear if one imagines simply turning the claims around so that they now state their opposites. That is, they now read “it is *not* right to do X” and “it is *not* the case that X ought to be”. The ‘familiar problem’ to be considered is whether it is possible to ‘get a noncircular justification’ of any of these normative stances.<sup>4</sup> On what basis, if any, can the denial of a normative claim be convincingly dismissed in a way that prevents the conduct or state of affairs that claim is said to justify being rejected? On what basis can a normative proposition be established as superior to alternatives, in a non-circular and non-question-begging fashion? As Leff colourfully puts the issue, what answer can be given to a sceptic making the ‘formal intellectual equivalent of what is known in barrooms and

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<sup>3</sup> Leff, ‘Memorandum’ (fn1) 880.

<sup>4</sup> R Rorty, *Philosophy and Social Hope* (Penguin Books 1999) 10.

schoolyards as "the grand sez who"<sup>5</sup> – a ‘universal taunt by which a skeptic may challenge the standing/competency of the speaker to make authoritative moral assessments’<sup>6</sup> - such that a particular claim can be placed ‘beyond question’, and can provide a stable basis from which to proceed in structuring society and guiding the conduct within it?<sup>7</sup> Taking some examples from the discussion of arguments in the constitutionalist debate to follow in later chapters, what is there to stop one simply denying the premise that everyone should be treated with ‘equal concern and respect’,<sup>8</sup> such that there is no reason to prefer Dworkin’s communal conception of “democracy”, which advocates placing substantive restraints on the power of elected majorities to ensure that this principle is respected (see **Chapter 4, sections 4.3** and **4.4.2**)? Alternatively, what is there to stop one rejecting Dworkin’s particular interpretation of “equality”, requiring ‘treatment as an equal’,<sup>9</sup> in favour of a less demanding conception of equal *opportunity*, such as Waldron’s favoured ‘political equality’,<sup>10</sup> or vice versa (see **Chapter 4, section 4.4.2**)? What can be said to those who disagree with Waldron’s underlying premise that individuals are moral agents with dignity that ought to be respected (**Chapter 3, section 3.5**)?

Unless such questions can be answered, giving particular normative claims authority over their sceptical denial or alternative propositions, those claims, along with the arguments and conclusions relying on them, will remain open to question. Leff’s conclusion is that ‘no one...has come up with a satisfactory solution’, leaving what he describes as the ‘bare, black void’ or ‘hollow core of our society – the total absence of any defensible moral position on, under, or about anything.’<sup>11</sup> The question to be considered in the remainder of this chapter is whether a satisfactory solution can be found to the problem of grounding normative assertions - defending them against the sceptical “sez who?” challenge - allowing Leff’s sceptical conclusion to be avoided. With this question in mind, two potential solutions will now be considered; a realist foundationalist approach (**section 2.3**), and Gewirth’s dialectical necessity argument (**section 2.4**).

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<sup>5</sup> Leff, ‘Unspeakable Ethics’ (fn2) 1230.

<sup>6</sup> Calhoun (fn2) 32.

<sup>7</sup> Leff, ‘Unspeakable Ethics’ (fn2) 1230.

<sup>8</sup> R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 273.

<sup>9</sup> *ibid.*

<sup>10</sup> J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1361.

<sup>11</sup> A Leff, ‘Law and Technology: On Shoring up a Void’ (1976) 8 Ottawa LR 536, 538.

### **2.3. Rejecting Realist Foundationalism**

Generally, foundationalist theories attempt to ‘ground our thinking [and] inquiry...in something firmer’ than mere belief or ‘partisan...assumptions.’<sup>12</sup> This ground can then serve as a basis outside individuals’ competing beliefs and preferred descriptions from which we can examine them and ‘discuss their adequacy.’<sup>13</sup> For the realist foundationalist, concepts such as “morality”, “justice”, “right”, “wrong”, are taken to *have* a ‘real essence’, or an ‘intrinsic nature’, which can be found and clarified through inquiry and reflection.<sup>14</sup> These essences are seen as independent standards to which beliefs and assertions are attempting to be adequate, meaning that they can be assessed on how successful they are in that attempt.<sup>15</sup> The idea is that notions such as “morality”, “truth”, and “right” are ‘the proper names of objects – goals or standards’ which can be reached and are to be pursued through inquiry.<sup>16</sup> They are notions it is possible to *know* more about in the ‘hope of better obeying such norms.’<sup>17</sup> The intrinsic nature of these objects can then serve as a constraint on what normative claims are acceptable; competing beliefs can be independently assessed and adjudicated on the basis of how well they correspond to the content and demands of these objects.

#### **2.3.1. Consequences of Realist Foundationalism for Normative Disagreement**

This view of inquiry as a means of getting to the intrinsic nature of “Morality”, “Justice” or “Rightness” etc, allows the realist to offer the possibility that particular normative assertions are ‘closer to the way things are in themselves’.<sup>18</sup> They are closer to the intrinsic and core nature of (for example) Morality and more in line with its Demands – than others.<sup>19</sup> Thus, in response to the sceptical questioning of a normative claim in the way discussed above, either turning a claim such as “it is right to do X” into the negative “it is *not* the case that it is right to do X”, or else putting forward a different idea of what “X” is, the realist can offer the reply “it is right to do X” because “it *is* Right to do X”. The capitalisation of the standard being discussed emphasises the idea that it is nominalised; it is being referred to as an *object*, with a discoverable content, independent of what

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<sup>12</sup> U Schulenberg, ‘Wanting Lovers Rather Than Knowers – Richard Rorty’s Neopragmatism’ (2003) 48(4) *Amerikastudien/American Studies* 577, 584.

<sup>13</sup> *ibid.*

<sup>14</sup> R Rorty, *Contingency, Irony, and Solidarity* (CUP 1989) 74.

<sup>15</sup> R Rorty, *Consequences of Pragmatism* (Harvester Press 1982) xxxvii.

<sup>16</sup> *ibid.*, xiv.

<sup>17</sup> *ibid.*, xv.

<sup>18</sup> R Rorty, *Truth and Progress* (CUP 1998) 1.

<sup>19</sup> *ibid.*

one chooses to believe about it or how one chooses to describe it, and the realist response claims that a particular assertion can be established as more in line with that content.<sup>20</sup>

In grounding the authority of a normative proposition in its correspondence to the intrinsic nature and demands of particular notions, this process can claim “objective authority” independent of the beliefs or particular perspective of an individual; authority is grounded in the nature of the *object* rather than a *subject* via their individual perspective and values. If an assertion can be grounded in the object itself in this way, Leff’s sceptical “sez who?” critique (see above, **section 2.2**) can be avoided, for the authority is shown to come from correspondence to what *is*, rather than what is *said to be* by an individual. The claimed-authority, being something beyond an individual and their assertions or claims, something independent which those assertions can be said to be adequate to or not, makes the relevant issue not *who says*, but *what is*. Thus, the consequence of the realist approach, if successful, would be to ground a normative assertion in something more than a bare reiteration of that assertion, and render the sceptical “sez who?” response irrelevant. The problem of grounding a normative assertion in a non-circular, non-question-begging fashion, and the problem of authoritatively dismissing competing assertions, will have been resolved. The aim of inquiry would then be to work out the content and demands of particular notions and their implications for specific disagreements.

### **2.3.2. Arguing for an Anti-Realist Anti-Foundationalism**

In contrast, the anti-foundationalist approach supported here, drawing on aspects of the work of Rorty, holds that we ‘cannot confirm, correct, or reject our beliefs by claiming that there is...something which is independent’ of those beliefs.<sup>21</sup> Whereas the approach set out in the previous section holds on to the idea that there is something beyond beliefs and descriptions reachable through inquiry, such as an “intrinsic nature” of particular notions, to which those beliefs and descriptions can be seen as adequate or inadequate, the approach supported here drops the idea that ‘there is anything like that’.<sup>22</sup> As Rorty puts it, ‘nothing has an intrinsic nature’ to which beliefs can be said to be either adequate or inadequate.<sup>23</sup> When the idea that notions such as “Morality”, “Justice” or “Rightness”, have an essence independent of what one chooses to believe about them, or how one chooses to describe and apply them, is discarded, then so is the idea that

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<sup>20</sup> *ibid*, 4.

<sup>21</sup> Schulenberg (fn12) 579.

<sup>22</sup> Rorty, *Consequences of Pragmatism* (fn15) xxxvii.

<sup>23</sup> Rorty, *Philosophy and Social Hope* (fn4) 63.

they can be used as ground independent of our beliefs and propositions which can be appealed to in order to resolve disputes over which beliefs and propositions should be accepted and acted upon.

The argument for this approach begins by pointing out that notions such as “rightness” (along with the terms “right” and “wrong”), and “morality” (along with “moral” and “immoral”) are terms of the human language. The consequence is that only if we imagine the world as either ‘itself a person or as created by a person’ who spoke this language can any sense be made of the idea that *any* notion ‘has an “intrinsic nature”’ which can act as a constraint on how we choose to apply it when describing the world and the situations that arise within it.<sup>24</sup> The problem is that, as Rorty puts it, ‘[t]he world does not speak. Only we do.’<sup>25</sup> Languages are ‘human creations’, so that while the ‘world is out there...descriptions of the world are not’.<sup>26</sup> The point is that the world does not have a preferred description of itself because descriptions require language and language requires a speaker.<sup>27</sup> However, unless the world ‘has a preferred description of itself’,<sup>28</sup> the only descriptions and applications of the notions within them we have are those preferred and applied by particular individuals or groups. This takes one back to the problem being discussed in this chapter; that of establishing particular normative and moral claims as superior to their alternatives, or their sceptical denial, in a non-circular and non-question-begging fashion, such that they can withstand the “sez who?” critique (**section 2.2**).

If the world does not offer a preferred description of itself, and does not itself have meaning, then the question that needs to be considered is whether there are nonetheless any constraints on the content of these descriptions and on how different individuals or groups choose to apply them in evaluating states of affairs. Holding that there are such constraints would be to hold that, despite being the creations of language, the content and application of the notions used to phrase particular claims are not entirely free and optional. This possibility is briefly suggested by Upton who questions Rorty’s idea that ‘all descriptions are *totally* optional and *freely* created.’<sup>29</sup> For the realist metaphysician, such constraint comes from “reality” or “the way things are”. In contrast to the Rortian anti-foundationalist, the ‘metaphysician [does] not believe that anything can be made to look good or bad by being redescribed’, or, if they do, ‘they deplore this fact and cling to the idea that reality will help us resist such seductions.’<sup>30</sup> The realist, in the sense criticised here, thus rejects the idea that our evaluations and descriptions are entirely optional; “reality”, or “the way things

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<sup>24</sup> Rorty, *Contingency, Irony, and Solidarity* (fn14) 21.

<sup>25</sup> *ibid*, 6.

<sup>26</sup> *ibid*, 5.

<sup>27</sup> *ibid*.

<sup>28</sup> *ibid*, 21.

<sup>29</sup> TV Upton, ‘Rorty’s Epistemological Nihilism’ (1987) 3(2) *The Personalist Forum* 141, 149 [emphases added].

<sup>30</sup> Rorty, *Contingency, Irony, and Solidarity* (fn14) 75.

are”, can serve as a constraint on the acceptability of such evaluations and descriptions. The goal of inquiry would then be to gain an understanding of these constraints, thereby gaining an understanding of which normative and moral claims are acceptable and which are not as either more or less in line with those constraints. As an example, Platts writes that moral claims, ‘like any other factual belief’, present claims ‘about the world which can be assessed...as true or false’.<sup>31</sup> Crucially, these qualities of claims are objective and determined by the world itself - to use Platts’ words, they are ‘the result of the (independent) world’<sup>32</sup> and ‘possible objects of human knowledge’.<sup>33</sup> Thus, far from optional, Platts clearly sees the acceptability of moral claims as something constrained by a power not ourselves - the independent world they are taken to be about, as this is taken to determine their “truth or falsity”, knowledge of which will assist us in the task of distinguishing acceptable and unacceptable claims.

With this idea of an independent “reality” which can serve as a constraint come the distinctions between appearance/reality and more accurate/less accurate representations. As Rorty points out, it is these distinctions which offer the possibility that particular claims can be rejected as inferior to others in a way which does not simply beg the question against those claims and views. Claims could be rejected as inferior on the basis that they are ‘descriptions of what only *appears* to be going on’ – less accurate descriptions of the “reality” - whereas others can be given authority on the basis that they ‘are descriptions of what is *really* going on’ – more accurate descriptions of the world.<sup>34</sup> Particular views and claims would be set up as authoritative through being presented as more accurate representations of a “reality” beyond, and independent of, those views and propositions, thereby ending the ‘potentially infinite regress of propositions-brought-forward-in-defense-of-other-propositions.’<sup>35</sup> An example of reliance on these ideas of appearance and reality and of claims as assessable representations of “reality” or “the world” in the context of morality and normativity can again be found in Platts. After making the realist statement quoted above that moral claims are rendered true or false by the world and that these qualities are possible objects of “knowledge”, Platts seems to make a suggestion as to how this knowledge can be acquired. According to Platts, we ‘detect moral aspects’ of the world and situations within it ‘in the same way we detect (nearly all) other aspects: by looking and seeing.’<sup>36</sup> He then suggests that by paying ‘careful attention to the world, we can improve our moral beliefs about the world, make them more approximately true.’<sup>37</sup>

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<sup>31</sup> M Platts, ‘Moral Reality’ in G Sayre-McCord (ed), *Essays in Moral Realism* (Cornell University Press 1988) 282.

<sup>32</sup> *ibid*, 284.

<sup>33</sup> *ibid*, 282.

<sup>34</sup> Rorty, *Truth and Progress* (fn18) 1 [emphases added].

<sup>35</sup> R Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1980) 159.

<sup>36</sup> Platts, ‘Moral Reality’ (fn31) 285.

<sup>37</sup> *ibid*.

The idea seems to be that moral aspects are something independent that can be identified or discovered in the world (as suggested by “detect”), and that if we look carefully enough at this world our claims about those qualities will become more accurate - more in line with the world itself - and so more approximately “true”. Claims are thus taken as attempts to describe – to represent - the moral aspects of an independent world we can “see”, and “looking” carefully at these aspects as the key to getting these descriptions more approximately right, which in turn is taken as the key to improving our claims. Congruence with the world and its moral aspects, attainable through careful examination of that world, serves as an independent constraint on the acceptability of moral claims.

However, this idea of a “reality” beyond particular claims and beliefs, which they are seen as attempts to represent, and the distinctions between appearance/reality and more accurate/less accurate descriptions that come with this idea, is another which the anti-realist aspect of the perspective put forward here discards. If this idea of an independent “reality” - as Platts put it, “independent world” - is set aside, then so is the possibility that it can serve to constrain the content and application of descriptions and evaluations, or as ground to appeal to in the event of disagreement. The argument for discarding the idea of a “reality” which claims are taken as attempts to represent or correspond to is the pragmatic one that holding onto such an idea is pointless. It is pointless in that the ‘attempt to get behind appearance’ and our preferred descriptions to a “reality”, or “way things are”, independent of how one describes them, is, as Rorty puts it, ‘hopeless’.<sup>38</sup> The problem is that ‘there is nothing to be known about anything save what is stated in sentences describing it.’<sup>39</sup> There is ‘no way to think about either the world or our purposes’ except through language and description,<sup>40</sup> because it is ‘only in language that we can mean something by something.’<sup>41</sup> The result is that “reality” is always ‘reality under some or another description’;<sup>42</sup> there is no way of distinguishing between one or another description and the “reality” supposedly being described, ‘no way to divide’ the “reality”, or an object within it, ‘in itself from our ways of talking about’ it.<sup>43</sup> There is no way of getting beyond descriptions to compare them with something independent - something which is not just another description, such as Platts’ “moral aspects” of an “independent world” - because giving that independent thing any meaning, which it must have if it is to serve as something which can be compared with or approximated so that it can offer any meaningful constraint on the acceptability of particular descriptions, immediately taints it with more

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<sup>38</sup> Rorty, *Philosophy and Social Hope* (fn4) 49.

<sup>39</sup> *ibid*, 54.

<sup>40</sup> *ibid*, xix.

<sup>41</sup> L Wittgenstein, *Philosophical Investigations* (Macmillan 1953) 18.

<sup>42</sup> M Brint, WG Weaver and M Garmon, ‘What Difference Does Anti-Foundationalism Make to Political Theory?’ (1995) 26(2) *New Literary History* 225, 228.

<sup>43</sup> Rorty, *Philosophy and Social Hope* (fn4) xxvii.

language and description. Thus, as Rorty argues, “reality” is never ‘unmediated by a linguistic description’; by *our* linguistic description.<sup>44</sup> So while Platts suggests that we can detect moral aspects of the world simply by “looking” and “seeing”, and that paying careful attention while doing so will improve the accuracy of our moral beliefs, the problem raised here is that one cannot be so sure that what one is “detecting” or “seeing” is anything more than the meaning *we* give to “the world”. Platts’ valued process of “paying careful attention to the world” cannot be shown to amount to anything more than paying attention to *our own* preferred descriptions. We cannot get beyond such descriptions to assess how well they are approximating something like Platts’ independent world, because to give that world a meaning, allowing a particular claim about it to be compared and the accuracy of that claim assessed accordingly, as pointed out directly above, is to immediately taint that “independent” world with another description, in which case it is no longer *independent* but is, from the start, rendered and conceptualised by the individual.

The consequence is that “reality”, or “the world”, conceived of as “the way things are” independent of how one describes them, becomes the name ‘of something unknowable’.<sup>45</sup> Inquiry into the constraints of “reality” on the acceptability of our claims - inquiry into which beliefs and descriptions correspond best to “the way things are” - can then be seen as inquiry into the unknowable. It is the ‘impossible attempt’ to step outside of our preferred descriptions and compare them with ‘something absolute’, something which is more than just another such description.<sup>46</sup> The pragmatist’s point here is that treating as a goal of inquiry and constraint something which is unknowable means that there is no way of establishing when the goal has been reached, or recognising when the constraint is being violated, and that this renders the exercise pointless. The idea of “reality” or “the world” as a source of constraint on the acceptability of competing descriptions and as a goal of inquiry, along with the distinctions between more and less accurate representations which rely on this idea, is thus set aside on the pragmatic basis that it fuels and encourages such a pointless exercise.

### **2.3.3. Consequences of Anti-Realist Anti-Foundationalism for Normative Disagreement**

The perspective defended so far has argued against holding onto the ideas of “intrinsic natures” independent of human descriptions, and an independent “reality” which can serve as a constraint on the acceptability of these descriptions. Rejecting the ideas of an independent “way things are”, or

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<sup>44</sup> *ibid*, 48.

<sup>45</sup> *ibid*, 49.

<sup>46</sup> Rorty, *Consequences of Pragmatism* (fn15) xix.

“intrinsic natures”, leaves ‘[t]ruth, right reason, rationality, validity, and the like’, conceived of as having objective qualities or contents - qualities independent of what a particular individual or group claims about them - as ‘myths’.<sup>47</sup> As a result, all that remains are the competing claims and beliefs and the individuals or groups who make them and consider them to be justified from their own perspectives. This leaves the “sez who?” critique unanswered as ultimately no one can be said to be ‘in touch with a power not [him or] herself’<sup>48</sup> when making and defending their claims. In the absence of independent foundations in which beliefs can be grounded and on the basis of which competing beliefs and claims can be adjudicated, the problem of choosing between competing normative and moral claims in a way which does not merely amount to the circular, question-begging ‘reiterated assertion’ of those optional claims, the beliefs on which they are based, or the mere fact of one’s questionable preference for those claims and beliefs, remains.<sup>49</sup>

#### **2.3.4. The Self-Refutation Criticism**

A common criticism of anti-realist perspectives is that they are incoherent and self-refuting. The argument is that, in rejecting realist approaches and the possibility of grounding claims in anything more than questionable belief and assertions, such as correspondence to “intrinsic natures”, “the way things are”, or “facts of the matter”, the anti-realist is caught in a ‘self-refuting attempt to both have and deny an “absolute perspective”’.<sup>50</sup> The anti-realist’s arguments are seen as ultimately amounting to the claim that, as Putnam puts it, ‘from a God’s-Eye View there is no God’s-Eye view’.<sup>51</sup> The anti-realist is seen as claiming that ‘metaphysical realism is wrong’, it is *really the case* that nothing is the case, meaning that anti-realism is right, and hence should be accepted instead.<sup>52</sup> This, critics point out, amounts to an incoherent claim to have discovered that there *is*, in fact, *nothing* to discover, that the “reality” *is* that there really is *no* “reality”, and that their theory is thus superior to the realism it rejects ‘in virtue of the way things really are.’<sup>53</sup> In short, as Rorty puts it, the criticism is that the anti-realist is inconsistently ‘claiming to know what they themselves claim cannot be known’.<sup>54</sup>

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<sup>47</sup> CJ Misak, ‘Introduction’ in CJ Misak (ed), *Pragmatism* (University of Calgary Press 1999) 2.

<sup>48</sup> Rorty, *Contingency, Irony, and Solidarity* (fn14) 73.

<sup>49</sup> Leff, ‘Memorandum’ (fn1) 880.

<sup>50</sup> H Putnam, *Realism with a Human Face* (J Conant ed, Harvard University Press 1990) 26.

<sup>51</sup> *ibid*, 25.

<sup>52</sup> *ibid*.

<sup>53</sup> JO Young, ‘Relatively Speaking: The Coherence of Anti-Realist Relativism’ (1986) 16(3) *Canadian Journal of Philosophy* 503, 504.

<sup>54</sup> Rorty, *Contingency, Irony, and Solidarity* (fn14) 8, n2.

However, while making such inconsistent claims would indeed, as Tasioulas is keen to point out in response to Rorty, leave the anti-realist ‘floundering in incoherence’,<sup>55</sup> allowing their arguments to be dismissed on their own terms, it is argued that the anti-realist perspective supported above, taken on *its own pragmatic terms*, does not make those claims. As Rorty points out in response to self-refutation critiques, the pragmatic anti-realist perspective supported here does *not* seek to make the problematic claim that it ‘corresponds to the way things really are’.<sup>56</sup> In fact, such a claim relies on ideas this perspective ‘wants to get rid of’; the idea that anything has an “intrinsic nature”, the idea of an objective “reality” or “way things really are”, to be pursued through inquiry, and of an “absolute perspective” of any kind.<sup>57</sup> After dropping altogether the ideas of “reality”, “representation” and “correspondence”, the contradictory claims which anti-realists are accused of making, made in these discarded terms, simply *cannot* be made.

The reasons for setting aside these ideas were set out above (**section 2.3.2**). To reiterate, the argument was that holding onto such ideas is unpragmatic in that the unavoidability of linguistic description makes distinguishing between objective “reality”, an “intrinsic nature”, or “fact of the matter”, and our own preferred descriptions of those “objects” problematic; one cannot tell whether one is getting closer to these goals or just another preferred description. The pragmatist sees little point in holding as a goal of inquiry, or a constraint, standards which one cannot be sure are *actually* being reached, or satisfied. In arguing for their claims on this pragmatic basis, the Rortian anti-realist is *not* making the claims critics such as Putnam accuse them of making – that realism is ‘wrong’ and that rejecting the ideas of “reality” and correspondence to the “way things are” will ‘make us better off...in the sense of having fewer false beliefs’.<sup>58</sup> Formulating the argument in this way misses the very point the pragmatist is making, which is that such claims should be *avoided* for the reason that it is ‘pointless’ to try and establish whether a belief “really is” true or false in the sense of representing something beyond those beliefs ‘accurately’,<sup>59</sup> because they see no way of being sure, no way of demonstrating, whether one “really is” representing something beyond another belief – no way of breaking out of our language and beliefs to test them against ‘something known without their aid’.<sup>60</sup> In arguing on this basis against the *very ideas* of an independent “reality”, “way things are”, or “absolute perspective”, the pragmatic anti-realist is not making any claims *about* the nature and content of those notions, let alone the self-refuting ones they are accused of making. Thus, it is argued that the self-refutation criticism not only attacks the pragmatic

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<sup>55</sup> J Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65(1) Current Legal Problems 1, 27.

<sup>56</sup> Rorty, *Contingency, Irony, and Solidarity* (fn14) 8.

<sup>57</sup> *ibid.*

<sup>58</sup> Putnam, *Realism with a Human Face* (fn50) 25.

<sup>59</sup> Schulenberg (fn12) 580-581.

<sup>60</sup> R Rorty, *Objectivity, Relativism, and Truth* (CUP 1991) 6.

anti-realist for making claims they *do* not actually make, but which they *cannot* make given that the very wording of the criticised-claims uses ideas it is the whole point of this anti-realism to oppose. In attacking claims the pragmatic anti-realist perspective supported here does not, and more fundamentally cannot, make, the self-refutation critique becomes irrelevant, and therefore unproblematic, to the position taken here. The perspective taken so far, along with the consequences for attempting to defend a moral or normative claim set out in the previous section, thus remain untouched by this criticism.

That the pragmatic anti-realist is not claiming to be describing the “way things really are” - to have on their side the authority of a power independent of themselves and their claims, such as “objective reality” or “fact of the matter” - may seem to some to have the result that their argument loses almost all force. It may seem that the pragmatist is effectively saying that it is *only their view* that all moral and normative views remain questionable. Yet if it is *only* their view, what reason do we have to accept it over the alternative it rejects? If the response to the self-refutation criticism is that the pragmatist is not purporting to have *discovered* the independent truth or reality of the lack of a discoverable independent “truth” or “reality”, then the only alternative, it might be suggested, seems to be that they are claiming to have merely ‘invented’ this fact.<sup>61</sup> The idea is that if the pragmatist has not *found* a lack of objective reality then they must have *fabricated* that situation themselves, via their own minds and optional descriptions, in which case, as Rorty himself recognises, this seems to beg the question ‘Why should anybody take our [the pragmatist’s] invention seriously?’<sup>62</sup>

The response to this potential criticism offered here is of a similar nature to that just offered in response to the self-refutation criticism. The point that if the pragmatist is not claiming to have “discovered” the truth of their perspective – to have found it in a power not themselves - then they must problematically be claiming to have “invented” or “made” it itself relies on the distinctions the pragmatist rejects. If one drops, as the pragmatist does, the idea that a perspective and the claims within it should be seen as trying to “represent” something outside itself, or beyond another such perspective, then one must also drop the idea that it can make sense to say that the pragmatist is *merely* inventing.<sup>63</sup> Accusing the pragmatist of “*only* inventing” implies that something more can be done – it is to say something like “the pragmatist has *only fabricated* the lack of an objective truth or reality whereas ideally they *should have discovered* it”. But only someone holding on to the idea that there is something independent capable of being “represented” can meaningfully speak of

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<sup>61</sup> Rorty, *Philosophy and Social Hope* (fn4) xviii.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

“discovery” as something to be aimed for, and its not being achieved or even being purported to be achieved, as something to be lamented. What this shows is that the criticism that the pragmatist has *merely* “made” or “invented” the lack of “reality” or “objectivity” that forms the content of their perspective, and that this means their views should somehow be taken less seriously than others’, can only be made in *realist* terms, and so can only be a *realist* one. As a realist criticism, it is not one the pragmatist can answer except to say that it should not be made; it is a criticism that it makes no sense to make for it expresses disappointment at not reaching a standard the pragmatist saw no hope of reaching in the first place, nor purported to reach, and uses concepts the pragmatist sees no point in holding onto in order to criticise their position rejecting those very concepts. If this response is further questioned, all the pragmatist can do is reiterate the arguments made for the rejection of realism and the distinctions and concepts within it in the first place – arguments such as those offered in **section 2.3.2**. *These* arguments give the reasons the pragmatic anti-realist position should be taken seriously. If they are found to be unpersuasive, it is indeed the case that the pragmatist cannot show that, after all, *their views really do* have the authority this realist-style criticism seems to want – correspondence to some “fact of the matter”. But that, of course, is the very point the pragmatic anti-realist is making.

#### **2.4. Gewirth’s Categorically Obligatory Moral Principle as a Means of Authoritatively Resolving Normative Disagreement**

Gewirth claims for his ‘Principle of Generic Consistency (PGC)’<sup>64</sup> the status of a ‘supreme moral principle’, conformity with which is ‘categorically obligatory’ and which can ‘stand unchallenged as the criterion of moral rightness’.<sup>65</sup> This supreme moral principle and its requirements, claimed to have ‘determinate contents that do not admit of variability’ according to the preferences or inclinations of an individual, can then be used to distinguish between principles and judgements which are morally right, and those which are morally wrong.<sup>66</sup> Thus, Gewirth’s PGC claims to offer a means of deciding between competing normative assertions in a ‘conclusive’ and unquestionable way;<sup>67</sup> ‘all...principles must conform to the PGC if they are to be morally right’.<sup>68</sup>

The key to the authority claimed for the PGC, and the judgements derived from it, is the dialectically necessary method used by Gewirth. Generally, dialectical methods seek to examine the logical

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<sup>64</sup> A Gewirth, *Reason and Morality* (University of Chicago Press 1978) 135.

<sup>65</sup> *ibid*, 48.

<sup>66</sup> *ibid*, 164.

<sup>67</sup> *ibid*, 21.

<sup>68</sup> *ibid*, 145.

implications of ‘assumptions, opinions, statements, or claims made by protagonists or interlocutors.’<sup>69</sup> Gewirth’s ‘dialectically *necessary* method’ starts from ‘statements or judgments that are *necessarily* attributable to every agent’ – agents cannot avoid accepting them – ‘because they derive from the generic features that constitute the necessary structure of action.’<sup>70</sup> Having ascertained the initial judgements which agents implicitly and unavoidably accept through the ‘fact of engaging in action’,<sup>71</sup> Gewirth states that his method ‘operates to trace what judgements and claims every agent logically must make’ from within their own standpoint.<sup>72</sup> It is through ‘confining the argument to rational necessities’ relying on nothing but deduction, logic, and necessary entailment from one judgement to the next, which all agents must accept ‘on pain of self-contradiction’, that Gewirth claims his PGC is established as ‘categorically obligatory’.<sup>73</sup>

Of particular interest here is that Gewirth also presents this dialectically necessary method as a means of grounding normative judgements in a conclusive and authoritative way while avoiding ‘certain difficulties that confront naturalistic approaches to ethics’.<sup>74</sup> Particularly, he presents his method as avoiding what he describes as ‘the problem of the independent variable’ – the problem of whether there exist any ‘objective independent variables that serve to determine the correctness or rightness of moral judgements’.<sup>75</sup> As Gewirth’s claim is only that particular beliefs and judgements cannot be avoided or denied ‘from *within* the standpoint of the agent’,<sup>76</sup> the question of the adequacy of those beliefs to something independent, *outside* this standpoint, does not arise. Thus, by remaining within the perspective of the agent, Gewirth’s argument can avoid presupposing ‘metaphysically suspect objective values’,<sup>77</sup> or a ‘normative structure of reality’,<sup>78</sup> to which propositions can be claimed to correspond in the way presupposed by the realist approach criticised above (**section 2.3**).

If successful, Gewirth’s dialectically necessary argument, seeking to ground his principle in subjectively unavoidable logic, can therefore be seen as a solution to the problem of grounding normative assertions to give them authority over their sceptical denial or competing assertions set out above (**section 2.2**), in a way which avoids anti-realist and anti-foundationalist criticisms of the

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<sup>69</sup> *ibid*, 43.

<sup>70</sup> *ibid*, 43-44 [emphases added].

<sup>71</sup> *ibid*, 48.

<sup>72</sup> *ibid*, 44.

<sup>73</sup> *ibid*, 47.

<sup>74</sup> *ibid*, 45.

<sup>75</sup> *ibid*, 5.

<sup>76</sup> *ibid*, 161 [emphasis added].

<sup>77</sup> C McMahon, ‘Gewirth’s Justification of Morality’ (1986) 50(2) *Philosophical Studies* 261, 264.

<sup>78</sup> EM Adams, ‘The Subjective Normative Structure of Agency’ in E Regis Jr (ed), *Gewirth’s Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth* (Chicago University Press 1984) 9.

idea of 'objectively right or correct' principles existing independently of particular beliefs according to which those beliefs can be assessed.<sup>79</sup> Put basically, the response to the sceptical questioning of a normative claim – Leff's "'grand sez who'"<sup>80</sup> – would be "you say"; any disagreement being self-contradictory.

The question which must now be considered is whether Gewirth successfully shows that his PGC must be accepted by all agents on pain of self-contradiction, thereby giving it this authority of a principle unchallengeable from the subjective perspective of all agents. The key to this question is whether Gewirth shows that this principle is derived through nothing but logical and necessary entailment from one 'necessary belief[]'<sup>81</sup> to the next. It will be argued that he does not. After setting out Gewirth's general argument for the PGC, it will be contended that it fails to fulfil the requirements of the dialectically necessary method in that at least one of the judgements in the series of steps leading to his principle is not the logically necessary entailment of the previous. As a result, it will be argued that Gewirth does not show that his PGC has the authority of a supreme moral principle which all agents cannot but accept. Therefore, it will be concluded, it cannot serve as a means of deciding between competing normative assertions in a non-question begging way. The problem of giving particular normative or moral claims authority over their sceptical denial or over competing claims thus remains unresolved by Gewirth.

#### **2.4.1. The Argument For Gewirth's Supreme Moral Principle**

Gewirth's overarching argument for the PGC is that 'action has...a normative structure', meaning that the very fact of engaging in action (as all agents unavoidably do), 'commits the agent to accept certain normative judgments on pain of self-contradiction.'<sup>82</sup> It is from these unavoidable judgements that Gewirth's supreme moral principle is derived. Gewirth then attempts to 'prove this doctrine' that action has a normative structure in 'three main steps', with each step claiming to necessarily follow from the previous.<sup>83</sup>

The first step claims that, by engaging in action (defined as the 'voluntary pursuit of purposes'), the agent 'implicitly makes evaluative judgments about the goodness of his purposes', and therefore about the 'goodness of the freedom and well-being' which are the 'necessary conditions' of acting to

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<sup>79</sup> Gewirth, *Reason and Morality* (fn64) 7.

<sup>80</sup> Leff, 'Unspeakable Ethics' (fn2) 1230.

<sup>81</sup> Gewirth, *Reason and Morality* (fn64) 47.

<sup>82</sup> *ibid*, 48.

<sup>83</sup> *ibid*.

achieve them.<sup>84</sup> The second step claims that these evaluative judgements about the ‘necessary goodness’ of the conditions of purposive action logically entail a further ‘deontic judgment’.<sup>85</sup> Here, the agent ‘claims that he has rights’ to the conditions of ‘freedom and well-being’<sup>86</sup> so that others, in the view of the agent, ‘ought at least to refrain from interfering’ with these conditions of action.<sup>87</sup> The consequence of this deontic judgement is that the agent sees the goods which form the necessary conditions of purposive action as ‘goods to which he is entitled – which are due him.’<sup>88</sup> The final step is to show that every agent claims these entitlements ‘for the sufficient reason that he is a prospective agent’ with purposes he wants to fulfil.<sup>89</sup> The consequence of this observation is that the agent must accept that, if he is (as he claims to be according to the previous steps) entitled to the necessary conditions of action and non-interference with those conditions from others for the sole reason that he has purposes he wants to fulfil, then all other prospective purposive agents are similarly entitled.<sup>90</sup> The agent’s claimed-entitlement is universalised so that he must accept that ‘all prospective purposive agents’ have the rights to freedom and well-being he claims for himself.<sup>91</sup> The result is that the agent must acknowledge the rights both of themselves and others to freedom and well-being, and therefore cannot act, support any action, or advocate any principle or norm, in a way which interferes with the freedom and well-being of others or themselves. This is the ‘Principle of Generic Consistency’, which Gewirth has claimed to show is unavoidable in that to ‘deny or violate’ this principle is to ‘contradict’ oneself.<sup>92</sup>

Having summarised the broad steps in Gewirth’s overall argument for the PGC, they will now be considered in more detail in order to assess whether he delivers on his promise of ‘confining the argument to rational necessities’ and the tracing of necessary entailments.<sup>93</sup> As Lomasky notes, a consequence of the nature of the dialectically necessary method - tracing a series of logically necessary entailments to demonstrate a supposedly unavoidable progression to the PGC - is that ‘the PGC is no stronger than the weakest step leading to it’.<sup>94</sup> This is because each step is reliant on the success of the previous; if one step can be rejected as not strictly entailed by the previous, then the steps claimed to necessarily follow on from it can also be rejected as not obligatory. Thus, if one step in the series can be rejected, the unavoidable progression towards the PGC will stop, and

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*, 63-64.

<sup>88</sup> *ibid.*, 66.

<sup>89</sup> *ibid.*, 48.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*, 135.

<sup>93</sup> *ibid.*, 47.

<sup>94</sup> LE Lomasky, ‘Gewirth’s Generation of Rights’ (1981) 31 (124) *The Philosophical Quarterly* 248, 248.

Gewirth's supreme moral principle will be left without the authority he claims for it – the authority of a categorically obligatory principle. Acceptance of the principle, along with the solutions it offers for normative and moral disagreement will, in the end, be questionable and *optional*.

It is argued here that this is the case; at least one step in Gewirth's series can be rejected as not logically necessitated by the previous, thereby stopping the obligatory progression towards the PGC. Specifically, it is argued that the deontic judgement forming the second step in Gewirth's argument (see the summary of Gewirth's overarching argument, above, **pp23-24**), where the agent makes the right-claim that he is entitled to the goods of freedom and well-being which form the conditions of purposive action, is not necessarily entailed by the evaluative judgement established in the first step concerning the 'necessary goodness' of these conditions.<sup>95</sup>

#### 2.4.2. Establishing Step Two of the Progression Towards the PGC - Gewirth's Argument That the Rights-Claim is Unavoidable

As noted above, the second step of the purportedly unavoidable progression towards the PGC is that the agent must claim that he has rights to the freedom and well-being that form the necessary conditions of purposive action, and which, according to step one of the progression, the agent regards as necessary goods. The argument for the necessity of the rights-claim for all purposive agents is that 'if any agent denies that he has the generic rights, then he is caught in a contradiction.'<sup>96</sup> Gewirth summarises the reasoning behind this claim in four steps - starting with the agent's denial that they have the generic rights and ending with the problematic self-contradiction of the agent. This reasoning seeking to show the obligatory nature of the rights-claim is summarised by Gewirth as follows:

'Denying (1) "I have rights to freedom and well-being"' would, '[b]ecause of the equivalence between the generic rights and strict "oughts"...entail the denial of (2) "All other persons ought at least to refrain from interfering with my freedom and well-being."' <sup>97</sup> Denying this positive statement would require accepting its negative equivalent '(3) "It is not the case that all other persons ought at least to refrain from interfering with my freedom and well-being"', and this would contradict '(4) "My freedom and well-being are necessary goods."' <sup>98</sup> '[A]nother way' of putting this point, according to Gewirth, is that an agent accepting (3) ("It

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<sup>95</sup> Gewirth, *Reason and Morality* (fn64) 48.

<sup>96</sup> *ibid*, 80.

<sup>97</sup> *ibid*.

<sup>98</sup> *ibid*.

is not the case that all other persons ought at least to refrain from interfering with my freedom and well-being”), again, as is ‘entailed’ by the ‘denial of (1)’ (“I have rights to freedom and well-being”), would mean accepting the equivalent statement that ‘it is permissible that other persons interfere with or remove his freedom and well-being.’<sup>99</sup> But accepting this idea would mean that the agent ‘regards his freedom and well-being with indifference or at least as dispensable’ which would mean accepting ‘(5) “It is not the case that my freedom and well-being are necessary goods.”’<sup>100</sup>

In both wordings, the argument is that denying the rights-claim would entail the denial of the agent’s previous judgement that his freedom and well-being are necessary goods. As this judgement, according to the first step of Gewirth’s overarching argument for the PGC, is accepted through the fact of engaging in action, the denial of the rights-claim inevitably catches the agent in a self-contradiction. With its denial being dismissible as contradictory, the rights-claim becomes rationally unavoidable; it must be accepted.

As Gewirth recognises, this argument for the necessity of the rights-claim ‘depends on the point...that such a right-claim is correlative with and logically equivalent to a strict “ought”-judgment’ that others ought to refrain from interfering with their freedom and well-being.<sup>101</sup> This is because, in the reasoning set out directly above, it is the consequence that denying the right-claim in (1) also denies the “ought”-judgement in (2) which leads to the acceptance of (3) (“It is not the case that others ought to refrain from interfering”) which, in turn, unacceptably contradicts (4), or, in the alternative wording, leads to (5). So the first issue is whether (1) is in fact logically equivalent to (2). It is argued that this equivalence is troubling. (1) and (2) are only equivalent if the notion of “ought” in (2) is given a particularly strong interpretation so that it includes the concept of entitlement or due, and this conception of “ought” does not necessarily follow from the evaluative judgement carried over from the first step in Gewirth’s overall argument for the PGC - that freedom and well-being are necessary goods.

#### **2.4.2.1. Equivocating the Right-Claim and the Ought-Judgement**

As Gewirth points out, the concept of ‘a right involves the concept of something due’ to the right-holder, ‘something to which he is entitled.’<sup>102</sup> Therefore, as Gewirth also recognises, if the “ought” in the judgement (2) - that others ought to refrain from interfering with the agent’s freedom and well-

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<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*, 78.

<sup>102</sup> *ibid.*, 73.

being - is to be 'logically correlative' to the "right" in statement (1) - that the agent has a right to freedom and well-being - it must be taken in a sense which also 'includes this concept of an entitlement or something due'.<sup>103</sup> The "ought"-judgement in (2) will only hold as equivalent to the rights-judgement in (1) if the agent making 'the "ought"-judgment regards it as setting for other persons duties that they owe to him', that is, they regard it as stating something 'to which he is entitled'.<sup>104</sup> Otherwise, the right-claim would contain an element of entitlement and duty that is not present in the "ought"-judgement, and the meaning of the two statements would differ. They would then not be equivalent, with the consequence that denying the right-claim would not entail denying the "ought"-claim and would therefore not entail the self-contradiction that Gewirth argues results from denying that "ought"-claim.

Furthermore, in order for Gewirth to stay within his dialectically necessary method, this particular conception of "ought" must be entailed and necessitated by the agent's judgements in the previous steps of his argument up to this point. The only previous step at this point in Gewirth's overarching argument for the PGC is the one stating that 'every agent implicitly makes evaluative judgments...about the necessary goodness of the freedom and well-being that are necessary conditions of his acting to achieve his purposes'.<sup>105</sup> Thus it is from this step that the required conception of "ought" must follow. So the crucial issue now becomes whether this conception of "ought" – regarded by the agent as expressing an entitlement and setting duties owed by others – is entailed by the agent's judgement that his freedom and well-being are necessary goods. In order to consider this issue, precisely what that first judgement involves must first be considered.

What is involved in the judgement carried over from the previous step of Gewirth's argument, where the 'agent regards as necessary goods the freedom and well-being that constitute the generic features of his successful action',<sup>106</sup> can be clarified by looking at the argument Gewirth puts forward to show that it must be made by agents. The argument starts by pointing out that action is inherently purposive in that 'the agent tries by his action to bring about' some result or consequence.<sup>107</sup> The intended result can be the action 'for its own sake', for the 'sake of some consequence' he or she intends to achieve by it, 'or both'.<sup>108</sup> Whatever the intended result, the agent 'regards this goal as worth aiming at or pursuing'.<sup>109</sup> That the agent regards the purpose of their action in this way is implied by the very fact of their acting in order to achieve it; if they did not

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<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*, 66.

<sup>105</sup> *ibid.*, 48.

<sup>106</sup> *ibid.*, 63.

<sup>107</sup> *ibid.*, 48-49.

<sup>108</sup> *ibid.*, 38.

<sup>109</sup> *ibid.*, 49.

regard their purpose, either the action itself, or the consequences of that action, as worth pursuing they 'would not unforcedly choose to move from...nonaction to action'.<sup>110</sup> In regarding their purposes as something worth pursuing, the agent is regarding them as things which 'seem to him to be good' so that "'I do X for purpose E'" entails the judgement "'E is good'".<sup>111</sup> Precisely what this means is made explicit by Gewirth; "'good" has the common illocutionary force of expressing a favorable positive evaluation of the objects or purposes to which it is attributed.<sup>112</sup> In this evaluative sense, to hold that something is "good" is to 'value or prize' it and to say that it is good is to 'give expression to these attitudes.'<sup>113</sup> In other words, to make the judgement that something is "good" is to regard a 'particular event or state of affairs as desirable'.<sup>114</sup>

The argument then goes on to extend this 'positive evaluation' of the purposes of action to the 'necessary preconditions' of engaging in that action, summarised as freedom and well-being.<sup>115</sup> Without these preconditions of action the agent 'would not be able to act for any purpose' at all,<sup>116</sup> and 'since the agent regards his purposes as good' they must also regard these conditions as 'at least instrumentally good' in enabling them to act for those purposes, even if those purposes amount to nothing more than the performance of the actions themselves.<sup>117</sup> The result of extending the agent's positive evaluation of their purposes to the necessary conditions of action is that these conditions are similarly valued. The sense of "good" as set out by Gewirth in relation to the agent's regarding of their purposes as "good" is extended to the conditions of achieving those purposes. Thus, what Gewirth has established, on his own terms, is that the agent must regard their freedom and well-being, like their purposive actions, as something to be 'value[d] or prize[d]'; something to be desired.<sup>118</sup> It is from this evaluative judgement that the judgement that others "ought" to refrain from interfering with the agent's freedom and well-being is derived.

However, as McMahan points out, the only sense of "ought" that can be 'directly derived' from an *evaluative* judgement is one with a *similarly evaluative* nature; one which, like the previous evaluative judgement, regards a state of affairs as valuable.<sup>119</sup> In this sense, the claim that others "ought" to refrain from acting in ways harmful to the conditions of action is taken to express the view that others refraining from interference is something to be valued or prized; a state of affairs

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<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*, 51.

<sup>113</sup> *ibid.*, 51-52.

<sup>114</sup> McMahan (fn77) 269.

<sup>115</sup> Gewirth, *Reason and Morality* (fn64) 54.

<sup>116</sup> *ibid.*, 52.

<sup>117</sup> *ibid.*, 54.

<sup>118</sup> *ibid.*, 52.

<sup>119</sup> McMahan (fn77) 270.

the agent regards as 'desirable'.<sup>120</sup> The agent necessarily desires or prizes a situation 'that others not interfere with his freedom and well-being', because he or she necessarily prizes and values his or her having those conditions of action, but this says nothing of the *obligations* of others to do so.<sup>121</sup> Regarding a state of affairs as valuable or something to be prized as in their necessary interests does not establish that anyone else has any obligation to act in that way, or that they owe it to the agent to act in that way.<sup>122</sup> As a result, on this evaluative sense of "ought", logically derived from the evaluative judgement of the agent that their freedom and well-being are necessary "goods" in that they both express the notion of valuing or prizing a particular state of affairs, the "ought"-judgement does not contain the notion of entitlement or due. As it does not contain the notion of entitlement or due, as Gewirth recognised it must if it is to be correlative to the right-claim (see above, **p27**), the "ought"-judgement of (2) is *not* logically equivalent to the right-claim of (1) in Gewirth's argument for the necessity of the right-claim set out above (**pp25-26**).<sup>123</sup>

The consequence of rejecting this equivalence is that denying (1) – the rights-claim that Gewirth seeks to show is unavoidable – does not contradict accepting (4) – the claim that freedom and well-being are necessary goods. This is because, if (1) and (2) are not equivalent, then denying (1) does not also deny (2) and so does not require accepting the equivalent (3) – it is not the case that others ought to refrain from interfering with the agent's freedom and well-being – and it was accepting (3) which Gewirth claimed contradicted (4). Denying that one is *entitled* to, or is *due*, freedom and well-being and their maintenance says nothing necessarily of whether one thinks it is *desirable* or *valuable* to remain free from interference, which, it has been argued here, is the logically entailed interpretation of (2) following on from the similarly evaluative judgement in the previous step. Denying the rights-claim thus leads to no contradiction, meaning that, according to Gewirth's method it is not necessary for the agent to accept.

#### **2.4.2.2. Gewirth's Response**

Gewirth has, however, in a later article,<sup>124</sup> offered a response to this criticism – that the sense of "ought" entailed by the evaluative judgement that freedom and well-being are necessary goods is one of a similarly evaluative nature, expressing a necessary desire for, or valuing of, the non-interference of others, but which need not say anything of their *obligations* or what they *owe* the

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<sup>120</sup> *ibid.*

<sup>121</sup> EM Adams, 'Gewirth on Reason and Morality' (1980) 33(3) *Review of Metaphysics* 579, 585.

<sup>122</sup> MG Singer, 'On Gewirth's Derivation of the Principle of Generic Consistency' (1985) 95(2) *Ethics* 297, 299.

<sup>123</sup> Lomasky (fn94) 251.

<sup>124</sup> A Gewirth, 'The Justification of Morality' (1988) 53(2) *Philosophical Studies* 245.

agent. Gewirth responds that the above argument's 'construal' of the judgement "my freedom and well-being are necessary goods" as 'containing or authorizing only the "ought" of evaluation is mistaken.'<sup>125</sup> It is mistaken because on this construal the agent's statement that freedom and well-being are necessary goods 'would simply report the existence of these qualities as "desirable"' but would not provide any 'practical advocacy or conative commitment on his part to ensuring his continued possession of them.'<sup>126</sup> According to Gewirth, the statement of the necessary goodness of freedom and well-being is *more* than just a statement of their desirability; 'on the contrary', it is 'equivalent to the "must"-statement..."I must have freedom and well-being"', and this "must"-statement is 'regarded by him [the agent] as prescriptive for the conduct of other persons.'<sup>127</sup> The reason offered by Gewirth for the claim that the agent regards this "must"-statement as prescriptive for the conduct of others is that 'in holding he *must* have freedom and well-being, the agent implicitly *demand*s of other persons that they at least not interfere' with them.<sup>128</sup> 'Hence', Gewirth concludes, 'he regards both [the statement of the necessary goodness of freedom and well-being] and [the statement that he "must" have freedom and well-being] as action-guiding for others because of this prescriptive component.'<sup>129</sup> Thus, contrary to the argument presented here, the move from the necessary good judgement to the 'prescriptive "ought"-judgment' does not involve an 'equivocation' because the necessary good judgement and 'its equivalent "must"-judgment...*already* implicitly incorporate prescriptive advocacy concerning the conduct of other persons.'<sup>130</sup> If successful, this response would show that the above argument denying the necessity of the rights-claim rests on a misguided premise; that the judgement of necessary goodness carried over from step one is of a merely evaluative nature saying nothing of the obligations of others. The necessary progression towards the PGC could then proceed in line with the authority claimed for that moral principle. This response must therefore be carefully considered.

For ease of analysis, Gewirth's response just set out will be broken down into the following parts. First, that the statement of the necessary goodness of freedom and well-being is equivalent to the statement "I must have freedom and well-being". Second, that this "must"-statement is seen by the agent as prescriptive for the conduct of others because it contains an implicit demand that others do not interfere with his freedom and well-being, and third, therefore, the statement of necessary goodness is seen by the agent as action-guiding for others rather than merely evaluative. Each part must hold if Gewirth is to successfully show that the statement of necessary goodness is not merely

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<sup>125</sup> *ibid*, 250.

<sup>126</sup> *ibid*.

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid*, 250-251.

<sup>130</sup> *ibid*, 251 [emphasis added].

evaluative but also prescriptive in the sense of expressing what one considers entitled to or due from others. With this in mind, each part of Gewirth's response will now be assessed.

- i) *The statement of necessary goodness is equivalent to "I must have freedom and well-being"*

Gewirth argues that the "must"-judgement follows from the statement of necessary goodness 'because of two interrelated aspects of the "must" in this judgement.'<sup>131</sup> Firstly, 'it reflects the factual relation of means-end necessity that the having of freedom and well-being bears to all successful action.'<sup>132</sup> The statements that freedom and well-being are necessary for purposive action and that one must have freedom and well-being to be successful in purposive action can indeed be seen as equivalent in that they both express the same idea – that freedom and well-being are required, or are essential, for purposive action. Thus this first part of the argument for their equivalence is acceptable when the "must" is taken as merely expressive of this observation that there is an essential connection between the conditions of action and action.

The second part of the argument for the logical equivalence of the necessary goodness and "must"-judgements is that this "must" 'reflects the practical prescriptiveness of the agent's conative attitude toward his purpose-fulfillment so that he advocates or endorses his having freedom and well-being.'<sup>133</sup> It can be accepted that the agent must logically proceed to "endorse" his having freedom and well-being from the previous judgement that they are necessary goods. This is because otherwise, without such endorsement, the agent would be regarding as neutral the conditions of his action which he did not regard as neutral in the previous judgement; he regards his freedom and well-being as "good" on the basis that he unavoidably regards the purposes he acts for as "good", and they are required if the agent is to be able to act towards these valued purposes. On this basis it is accepted that the "must"-statement is meant by the agent as more than a neutral expression of the factual connection between their having freedom and well-being and their engaging in purposive action. It must be taken in a way so as to actually support their having these conditions of action if what the agent says is to be coherent and of any meaning. However, this does not say anything about the *nature* of the entailed endorsement.

So while Gewirth may have shown that the necessary goodness and "must"-judgements can be seen as equivalent, in that they both express the factual connection between the conditions of action and

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<sup>131</sup> *ibid*, 246.

<sup>132</sup> *ibid*, 246-247.

<sup>133</sup> *ibid*, 247.

action, and that the agent must (to remain coherent) take this statement as expressing his or her support for his or her having these conditions of action, he has yet to show that the “must”-judgement *has* to be seen as prescribing for the conduct of others and *has* to be seen as expressing the idea that the agent regards others as obligated to behave in a particular way where his or her freedom and well-being are concerned. The argument for that claim will now be considered.

ii) *The “must”-statement is seen by the agent as prescriptive for others*

As noted above in the discussion of Gewirth’s response to the criticism presented so far, the argument for the claim that the agent sees the “must”-statement as prescriptive for others is that, in ‘holding that he *must* have freedom and well-being, the agent implicitly *demand*s of other persons that they at least not interfere with his having’ freedom and well-being.<sup>134</sup> The key question at this point is therefore whether the “must”-statement does in fact include an implicit demand prescribing for the conduct of others. Returning to *Reason and Morality*, Gewirth sets out four ‘necessary and sufficient conditions of some person’s addressing’ such an obligation to others.<sup>135</sup> The first is that ‘he sets forth a practical requirement for their conduct that he endorses’.<sup>136</sup> The second is that ‘he has a reason on which he grounds this requirement’, the third is that ‘he holds that this requirement and reason justify in some way preventing or dissuading the persons addressed from violating the requirement’, and finally ‘he holds that fulfillment of the requirement is due to himself’.<sup>137</sup> Being described as both “*necessary and sufficient*”, it is clear that Gewirth considers that *each* condition must be satisfied if the agent is to be seen as making a demand prescribing for the conduct of others. However, it is argued that at least two of these conditions are problematic.

Regarding the first necessary condition, that the agent ‘sets forth a practical requirement’ for the conduct of others,<sup>138</sup> Regis Jr argues that ‘it is not clear’ that it is ‘fulfilled’.<sup>139</sup> The reason is that while it is ‘probable that a rational agent will be aware that freedom and well-being are necessary for his action and he will therefore *want* them to be unabridged’, it does not necessarily follow that he or she will ‘on that account require...of others that they do not abridge them.’<sup>140</sup> Wants and demands are two distinct notions; one can want without thereby setting forth a requirement or demand of others. There is ‘no contradiction’ in the idea of an agent ‘acting for some end’ while also ‘refraining

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<sup>134</sup> *ibid*, 250.

<sup>135</sup> Gewirth, *Reason and Morality* (fn64) 79.

<sup>136</sup> *ibid*.

<sup>137</sup> *ibid*.

<sup>138</sup> *ibid*.

<sup>139</sup> E Regis Jr, ‘Gewirth on Rights’ (1981) 78(12) *Journal of Philosophy* 786, 787.

<sup>140</sup> *ibid*.

from setting forth requirements to others', so that they are not logically compelled to lay down such requirements of others.<sup>141</sup> Of course, an agent is free to set forth such requirements, 'free to demand', and some 'may well do so', but that is not the same as being logically *compelled* to 'demand that others respect his freedom and well-being.'<sup>142</sup> As a result, it is not clear that the agent must set forth a practical requirement of others, and it is therefore not clear that they must mean the "must"-statement in a way which incorporates this prescriptive demand.

In defence of Gewirth, Beyleveld offers a reply to this argument. Replying to Regis Jr, Beyleveld points out that 'as a means to its actions for purposes, it is not a case of [an agent] probably wanting its freedom and well-being', rather, the agent 'categorically...must want its freedom and well-being, and hence, *must* demand noninterference.'<sup>143</sup> Beyleveld presumably considers this emphasis on the idea that the agent *must* (as opposed to *probably* will) want freedom and well-being a reply to Regis Jr because of Regis Jr's initial phrasing of his objection as 'although it is *probable* that a rational agent will be aware that freedom and well-being are necessary...and he will therefore *want* them', this does not logically compel him to set forth requirements for others.<sup>144</sup> However, it is submitted that Beyleveld, in focussing on the word "probable", misses the point of the criticism. The argument was not that the agent *merely* probably wants freedom and well-being, and *therefore* it is not the case that they must make the demand of others. The "probably" was attached to the agent *being aware that freedom and well-being are necessary*, and the argument went on to suggest that *even if the agent is aware of this necessity* and so will (as they must once they are aware of their necessity) *want* them, it is not the case that 'he will on that account' (that he undeniably wants them) make a *demand* addressed to others.<sup>145</sup> The point of the criticism as presented by Regis Jr and supported above is that *wants* do not logically or necessarily entail the issuing of requirements or *demands* addressed to others. While a demand may well entail a want (arguably because making a demand is a purposive action and in acting for a purpose an agent implicitly regards it as "good"), a want does not entail a demand, and so while an agent recognising the necessity of freedom and well-being as a means to action will necessarily want freedom and well-being, they are not thereby caught in a contradiction if they do not demand of others that those others assist them in maintaining these conditions of action. That the necessity of the wants may only be probably *recognised* is irrelevant to this point; the inescapable nature of a want does not say anything of the sufficient connection between a want and a demand addressed to others. Once this is recognised, it can be seen that

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<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> D Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1992) 172.

<sup>144</sup> Regis Jr, 'Gewirth on Rights' (fn139) 787 [emphasis added on "probable"].

<sup>145</sup> *ibid.*

Beyleveld's response, emphasising the *necessity of wanting* freedom and well-being, does not address this point. This is because it amounts to repeating the claim that because the agent '*must want*' freedom and well-being it '*must demand*' noninterference from others,<sup>146</sup> and that is the claim Regis Jr was criticising in the first place. In not addressing the point of the criticism made here, Beyleveld's response to Regis Jr can be rejected as unproblematic for the conclusion that Gewirth's first necessary condition of making a prescriptive demand of others – that the agent sets forth a practical requirement for their conduct – is not established.

It is further argued that Gewirth's fourth necessary condition of setting out an obligation for others – that the agent holds that 'fulfilment of the requirement' set forth to others 'is due to himself'<sup>147</sup> - is problematic. Gewirth's argument for this condition being established is remarkably weak. After stating that the agent's reason for issuing a requirement of others is that freedom and well-being are 'necessary for all his pursuits of his purposes' (thereby arguing for the second condition of an agent's considering that others have obligations towards them), and that this is also 'what justifies for him preventing any violations' (arguing for the third), the argument for the last condition is not set out so explicitly. As Regis Jr points out, what one finds is a repetition of this condition 'in different words'.<sup>148</sup> Gewirth states that the agent claims he has a right (an entitlement, a duty owed by others) to noninterference 'because the agent holds that other persons owe him this strict duty of at least noninterference'.<sup>149</sup> This is not an argument, but merely a reassertion of the condition sought to be established; that the agent regards noninterference as due from others. As Regis Jr points out, 'without a reason why the agent *must* make this claim' that others owe them noninterference, other than that they simply must make this claim (which is not a reason but a repetition of the claim a reason is needed to justify), Gewirth simply 'exceeds what he has evidence to show'.<sup>150</sup>

iii) *Therefore, the statement of necessary goodness is seen by the agent as action-guiding for others rather than merely evaluative*

Having rejected two of the conditions Gewirth puts forward as necessary and sufficient for the claim that an agent necessarily makes a prescriptive demand of others that they refrain from interference with the agent's freedom and well-being, that claim is rejected as unsupported on Gewirth's own terms. Having rejected that an agent necessarily makes such a demand of others, prescribing for

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<sup>146</sup> Beyleveld (fn143) 172 [emphasis added].

<sup>147</sup> Gewirth, *Reason and Morality* (fn64) 79.

<sup>148</sup> Regis Jr, 'Gewirth on Rights' (fn139) 789.

<sup>149</sup> Gewirth, *Reason and Morality* (fn64) 80.

<sup>150</sup> Regis Jr, 'Gewirth on Rights' (fn139) 789.

their conduct and requiring that they refrain from acting in a way which interferes with the agent's freedom and well-being, Gewirth's argument that the agent's "must"-judgement (that they must have freedom and well-being) must be seen by the agent as putting forward such a demand is also rejected. Having rejected that the "must"-judgement implicitly contains a prescriptive demand addressed to others regarding their conduct, the argument that, on the basis that the necessary goodness judgement and the "must"-judgement are logically equivalent, the necessary goodness judgement also already contains a prescriptive element for the conduct of others is also rejected. Finally, having rejected the argument that the necessary goodness judgement carried over from step one of the overall argument for the PGC (see the summary above, **pp23-24**) necessarily contains a prescriptive element prescribing for the conduct of others, Gewirth's response that the argument that the necessary goodness judgement 'contains or authorizes only the "ought" of evaluation is mistaken'<sup>151</sup> on this basis is rejected.

It is therefore argued that the criticism presented here of the second rights-claiming step of Gewirth's argument for the PGC holds. The argument for this right-claim relies on a prescriptive conception of the word "ought" which is *not* the necessary entailment of the evaluative premise carried over from the previous step that freedom and well-being are necessary goods. The logical entailment of this evaluative judgement would be for the agent to hold, via a similarly evaluative use of the word "ought", that it is necessarily desirable or valuable that others refrain from interfering with the freedom and well-being that form the necessary conditions of purposive action, which they necessarily want to achieve.<sup>152</sup> It is therefore argued that Gewirth establishes, at most, that it is necessary for the agent to *want* others to act in a particular way, not that it is necessary that they see such conduct as something which they are owed and which they demand as an entitlement. Gewirth has shown that the agent must endorse or advocate their having freedom and well-being in order to remain consistent with the judgement that they are necessary goods, but this falls short of showing that the agent *must* regard noninterference from others as something which they are *due* or *entitled* to. Because a right-claim is defined by Gewirth as a claim to such an entitlement (see above, **section 2.4.2.1, p27**) the argument presented here has the consequence that the right-claim is not a logically necessary entailment of the previous step in the argument for the PGC. It is therefore concluded that the agent is not compelled to make the claim that 'he has rights to freedom and well-being' which forms the second step in the progression towards the PGC.<sup>153</sup>

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<sup>151</sup> Gewirth, 'Justification of Morality' (fn124) 250.

<sup>152</sup> Adams, 'Gewirth on Reason and Morality' (fn121) 585.

<sup>153</sup> Gewirth, *Reason and Morality* (fn64) 80.

### 2.4.3. Consequences of Rejecting the Rights-Claiming Step for the Argument for the PGC

As noted above (**section 2.4.1, pp24-25**), because of the nature of Gewirth's method, claiming to trace a progression of necessary judgements from the perspective of the agent to reach the PGC, the rejection of the necessity of one step is fatal to the argument that the PGC must be accepted as categorically obligatory. If one step is not necessary, then neither are the steps claimed to follow from it, and the unavoidable progression towards the PGC stops. This can be more clearly seen through considering the particular consequences of rejecting the necessity of the rights-claim in step two of Gewirth's argument for the judgement claimed to follow from it in step three.

The third and final step of the argument for the PGC which follows on from the right-claiming step is that the agent 'must claim these rights for the sufficient reason that he is a prospective agent' with purposes he necessarily wants to fulfil,<sup>154</sup> and that the agent is 'entitled to adduce only' this description as his sufficient reason.<sup>155</sup> Furthermore, because of the 'logical principle of universalizability', showing that an agent would be caught in a contradiction if they hold that they have rights for the sole sufficient reason that they are purposive agents while denying that others who also satisfy this condition also have those rights,<sup>156</sup> the agent must 'admit that all prospective purposive agents have these rights' which he claimed for himself.<sup>157</sup> It is from this third step that the PGC – the principle demanding that agents '[a]ct in accordance with the generic rights of [their] recipients as a well as of [themselves]' – is derived.<sup>158</sup>

However, if the rights-claim of step two is rejected as *not* obligatory to accept on pain of self-contradiction, as it was argued above that it can be, then the third step of universalising this right-claim cannot follow, and the PGC derived from it also does not follow, as a matter of obligation. Rather, as the second stage of Gewirth's argument shows nothing more than that one is logically required to regard freedom and well-being and noninterference from others allowing them to enjoy these goods as valuable, generalising this judgement 'merely forces' the agent to 'grant that other agents have sufficient reason (from their points of view) to regard as desirable [the present agent's] promoting their freedom and well-being.'<sup>159</sup> It does not force the agent to grant that others are entitled to or due such necessary goods and therefore to the noninterference of others with these goods. As the agent does not necessarily claim such entitlements for themselves, there is no unavoidable contradiction in denying such entitlements to others, or acting in a way which is

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<sup>154</sup> *ibid*, 48.

<sup>155</sup> *ibid*, 109.

<sup>156</sup> *ibid*, 105.

<sup>157</sup> *ibid*, 127.

<sup>158</sup> *ibid*, 135.

<sup>159</sup> McMahon (fn77) 270.

incompatible with those entitlements. Gewirth's supreme moral principle is therefore not, as he claims, necessary to accept on pain of self-contradiction.

#### **2.4.4. Consequences for Using the PGC to Ground Normative Claims**

The aim of Gewirth's argument was to give the PGC the authority of a 'supreme moral principle' which can 'stand unchallenged as the criterion of moral rightness'.<sup>160</sup> As the unchallengeable criterion of moral rightness, the idea was that the PGC could be used to resolve normative disagreement in an unchallengeable way; principles and judgements incompatible with the supreme moral principle and its requirements would have to be rejected by the agent putting them forward to avoid contradicting this principle they cannot deny, and thereby contradicting themselves. The unchallengeable authority of the PGC depended on showing that 'the steps leading to its justification cannot rationally be evaded.'<sup>161</sup> However, it has been argued that at least one of those judgements, the deontic right-claiming statement of step two, is not logically necessary, and therefore *can* be rationally evaded.

As a result, the dialectically necessary method does not provide Gewirth's PGC with the authority he claims for it – the authority of a categorically obligatory principle which must be accepted from the perspective of all agents on pain of self-contradiction. The principle has not been shown to be anything more than *optional*. If the principle is not obligatory to accept from the perspective of all purposive agents, then neither are its implications. The PGC therefore fails to provide an authoritative means of overcoming the questioning of particular normative claims, or of adjudicating between competing claims. The problem of grounding normative or moral claims in something more than the mere question-begging assertion and reassertion of a particular individual or group therefore remains unsolved.

#### **2.5. Conclusion**

This chapter has raised and considered the problem of defending moral and normative claims against their sceptical denial or competing alternatives. Unless this problem can be convincingly resolved, meaning particular claims and principles could be placed beyond question, arguments relying on such claims as their fundamental premises, including those in the constitutionalist debate,

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<sup>160</sup> Gewirth, *Reason and Morality* (fn64) 48.

<sup>161</sup> *ibid*, 354.

would also remain open to question. For example, as will be seen in **Chapter 4**, in the event of disagreement, a particular conception of “democracy” would remain indefensible in a way which does not, when taken back its underlying normative or moral premises, simply beg the question and rest on the mere questionable assertion and reassertion of a particular individual or group. With this problem in mind, two means of establishing particular claims as superior to their alternatives, in a way which avoids resting on question-begging assertion and reassertion, were considered.

Firstly, a realist foundationalist approach offering the possibility of establishing which claims correspond best to the “intrinsic nature” of (for example) “morality”, “rightness”, “justice”, or “objective reality”, thereby giving particular claims objective authority independent of the perspective of an individual or group, was considered but rejected. It was rejected via an anti-realist and anti-foundationalist approach arguing against the possibility of escaping beliefs in order to independently assess them and their accuracy. This argument drew on aspects of the pragmatic work of Rorty. It was argued that this pragmatic argument avoids the popular self-refutation attack on anti-realist approaches, for once this pragmatic argument is taken seriously on its own terms it becomes clear that the self-refuting claims anti-realist approaches are criticised for making both *are not*, and *cannot*, be made by the approach supported here, relying as they do on the very concepts the pragmatic anti-realist drops. Having rejected the realist approach of escaping our preferred beliefs, descriptions and claims to assess their adequacy to something independent, it was argued that all one is left with are the competing beliefs and claims themselves, supported by some individuals or groups, and rejected by others. There is no independent or neutral ground to appeal to allowing some claims to be set up as superior to others, and this takes one back to the problem identified at the beginning of this chapter; that of defending a normative or moral claim against their denial, or against other competing claims, in a way which does not merely beg the question.

The chapter then went on to consider the influential argument of Gewirth. His dialectically necessary method sought to show that particular claims were obligatory for all purposive agents from *their own subjective perspectives*, thereby moving around the criticism of anti-realist and anti-foundationalist approaches of the idea of escaping that perspective to reach independent ground. Gewirth’s claim was that his PGC, requiring all purposive agents to act in accordance with the generic rights to freedom and well-being of themselves and others, could be set up as the supreme and undeniable principle of morality. As a supreme and unavoidable moral principle, Gewirth’s PGC potentially offered a means of adjudicating between competing claims in a way which does not amount to the questionable assertion of a particular individual or group, nor presuppose the realist

concepts and ideas rejected here. All beliefs, principles and actions would have to be in line with the requirements of this moral principle which all agents cannot question *from their own* points of view.

However, it was argued that Gewirth fails to show that his PGC has the obligatory nature claimed for it. This is because the second step in the series of purportedly obligatory judgements leading to the PGC - the crucial rights-claiming judgement - was not the necessary entailment of the previous judgement. Because of the nature of the dialectically necessary method, rejecting one stage as not logically entailed by the previous has the result of stopping the purportedly unavoidable progression towards Gewirth's PGC and leaving that principle as optional; it does not have the nature of an unavoidable supreme moral principle that Gewirth claims for it. If Gewirth's principle is questionable, then so are its implications, and it therefore cannot serve as a convincing means of deciding between competing normative and moral claims in a non-question-begging way. The problem of defending particular claims against others therefore remains unresolved by Gewirth.

It is therefore concluded that neither realist approaches, nor Gewirth's supreme moral principle, can provide a satisfactory solution to the problem considered here of defending a particular normative or moral claim against their sceptical denial, or competing claims. It is suggested that this provides support for Leff's sceptical conclusion of the 'absence of any defensible moral position on, under, or about anything.'<sup>162</sup> In the following chapters, the consequences of this sceptical conclusion of the lack of the ability to place normative and moral positions beyond the mere questionable assertion of an individual or group for the constitutionalist debate and the arguments within it will be considered in detail.

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<sup>162</sup> Leff, 'Law and Technology' (fn11) 538.

## Chapter 3

### Waldron and the (Ir)relevance of (Anti)Realism and (Non)Objectivity

#### 3.1. Introduction

Having set out and defended the sceptical claim that there exists no convincingly defensible moral position via a pragmatic anti-realist and anti-foundationalist philosophical approach (**Chapter 2**), the thesis will now go on to explore some of the consequences of this claim for the constitutionalist debate. In doing so, the irrelevance argument of Jeremy Waldron must first be addressed. According to Waldron, ‘the truth or falsity of moral realism’, and, therefore, the “truth or falsity” of anti-realism,<sup>1</sup> ‘makes no difference to the justification’, or lack of justification, of the judicial review of legislation enacted by the elected branches on rights grounds.<sup>2</sup> Put the other way around, shifting the focus from the legal branches to the political, Waldron’s irrelevance argument is that the realist/anti-realist issue makes no difference to the (lack of) justification for leaving issues concerning rights and morality to be determined by the elected political branches, and remain legally unquestioned by the judicial branches.

By “moral realism”, Waldron means the ‘claim that some moral judgements are objectively true, while others are objectively false’, and by “anti-realism”, the denial of this claim.<sup>3</sup> Thus, according to Waldron, anti-realists ‘deny that there are moral facts which determine the truth or falsity of the judgements people make’; with no means of showing such judgements to be correct or incorrect, there are ‘only moral judgements and the people who make them’.<sup>4</sup> On these definitions, it is clear that the perspective defended above in **Chapter 2** falls under Waldron’s “anti-realist” category given that it argued against the idea that there exist any independent constraints on which moral claims and judgements must, or should, be accepted, and which must, or should, be rejected. Part of the

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<sup>1</sup> The use of the terms “true” and “false” in setting out the realist/anti-realist issue is Waldron’s, and so, as it is Waldron’s argument that is being evaluated here, those terms will also be used. The use of this vocabulary in this chapter should not, however, in relation to the present author’s arguments, be taken to claim that there is an objective truth, fact of the matter, or “way things are”, concerning the realist and anti-realist issue; it should not be interpreted as claiming that either realism or anti-realism is more in line with the “way things are”, and therefore “true”. Such a claim would presuppose the concepts of a constraining “reality” or “way things are” which it was the purpose of **Chapter 2** to oppose on pragmatic grounds. Using the idea of a “way things are” to deny that there is actually a “way things are” could also, as was discussed in that chapter, be seen as self-contradictory (see **Chapter 2, section 2.3.4**). An interpretation more compatible with the perspective taken in this thesis would be to take “true” and “false”, when used by the present author in relation to realism and anti-realism, to mean something like “convincing” and “unconvincing”, or “accepted” and “not accepted”.

<sup>2</sup> J Waldron, ‘Moral Truth and Judicial Review’ (1998) 43 Am J Juris 75, 77.

<sup>3</sup> J Waldron, *Law and Disagreement* (OUP 1999) 164.

<sup>4</sup> *ibid*, 165.

argument for that position was a rejection of the idea that there exist any moral facts, realities, intrinsic natures, or what Waldron describes as ‘real properties’,<sup>5</sup> which particular moral judgements and predicates could be said to represent or correspond to more or less accurately. The result is that moral claims amount to nothing more than the questionable assertions and reassertions of particular individuals or groups; there are only assertions, question-begging reassertions, and the people who make them.

As the philosophical perspective taken in this thesis falls under Waldron’s description of “anti-realism”, and rejects what Waldron describes as “realism”, it falls under his irrelevance argument. As a result, if Waldron’s irrelevance claim can be made out, then the philosophical perspective taken and defended in this thesis would be shown to be irrelevant to key issues in the constitutionalist debate, and arguably, therefore, irrelevant to that debate itself. The perspective defended here would have nothing, or at best very little, worthwhile to say about the legal/political constitutionalist debate being explored. For that reason, Waldron’s irrelevance case must be carefully examined and tested before proceeding any further. It will, however, be argued that Waldron’s arguments fail to demonstrate his claim that the realist/anti-realist debate is irrelevant to the constitutionalist debate and the issues within it.

To show this, a standard of irrelevance – a benchmark according to which Waldron’s arguments can be tested – will first be set out and justified (**section 3.2**). Waldron’s specific arguments relied on to establish the irrelevance of the realist/anti-realist issue will then be evaluated according to this standard (**section 3.3**). In doing so, it will be argued that Waldron’s arguments contravene the standards that an argument of irrelevance must satisfy in order to successfully prove its point. This is because those arguments, it will be argued, in effect amount to an implicit attack on realist claims and theories; they attack realism ‘under the guise’ of showing it to be irrelevant whether convincing or not.<sup>6</sup> The result is that, rather than showing the realist/anti-realist issue to be irrelevant, Waldron himself becomes entangled in that debate and the issues within it. Moreover, it will be argued that because Waldron’s arguments take sides in the philosophical debate he claims is irrelevant in the very course of attempting to show that debate to be irrelevant, they turn out to be self-contradictory and incoherent. Ultimately, therefore, it will be concluded that Waldron’s irrelevance arguments do not prove their point, are incoherent and so *cannot* prove their point, and should be dismissed on these grounds. Following this argument, there will be some discussion of the tensions and, it could be argued, contradictions, Waldron’s comments on the realist/anti-realist debate give rise to (**section 3.3.1**). This is a problem highlighted by, and forming an interesting background to,

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<sup>5</sup> *ibid*, 171.

<sup>6</sup> J Tasioulas, ‘The Legal Relevance of Ethical Objectivity’ (2002) 47 *Am J Juris* 211, 236.

the criticism of Waldron's irrelevance argument offered here. Reading Waldron's irrelevance arguments alongside his other comments in the writings where those arguments are found, and others, and drawing out the philosophical suggestions of those comments, gives rise to a problematically inconsistent picture of where Waldron stands on the realist/anti-realist issue.

Having set out the negative case against Waldron's irrelevance argument, the consequences of the anti-realist perspective will be considered in relation to a key issue of concern for Waldron, and one at the heart of the constitutionalist debate – decision-making authority in a constitution, particularly concerning rights. Specifically, Waldron's criticisms of instrumental approaches to constitutionalism and authority – approaches holding that the (lack of) justification for a particular constitutional arrangement or distribution of decision-making authority depends on the quality of the substantive outcomes it is likely to reach - will be discussed, along with responses to these criticisms (**section 3.4**). Waldron's conclusion that instrumental approaches to the constitutionalist debate are misguided will be supported, but, contrary to Waldron, this will be explicitly via the anti-realist perspective taken in this thesis. It will be argued that the responses to Waldron's anti-instrumentalist case, while arguable if one accepts their realist assumptions (which Waldron, as will be suggested, at times seems to do, and those responding to his arguments on authority take him as doing), lose their force if these assumptions are rejected. Once an anti-realist stance is taken, the instrumentalist approach (and its defence) becomes fundamentally misguided. Finally, one of Waldron's more positive contributions to the constitutionalist debate – his direct argument in favour of leaving decision-making over rights and the moral issues involved to elected representatives and against the institution of judicial rights-review, based on the idea that participation is the "right of rights" – will be considered. It will, however, be rejected as relying on, when taken to its fundamental premise, moral claims which (according to the perspective defended in the previous chapter) are incapable of convincing, non-question-begging defence against their sceptical denial, or against competing claims.

### **3.2. The Standard of Irrelevance**

Testing Waldron's argument that 'the truth or falsity of moral realism' makes no difference to the (lack of) justification of judicial rights-review of legislation<sup>7</sup> requires a standard according to which it can be assessed. The standard suggested by Smith in discussing Waldron's irrelevance, or 'no-

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<sup>7</sup> Waldron, 'Moral Truth' (fn2) 77.

difference thesis',<sup>8</sup> will be supported and adopted here. Generally speaking, an argument for the irrelevance of a particular debate and the issues involved cannot involve taking sides on such issues, either explicitly, or implicitly. Otherwise, the argument would become involved in the very debate the irrelevance theorist claims can be avoided. The argument would therefore contradict the very point it tries to support in the course of attempting to support that point, rendering the argument paradoxical and simply incoherent. Thus, using this logic, Waldron cannot show that the realist/anti-realist issue is *irrelevant* to the constitutionalist issue 'by taking sides in [that] meta-ethical debate', either explicitly or implicitly.<sup>9</sup> This standard of "not taking sides" must be operationalised to be of any use in assessing Waldron's irrelevance argument. In order to avoid taking sides in the realist/anti-realist debate, Waldron 'cannot deny any meta-ethical claim' argued for by either realists, or anti-realists, for again, to do so would be to become 'embroiled in the very debate [he] claims to be irrelevant'.<sup>10</sup>

Putting this standard of irrelevance into practice in relation to realism will involve 'distinguishing claims about, say, how to identify objective moral beliefs' – how to establish moral truths – 'from claims about the relevance' of those truths to the (lack of) justification of judicial rights-review.<sup>11</sup> Furthermore, putting this "not taking sides" standard of irrelevance into practice will also require distinguishing claims about the *ability* to identify objective moral beliefs and establish moral truths from claims about the relevance of this ability to the (lack of) justification of judicial rights-review. This is because claims about how to identify accurate moral beliefs, or objectively assess the accuracy of moral claims, presuppose the *ability* to do so, and more fundamentally the *possibility* of doing so. Otherwise the realist would incoherently be claiming to provide a means of doing what they do not accept they can do, or can be done at all. A realist claim about how to identify moral truths or objectively superior moral beliefs therefore inherently involves a positive claim about the ability and possibility of doing this. Turning this around, in relation to anti-realism, evaluating Waldron's irrelevance argument will require distinguishing claims about the *lack of ability* of establishing moral truths, from claims about the effect of that on the justification (or otherwise) of judicial rights-review. For the purposes of his irrelevance argument, Waldron is 'free to challenge the claim that [realism or anti-realism] makes a difference to' the *justification* (or lack of justification) of judicial rights-review of legislation, but '*not* the claim that objective moral truths *can* [according to

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<sup>8</sup> D Smith, 'The Use of Meta-Ethics in Adjudication' (2003) 23(1) OJLS 25, 25.

<sup>9</sup> *ibid*, 36.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid*, 37.

the realist, or cannot, according to the anti-realist] be discovered in a certain way [or indeed in any way]’.<sup>12</sup>

Smith suggests that the above distinctions are ‘likely to become blurred at certain points’.<sup>13</sup> This would clearly raise problems. If one has difficulty identifying what claims are and are not acceptable, one will have difficulty establishing whether the irrelevance thesis successfully proves its point. To overcome this problem, Smith suggests another test for use in those cases where the distinction between a philosophical claim, and a claim about the relevance of such claims, is unclear. In those cases, ‘one must decide...whether the no-difference theorist can challenge the claim in question without begging the question.’<sup>14</sup> Again, to be of any use, *what it means* to “beg the question” in this context must be clarified. This can be done by asking ‘whether the claim in question can be accepted by all sides to the meta-ethical debate’ – by realists and anti-realists alike.<sup>15</sup> If it can, this ‘suggests that [the claim in question] is not sufficiently central to any meta-ethical position to be immune to challenge’ without questioning that position itself.<sup>16</sup> Conversely, it can be added, if it cannot, then this would suggest that the claim in question *is* one at issue in the philosophical debate Waldron is claiming to be irrelevant, and would therefore beg the question, and as suggested above would be self-contradictory and paradoxical, to rely on in the context of his irrelevance argument.

Having set out and operationalised the standards that will be used to test Waldron’s claim that the realist/anti-realist issue makes no difference to the justification or lack of justification of judicial rights-review, Waldron’s specific arguments seeking to show the irrelevance of the realist/anti-realist issue to the legal/political constitutionalist issue will now be set out and evaluated, both on their own terms and, where necessary, by applying the above standards and tests.

### **3.3. Waldron’s Arguments for the Irrelevance of the Realist/Anti-Realist Issue**

Waldron is, in his own words, ‘known as a fanatical opponent of strong judicial review’,<sup>17</sup> and, as Kavanagh notes, one of the most ‘persistent and influential opponents’ of such review in favour of leaving decisions over rights to the electorally accountable representatives of citizens.<sup>18</sup> It is

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<sup>12</sup> *ibid* [emphasis added].

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid*.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid*.

<sup>17</sup> J Waldron, ‘Compared to What? Judicial Activism and New Zealand’s Parliament’ (2005) NZLJ 441, 442.

<sup>18</sup> A Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) 22(5) *Law and Philosophy* 451, 466. See, for example, J Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (1993) 13 *OJLS* 18; J Waldron, ‘Participation: The Right of Rights’ (1998) 98 *Proceedings of the Royal Aristotelian Society* 307; J

therefore perhaps hardly surprising that Waldron argues for his claim of the irrelevance of realism and anti-realism to the constitutionalist issue on the basis that ‘the truth of moral realism – if it *were* true – would make no difference’ to *his* conclusion that the ‘practice of judicial review of popular legislation’ on rights grounds *cannot* be justified.<sup>19</sup> Specifically, in ‘The Irrelevance of Moral Objectivity’,<sup>20</sup> Waldron argues for the irrelevance of the realist/anti-realist issue on the grounds that it makes no difference to his argument that judicial decision-making regarding the controversial moral issues involved in rights protection is ‘arbitrary’.<sup>21</sup> Waldron’s point here is that ‘moral decision-making in law is likely to be as arbitrary...for a moral realist as it is for any opponent of moral objectivity’, and that, therefore, the issue makes no difference, and thus is irrelevant, to the issue of the (lack of) justification for judicial review of legislation on rights grounds.<sup>22</sup>

Waldron’s main concern with judicial decision-making in rights cases, where ‘a judge sometimes has to assert his view of what is [morally] right over the view taken by a legislature or electorate’, is with ‘explaining the democratic legitimacy of this.’<sup>23</sup> The problems with such arguments from “democratic legitimacy”, relying as they do on the heavily contested concept of “democracy”, will be discussed in **Chapter 4**. It is argued there that “democracy” is ultimately a useless concept for the constitutionalist debate unless the contestation over what it actually involves, or rather should involve, can first be addressed. It will be argued that such disagreement is irresolvable due to its value-laden nature, along with the inability of showing any side of these value, moral and normative disputes to be correct, or at least superior to others - a claim made relying on the anti-realist and anti-foundationalist perspective defended earlier. For now, however, Waldron seems to offer an argument as to the arbitrariness of judicial decision-making on rights-issues that avoids making use of this contested concept, and as such may not be subject to the criticisms made of “democratic” arguments in that chapter. If it is subject to those criticisms, however, then that could be a further argument against Waldron’s case that the realist/anti-realist issue is irrelevant, given that those criticisms are made from an anti-realist perspective. Earlier in the chapter of *Law and Disagreement* where Waldron makes his argument for the irrelevance of the realist/anti-realist issue on the grounds that it makes no difference to the arbitrariness or otherwise of judicial decision-making,

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Waldron, *Law and Disagreement* (OUP 1999); J Waldron, *The Dignity of Legislation* (CUP 1999); J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346. For discussion of Waldron’s influence in constitutional theory and jurisprudence see, for example, R Stacey, ‘Democratic Jurisprudence and Judicial Review: Waldron’s Contribution to Political Positivism’ (2010) 30(4) OJLS 749; J Allan, ‘Jeremy Waldron and the Philosopher’s Stone’ (2008) 45 San Diego Law Review 133.

<sup>19</sup> Waldron, ‘Moral Truth’ (fn2) 76.

<sup>20</sup> Waldron, *Law and Disagreement* (fn3) Ch8 (164-187).

<sup>21</sup> *ibid*, 170.

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid*, 184.

Waldron writes of ‘*political legitimacy*’.<sup>24</sup> The issue is that judges determining issues of ‘social principle and social value’, lacks ‘authority’ over the determinations of those issues by elected legislators.<sup>25</sup> Waldron’s point is that this is likely to be so regardless of whether moral realism is correct or not. Furthermore, because the argument below will be that Waldron’s *irrelevance arguments* amount to an attack on realism, and can therefore be dismissed as incoherent and not proving their point, whether Waldron’s arguments *concerning the arbitrary nature of judicial rights review* are themselves convincing is not at issue at this stage. Whether Waldron’s premise that judicial review is “arbitrary” or “democratically” questionable is convincing or not, his arguments that moral realism would not change that, it is argued, are in either case problematic. That premise, is (to adopt a Waldronian phrase) “irrelevant” to the argument against Waldron in this section.

Returning to Waldron’s *irrelevance case*, to support his point that judicial decision-making over issues of rights remains “arbitrary” regardless of whether one takes a realist or anti-realist approach, Waldron recasts the situation of judges determining rights-issues and imposing them on society in preference to the determinations which have been, or could have been, made by elected legislators in (what he describes as) realist terms. For Waldron, ‘if moral realism is true’ then it would be accurate to say that ‘what the judge is imposing on his [or her] fellow citizens...is a belief of his [or hers] about the moral facts’, rather than their ‘subjective preference[s]’, as he suggests it would be described by the anti-realist.<sup>26</sup> However, Waldron argues, if realism *were* the case then the decisions of ‘legislators and voters’ could equally be cast in this realist language to the effect that *their* decisions and judgements reflect ‘*their* beliefs about the moral facts’.<sup>27</sup> Thus, the judges’ ‘beliefs about the moral facts’ would be imposed in preference to those of electorally accountable legislators, and by extension, the general population.<sup>28</sup> But, and this is Waldron’s key point, ‘in the absence of any account of how one could tell which of two conflicting beliefs about the moral facts is more accurate’ – which is to say, to use the language of realism discussed in the previous chapter of this thesis, which represents the “moral truth” or “moral reality” more accurately – the ‘imposition of...a few people’s beliefs over those of the population at large still seems arbitrary.’<sup>29</sup>

This argument for the irrelevance of the realist/anti-realist issue rests on the premise that there is “an absence of any account” of how to distinguish accurate (or more accurate) moral beliefs from inaccurate (or less accurate) ones. Waldron is saying that *without such an account*, judicial decision-

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<sup>24</sup> *ibid*, 168 [emphasis removed from “legitimacy”].

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid*, 184.

<sup>27</sup> *ibid*.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid*.

making still seems “arbitrary”. However, even taking Waldron’s argument on its own terms and assuming that judicial decision-making on rights and moral issues is actually “arbitrary” in the first place (so that it could properly be said to “*still be*” arbitrary even on a realist approach), it is argued here that this premise of the irrelevance argument is problematic. It is problematic for slightly different reasons depending on what interpretation is given to the claim that there is an “absence of any account” of how to distinguish between more and less accurate moral beliefs. If Waldron’s claim here is that there is an absence of *any* account among moral realists of how more and less accurate beliefs can be distinguished, then it is argued that it is both empirically questionable - such accounts (whether convincing or not) *are* provided – and contradictory to other comments made by Waldron - he himself refers to such accounts. If Waldron’s point is, rather than there being an absence of *any account at all* of how to tell the difference between more and less accurate moral beliefs, that whatever accounts are offered turn out to be unconvincing or unpersuasive, then his argument begs the question against realist theorists. That is, the argument becomes an attack on realist theories and claims - in effect an anti-realist argument – thereby contradicting Waldron’s case that the realist/anti-realist issue is irrelevant in the very course of trying to establish that case. These problems will now be set out in more detail, along with a discussion of the particular interpretation of Waldron’s premise that leads to each problem and the evidence supporting these interpretations.

a) *The Claim That There is an “Absence of Any Account” of How to Distinguish Accurate From Inaccurate Moral Claims is Empirically Questionable and Self-Contradictory*

The idea that there is “an absence of any account” of how to distinguish accurate (or more accurate) from inaccurate (or less accurate) moral beliefs, which forms the key premise of Waldron’s irrelevance argument set out above, is empirically questionable and contradictory to other comments made by Waldron if it is read as claiming that there is an absence of *any* such account. On this interpretation the claim simply reports that no realist offers *any* means for establishing the accuracy of beliefs regarding the moral facts they claim those beliefs seek to, and more fundamentally can, represent. There is some evidence to suggest that this is what Waldron means by the premise of his irrelevance argument. For example, he writes earlier that, ‘though they [realists] insist that there is some fact of the matter, *they offer nothing* which would help distinguish a mere arbitrary opinion from a well-grounded belief.’<sup>30</sup> The emphasised words suggest that the criticism Waldron makes of realists is that they put forward *no test at all* for the accuracy of moral

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<sup>30</sup> *ibid*, 180 [emphasis added].

beliefs in representing the moral facts; that they offer no epistemology which can be used to establish what the moral truth of the matter is, or even how to get closer to that truth.

However, as Smith points out, realists and objectivists 'do indeed offer ways of determining which moral beliefs are objectively true', or at least more accurate than other moral beliefs.<sup>31</sup> In fact, Waldron himself mentions such accounts when he recognises that, for example, the realist 'natural lawyer...will claim that the development of the natural law tradition represents progress towards the truth, and that *it indicates the epistemic strategies*' that should be encouraged to 'continue down this path' towards such truth.<sup>32</sup> Similarly, Waldron himself notes that, for example, a realist utilitarian 'will claim that the development of utilitarian ethics', along with the development of a utilitarian epistemology, represents 'progress towards the truth.'<sup>33</sup> These examples of theories offering epistemologies for purportedly reaching, or progressing towards (if their proponent also happens to be a realist) the moral truth or fact of the matter given by Waldron himself demonstrate that the claim that there is an absence of *any* account of how to distinguish which beliefs represent the moral facts accurately, or at least progress towards such representation, simply cannot be maintained. These theories *do* offer epistemologies, which, if characterized in the realist language, *do* purport to represent a means of progressing towards moral truth or more accurate representations of such truth. Therefore, on this first possible interpretation of Waldron's key argument that there is 'an absence of *any* account' of how to distinguish accurate moral beliefs from inaccurate ones,<sup>34</sup> which he relies on to demonstrate that judicial decision-making would still be unacceptably "arbitrary" even if realism were accepted, that argument is problematic and unconvincing. Such a claim cannot be maintained in light of what realists *do* say,<sup>35</sup> and is contradicted by Waldron's referring to claims that a particular theory provides a means of reliably progressing towards moral truths. Insofar as this interpretation *does* accurately reflect Waldron's argument for the continued arbitrariness of judicial decision-making over issues of rights in the event of realism, and therefore the irrelevance of the realist/anti-realist issue, it is argued that it can be quickly rejected on these grounds.

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<sup>31</sup> Smith, 'Use of Meta-Ethics' (fn8) 39.

<sup>32</sup> Waldron, 'Moral Truth' (fn2) 86 [emphasis added].

<sup>33</sup> Waldron, *Law and Disagreement* (fn3) 179.

<sup>34</sup> *ibid*, 184 [emphasis added].

<sup>35</sup> Smith, 'Use of Meta-Ethics' (fn8) 39.

b) *The Claim That There is an “Absence of Any Account” of How to Distinguish Accurate From Inaccurate Moral Beliefs Incoherently Begs the Question Against Realism*

However, the above interpretation is not the only way in which Waldron’s premise of the “absence of any account” of how to distinguish accurate (or more accurate) from inaccurate (or less accurate) moral beliefs could be read. Indeed, the very fact that Waldron *himself* appears to mention such accounts may itself point against the first interpretation as the one actually intended, assuming he would not intend to so clearly contradict himself. As Smith suggests, it could also be taken to mean that there is an absence of any ‘*successful*’, *convincing*, ‘*plausible*’, and therefore *useful*, account of how to determine the accuracy of moral beliefs, rather than that there is an absence of *any account at all*.<sup>36</sup>

There is also some evidence to suggest that this second interpretation is the way Waldron meant his claim. To rework an example from the discussion of the first possible interpretation above, Waldron writes that ‘though they [realists] insist that there is some fact of the matter, they offer nothing *which would help* distinguish a mere arbitrary opinion from a well-grounded belief.’<sup>37</sup> The words emphasised here suggest that the criticism Waldron makes of realists is that, while they may offer some purported means of distinguishing mere arbitrary opinions from well-justified beliefs about the moral facts, the means they *do* offer are, it turns out, *unhelpful* for that purpose; they cannot deliver on their promises of providing a means of deciding between competing beliefs about the moral facts. As another example, Waldron immediately follows his consideration of the possibility that a realist utilitarian ‘will claim that the development of utilitarian ethics...is progress towards the truth’, in that the ‘basic propositions of his theory are true’, with the objection that ‘there is nothing he *can say to support* these claims.’<sup>38</sup> The words emphasised here suggest that Waldron’s problem with realist theorists is that they *cannot back up* their claims to epistemological authority; their claims to have a theory which provides a sound means of accurately, or more accurately, representing moral truth which can then be used to decide between competing moral beliefs. This objection seems to be made explicit by Waldron when he writes that ‘moral realists...are quite *unable to demonstrate* the truth of their judgements or *show* how they correspond to moral reality’ and that they should therefore qualify their substantive moral claims with the rider that it is “‘only [their] opinion’”.<sup>39</sup> Similarly, Waldron goes on to write that no beliefs about the moral facts ‘*can be certified* as superior or naturally prevalent on any credentials other than that some people find them

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<sup>36</sup> *ibid.*

<sup>37</sup> Waldron, *Law and Disagreement* (fn3) 180 [emphasis added].

<sup>38</sup> *ibid.*, 179 [emphasis added].

<sup>39</sup> *ibid.*, 180 [emphases added].

congenial.<sup>40</sup> Whether or not a claim delivers on its promises, can be supported, or is adequately demonstrated, is an *evaluative* judgement, as opposed to the empirical one of whether a claim is made at all. Waldron's criticism of realist theories, on this interpretation, therefore differs from the first interpretation offered above in that it involves an *assessment* of whatever claims realists do make; whether they *can convincingly* make those claims, and whether they are *capable of support*, rather than whether or not they actually make those claims in the first place.

However, while this evaluative interpretation of Waldron's key claim of the "absence of any account" of how to distinguish more and less accurate beliefs about moral truth avoids the criticisms of the first interpretation discussed above - that it simply cannot be maintained in light of what some realists *do* say, and in light of other statements made by Waldron himself on this matter - it is argued that it is nonetheless problematic. If this interpretation is how Waldron intended his claim then it is argued that it can be dismissed as 'question-begging' in the context of an irrelevance argument.<sup>41</sup> It is question-begging in that it 'focuses on', as Tasioulas notes, 'what on anyone's view must be a serious defect' in the realist position; the 'putative absence of a reliable' and convincing means of identifying moral truths.<sup>42</sup> Claiming that there is a fundamental defect in realism – that its claims cannot be supported or demonstrated – seems 'indistinguishable from an attack' on realist theories, and even the very idea of realism itself.<sup>43</sup>

That this argument (on this interpretation) is question-begging against realism becomes even clearer by applying the more specific test for question-begging set out above; whether the claims involved can be accepted by both sides to the philosophical debate (see **section 3.2**). It is argued that Waldron's claims on this interpretation are *not* acceptable to both sides. Those realists putting forward their favoured epistemological theory, and, as Waldron himself notes, which *they* regard as facilitating 'progress towards the truth' and relying on 'basic propositions' which are 'true', would surely *not* accept Waldron's point that there is 'nothing [they] can say to support these claims'.<sup>44</sup> If such realists thought their claims were not supported, and more fundamentally, *could not* be supported, then surely they would not advance them at all. However, as Waldron has just noted, they *do* make claims to epistemological superiority and *do* claim to provide a means of progressing towards moral truths. Indeed, as Waldron has noted previously regarding the very nature of putting forward an argument, 'everyone thinks her [or his] own current position is correct; otherwise she [or

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<sup>40</sup> *ibid*, 186 [emphasis added].

<sup>41</sup> Smith, 'Use of Meta-Ethics' (fn8) 39.

<sup>42</sup> Tasioulas, 'Legal Relevance of Ethical Objectivity' (fn6) 239.

<sup>43</sup> Smith, 'Use of Meta-Ethics' (fn8) 39.

<sup>44</sup> Waldron, *Law and Disagreement* (fn3) 179.

he] would not be putting it forward' at all.<sup>45</sup> Thus, on this logic (which, again, is Waldron's own), it is argued that to the realists who also advance an epistemology, whether they be (to use Waldron's examples) 'utilitarians', 'Christian fundamentalists',<sup>46</sup> 'deontologist[s]'<sup>47</sup> or whatever, Waldron's argument that their claims cannot be supported or certified, or are unconvincing, is likely to be *unacceptable*. This further demonstrates that Waldron's argument, on this interpretation, begs the question against realism, and as such takes sides in the realist/anti-realist debate in the course of arguing for its irrelevance.

The problem is that to support the claim that the realist/anti-realist issue is irrelevant with an argument that amounts to an attack on realism is, as Smith puts it, 'to take part in the meta-ethical debate, not to show that it is irrelevant.'<sup>48</sup> Furthermore, as was argued above while setting out the standard an irrelevance argument must meet in order to be convincing (**section 3.2**), to take sides (explicitly or otherwise) in the debate one claims to be irrelevant in the very process of supporting the claim that it is actually irrelevant is self-contradictory and incoherent. Therefore, on this second interpretation of Waldron's argument for the irrelevance of the realist/anti-realist issue to the constitutionalist issue, which it was just argued *does* take sides in the realist/anti-realist debate (against realism and realist claims) that argument can be rejected as incoherent.

Putting the arguments in this section together, whichever of the above interpretations of Waldron's argument that realism makes no difference to the "arbitrariness" of judicial decision-making on rights-issues is taken, and even assuming such judicial decision-making is actually "arbitrary" to start with, that argument does not, and furthermore *cannot*, support Waldron's case that the realist/anti-realist issue is irrelevant. It is either empirically questionable and hostile to realism in a way which is self-contradictory, in denying that any realist puts forward a means of distinguishing more accurate from less accurate moral beliefs while also mentioning examples of realist epistemologies put forward precisely for this purpose (the first interpretation), or it is hostile to realism in a way which is both question-begging and self-contradictory in the context of an irrelevance argument, as itself taking sides in the debate it supposedly demonstrates is irrelevant and can be avoided (the second interpretation). Either way, the consequence is that Waldron's irrelevance argument is wholly unconvincing.

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<sup>45</sup> Waldron, 'Rights-Based Critique' (fn18) 30.

<sup>46</sup> Waldron, *Law and Disagreement* (fn3) 178.

<sup>47</sup> *ibid*, 179.

<sup>48</sup> Smith, 'Use of Meta-Ethics' (fn8) 39.

### 3.3.1. A Tale of Two Waldrons?

The argument of this chapter so far has been that Waldron's case for the irrelevance of the realist/anti-realist issue to key issues at stake in the constitutionalist debate amounts to an implicit attack on realism itself, and as such does not, and cannot due to its self-contradictory nature, prove its point. That Waldron's arguments are hostile to realism is, it might be suggested, unsurprising given what he has previously written regarding realism and anti-realism. In an article on the issue of moral truth, rights, and judicial review (prior to the publication of *Law and Disagreement*),<sup>49</sup> Waldron expressly states that one of the views he holds is 'anti-realism',<sup>50</sup> before proceeding to point to sceptics such as Hume and Hare as providing the 'accounts of moral judgement [he] find[s] most convincing.'<sup>51</sup> In this article Waldron talks of anti-realists in the first-person; one 'of the views that I hold [is] anti-realism',<sup>52</sup> 'we...discover that there is simply no room for realist conceptions like moral truth and moral objectivity, and we put those ideas quietly and untendentiously aside.'<sup>53</sup> The use of the first-person here suggests that Waldron, at this stage, identifies *himself* as an anti-realist. Waldron *himself* seems to find moral realism unconvincing and Waldron *himself* puts realist concepts like "moral truth" and "moral objectivity" to one side. Even more strongly, Waldron openly claims that 'the realist is making some wretchedly misbegotten category-mistake in assimilating moral judgments to judgments about matters of fact.'<sup>54</sup> Reading this article, putting his first-person alignment with anti-realism, anti-realists, and anti-realist ideas together with his apparently open rejection of realist concepts and ideas, one gets the impression that Waldron is a trenchant anti-realist. This alignment with anti-realism, may, it could be suggested, fuel Waldron's implicit attack on realism which it was argued above his irrelevance argument amounts to.

However, in the chapter of *Law and Disagreement* where the irrelevance arguments discussed and rejected above are found (Chapter 8), Waldron seems to want to distance himself from the anti-realist position and the ideas within it. In that chapter, one finds statements like; 'of the various views about justice and rights that compete in our society, surely some are more acceptable than others', and that '[s]urely...some of them are true and others false.'<sup>55</sup> That Waldron wants to

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<sup>49</sup> Waldron, 'Moral Truth' (fn2). Publication date of 'Moral Truth and Judicial Review' is 1998, and the date of publication for *Law and Disagreement* is 1999. *Law and Disagreement* is therefore taken as representing the more recent views of Waldron.

<sup>50</sup> Waldron, 'Moral Truth' (fn2) 76.

<sup>51</sup> *ibid*, 75, n1.

<sup>52</sup> *ibid*, 76 [emphasis added].

<sup>53</sup> *ibid*, 78 [emphases added]. Footnote again refers to the work of the anti-realist, Hare (RM Hare, *Moral Thinking: Its Method, Levels and Point* (Clarendon Press 1981)).

<sup>54</sup> Waldron, 'Moral Truth' (fn2) 79.

<sup>55</sup> Waldron, *Law and Disagreement* (fn3) 164 [emphasis added].

distance himself from anti-realism is further suggested by the use of, contrary to the quotes from the previous article just noted, the *third*-person when mentioning anti-realists. For example, when defining anti-realism he writes that '*[t]hey* [anti-realists] deny that there are moral facts which determine the truth or falsity of the judgements people make', '*[t]hey* say: there are only moral judgements and the people who make them',<sup>56</sup> and, in a quote otherwise strikingly similar to that found in the previous article, that '*they* [no longer "*we*"]...discover that there is no room for any realist notion of moral truth and moral objectivity, and *they* [no longer "*we*"] put those ideas quietly aside.'<sup>57</sup>

The absence of the explicit attacks on realism from his previous article on moral truth and judicial review referred to above, and the shift from the first-person to the third-person in statements regarding anti-realists and their claims which are otherwise identical, could suggest a number of things. Firstly, it could represent the full flowering of Waldron's irrelevance case. Because Waldron's argument is that the realist/anti-realist debate is irrelevant and of no consequence to the constitutionalist issues, he may see his own stance in that debate as irrelevant. Indeed, if his irrelevance case is to be convincing, according to the standard set out above (**section 3.2**), he *should* see his own stance in the philosophical debate as irrelevant. Seeing his own philosophical views as irrelevant, Waldron may simply see no need to mention them in a chapter which has the purpose of showing the irrelevance of the philosophical debate to the constitutionalist issue. Those views would not (again, as they *should* not) add anything to this argument.

Secondly, the shift could signal a change in Waldron's stance so that, by the time of *Law and Disagreement*, he is no longer convinced that realism is ill-founded, or makes some "wretchedly misbegotten mistake", and no longer sees anti-realism as more convincing. Simply put, Waldron could have changed his mind regarding his philosophical stance. Some commentators do seem to take it as read that Waldron is (now at least), ultimately, a realist, and thinks that there *are* such things as moral facts regarding moral rights and wrongs, and accepts realist concepts like "moral truth" and "moral objectivity". For example, in the course of discussing Waldron's critique of instrumentalist conceptions of authority and arguing that the constitutional design which is 'most likely to yield morally right decisions, or is likely to yield the most morally right decisions, is most justified', Kavanagh points out that while some would regard the very idea of a "morally right"

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<sup>56</sup> *ibid* [emphases added].

<sup>57</sup> *ibid*, 176 [emphases added].

decision dubious, Waldron does not.<sup>58</sup> Kavanagh's assumption that 'there is such a thing as a morally right and wrong decision' regarding issues of rights is, she states, 'not in contention with Waldron.'<sup>59</sup>

To support this point that Waldron accepts, and is even 'keen to stress', the realist idea of moral rights and wrongs 'independently of what people believe', Kavanagh points to the statement made by Waldron that "'rape is wrong even in societies where it is a common practice"'.<sup>60</sup> Here, Kavanagh takes Waldron not only as accepting that there *are* moral rights and wrongs, but as regarding this particular statement as an example of a moral truth. Waldron appears to assume that *he* knows this particular moral truth, and that those who deny it (even whole societies) *are wrong* to think otherwise.<sup>61</sup> How Waldron's apparent assumption of the existence of moral truths and the apparent assumption that he himself knows such a moral truth (the rape example) is reconcilable with his other comments discussed above – particularly that, while some realists claim to have found the truth, or a means of accessing it, there is nothing they can say to support these claims (see **section 3.3, p49**) - is another problem pointing to the inconsistency in Waldron's various comments involving the realist/anti-realist issue. To reconcile the idea that one *cannot support* a claim to know, or to know how to access, a moral truth with Waldron's suggestion that the rape example *is* a moral truth so that those who disagree with him *are* wrong, that latter suggestion must be regarded by Waldron as unsupportable. But if it is regarded by Waldron as incapable of support – that there is nothing he could say to demonstrate the truth of his claim – how can he consistently say that those who disagree (even whole societies) *are* - not merely that *he thinks* they are - wrong? Without such a rider, his own claim, then, seems to be caught by the criticism he makes of realists for the purposes of his irrelevance argument. That said, the important point to take from the discussion at this stage is that there is evidence to suggest that Waldron *has* in his later writings taken a realist stance, using realist concepts, making claims which can only make coherent sense to a realist, and that other commentators have noticed this. They take the idea that Waldron is a realist and accepts moral objectivity to be straightforward and uncontroversial. These commentators, and the further evidence they point to, could therefore support the idea that Waldron has shifted to a realist philosophical stance.

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<sup>58</sup> Kavanagh, 'Participation and Judicial Review' (fn18) 460.

<sup>59</sup> *ibid*, 460, n30.

<sup>60</sup> *ibid*. The Waldron quote is from *Law and Disagreement* (fn3) 105.

<sup>61</sup> The author would like to make clear that the *substantive content* of Waldron's (and Kavanagh's) claim that rape is indeed "wrong" - taken as meaning that the practice is, to the author, repugnant and reprehensible – is not at issue here. The author is of the view that rape is, in this sense, "wrong". The issue of disagreement with Waldron (if his claim is taken in a realist and objectivist sense), and with Kavanagh (who explicitly *does* mean the claim in such a sense) is whether this view can meaningfully be said to be "true" or "right" in the sense of representing an independent moral fact, and whether that status can be convincingly supported. As a reminder, **Chapter 2** set out and defended the claim that moral views such as these *cannot* be shown to have such objective authority. That argument was regarding the *status* of such moral judgements, not their *content*.

If this “change of mind” explanation is taken, however, one should be aware that this would not be the first time Waldron would appear to have “changed his mind”. From an article published several years *before* ‘Moral Truth and Judicial Review’ (the article where, as above, Waldron openly aligns himself with anti-realism), one finds statements that seem to align Waldron with the *realist* case, and which are cast in the realist terminology, using realist concepts, rejected by Waldron in the later article. While criticising Freeman’s instrumental defense of judicial review,<sup>62</sup> Waldron considers what he sees as the likely situation of disagreement over rights where ‘a number of citizens think a piece of legislation respects and even advances fundamental rights’ while others ‘believe that it unjustifiably encroaches on rights’.<sup>63</sup> In such a situation, he states that ‘no doubt from a *God’s-eye point of view*, one of these positions is *ultimately true and the other false*’.<sup>64</sup> The idea of a “God’s-eye point of view”, and the idea that judgements concerning rights can “no doubt” be “true” and others “false” are, as discussed at length in the previous chapter, typically *realist* ones. Furthermore, they are typically realist ones according to *Waldron’s own definitions* of “realism” and “anti-realism”. Recall that in ‘Moral Truth and Judicial Review’, Waldron states that ‘we [anti-realists] discover that there is simply no room *for realist conceptions like moral truth and moral objectivity*, and we put those ideas quietly and untendentiously aside,<sup>65</sup> and in ‘The Irrelevance of Moral Objectivity’ that ‘they [anti-realists]...discover that there is no room for any *realist notion of moral truth and moral objectivity*’.<sup>66</sup> In these descriptions of the position of anti-realists, Waldron sees “moral truth” and “moral objectivity” as “realist notions”. If “moral truth” is a realist notion, and if the issue of rights is (as Waldron characterises it) a moral one,<sup>67</sup> then the idea that one position in the moral disagreement over rights citizens are likely to come across is “true”, and others “false”, is clearly a realist idea, according to Waldron’s characterisation of that term. This statement from an earlier article of Waldron’s is therefore incompatible with his later statements that ‘we’ (first person, and therefore including Waldron) ‘put those ideas [moral truth and moral objectivity] quietly and untendentiously aside.’<sup>68</sup> The earlier Waldron accepts (with “no doubt” - which is far from “putting aside”) the very realist notions the later Waldron rejects as an anti-realist. So if Waldron *has* changed his mind at all, he seems to have done so several times; from realism to anti-realism, and back again.

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<sup>62</sup> S Freeman, ‘Constitutional Democracy and the Legitimacy of Judicial Review’ (1990) 9(4) *Law and Philosophy* 327.

<sup>63</sup> J Waldron, ‘Freeman’s Defense of Judicial Review’ (1994) 13(1) *Law and Philosophy* 27, 36.

<sup>64</sup> *ibid* [emphases added].

<sup>65</sup> Waldron, ‘Moral Truth’ (fn2) 78 [emphasis added].

<sup>66</sup> Waldron, *Law and Disagreement* (fn3) 176 [emphasis added].

<sup>67</sup> For example, *ibid*, 225 (‘rights themselves are morally complicated’) and 226 (‘In the area of rights...it is precisely questions of...moral priority that are at stake’).

<sup>68</sup> Waldron, ‘Moral Truth’ (fn2) 78.

Thirdly, the motive behind Waldron's move away from an explicit anti-realist position could be a tactical one to strengthen his irrelevance case. Again, as was argued above, an irrelevance case cannot rely on a particular stance (or hostility to a particular stance) in the debate which it is the whole point of the case to show is irrelevant. If the irrelevance case *does* rely on taking sides in the debate in the course of arguing that the debate is actually irrelevant it would be paradoxical, contradictory, and simply incoherent. With this in mind, Waldron may have consciously decided to distance himself from the anti-realist position to avoid encouraging the kinds of criticisms made in this chapter – that his arguments *do* take sides in the realist/anti-realist debate, and should therefore be rejected as an unconvincing irrelevance case.

Whichever (if any) of these suggested explanations are behind what seem to be incompatible statements concerning the realist/anti-realist debate made by Waldron at various times, the above argument that Waldron's case against the relevance of the realist/anti-realist debate is problematic as begging the question against realism remains. Whichever is most likely to be the case is therefore not a crucial issue for the argument of this chapter. Moreover, this thesis is not in a position to confidently state which is in fact the case (ultimately only Waldron himself can know his own position(s) and reasoning with confidence). But what this thesis *is* in a position to suggest, following the argument so far, is that if Waldron does *not* consider himself to be an anti-realist, then his realist-hostile irrelevance arguments are inconsistent with that. If Waldron *is* an anti-realist, then perhaps he should justify this stance openly rather than deny its relevance with what are, in effect, anti-realist arguments. Rather than putting realist concepts and ideas, to use Waldron's words, 'quietly...aside',<sup>69</sup> they should be put *noisily* to one side, through direct arguments so that his implicit hostility to realism is openly justified and supported. Of course, Waldron would no longer be able to characterise his arguments as an "irrelevance" case, but, according to the argument of this chapter so far, that characterisation is misleading in any case. Waldron could then, perhaps, proceed to work out the links between his anti-judicial review stance, specifically his views on the "arbitrary" nature of judicial decision-making over rights, and his philosophical stance, no longer regarding (without cogent justification according to the above argument) those two issues as irrelevant to one another. From the perspective of an anti-realist concerned with the constitutionalist debate, this would be a welcome move in developing an anti-realist take on constitutionalist issues.

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<sup>69</sup> *ibid.* See also Waldron, *Law and Disagreement* (fn3) 176.

### **3.4. The Relevance of the Realist/Anti-Realist Issue to Instrumentalist Approaches to the Constitutionalist Debate**

Having rejected Waldron's argument that the realist/anti-realist issue is irrelevant to the issues involved in the constitutionalist debate, its *relevance* will be considered in relation to the key issue of authority. The question theories of authority seek to address is that of who, by what processes, and under what principles and constraints (if any), is to be given the power to decide which answers to questions of rights, morality and justice are to be enforced in society, and what is the justification for that power? As Waldron puts it, the issue of authority in constitutional theory is that of '[w]ho is to have the power to make social decisions, or by what processes' are those decisions to be made, over questions of rights and the practical and moral issues involved?<sup>70</sup> In this section, the instrumentalist approach to constitutionalism and authority often put forward will be examined. In doing so, Waldron's criticisms of this approach will be considered, along with responses by advocates of instrumentalism. It will be argued that the responses to Waldron's criticisms, while arguable if one accepts their realist and objectivist underpinnings, are unconvincing if one rejects these underlying philosophical assumptions. That is, they are unconvincing if one takes an anti-realist stance such as that offered and argued for in **Chapter 2**. Furthermore, it will be argued that the *very idea* of the instrumentalist approach becomes fundamentally misguided if one takes such a stance. Thus, Waldron's conclusion dismissing instrumentalist approaches to constitutionalism and authority will be supported, but, unlike Waldron, this conclusion will be reached explicitly as a consequence of the anti-realist stance taken in the philosophical debate by this thesis – a stance which Waldron, as has already been argued, has failed to show is irrelevant to the constitutionalist debate. In short, the *relevance* of the realist/anti-realist issue here is that Waldron's criticisms of instrumentalism become more convincing if given an anti-realist underpinning, but less convincing if that approach's realist assumptions remain unchallenged.

#### **3.4.1. The Instrumentalist Approach and its Justification**

The instrumentalist approach to the constitutionalist debate and the key question of authority within it is, as Kavanagh puts it, that 'the justification of political authority must ultimately rest on its instrumental value to "good government"'.<sup>71</sup> In the context of rights and the issues of morality

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<sup>70</sup> Waldron, *Law and Disagreement* (fn3) 244.

<sup>71</sup> A Kavanagh, 'Constitutional Review, the Courts, and Democratic Scepticism' (2009) 62(1) *Current Legal Problems* 102, 113. Kavanagh's use of the "instrumental condition of good government" relies on J Raz, *Ethics in the Public Domain* (OUP 2004) 117.

involved, Kavanagh adopts an instrumentalist approach to argue that the institution and constitutional design ‘that is most likely to yield morally right decisions, or is likely to yield the most morally right decisions, is most justified.’<sup>72</sup> The (lack of) justification of constitutional review (or its absence) thus ‘hinges crucially on its conduciveness to producing good outcomes for human rights’<sup>73</sup> – on its conduciveness to ‘enhancing the protection of human rights’ in society.<sup>74</sup> As Kavanagh notes, this instrumentalist approach is ‘supported by many political theorists’.<sup>75</sup> For example, for Rawls, the ‘fundamental criterion for judging any procedure is the justice of its likely results’.<sup>76</sup> Similarly, Dworkin argues that the ‘best institutional structure is the one best calculated to produce the best answers’,<sup>77</sup> and Raz claims that a ‘natural way to proceed’ regarding the issue of rights in society is ‘to assume that the enforcement of fundamental rights should be entrusted to whichever political procedure is...most likely to enforce them well.’<sup>78</sup>

The justification for adopting an instrumental condition of authority of ‘delivering sound political decisions’,<sup>79</sup> or, as Kavanagh also puts it, decisions ‘in accordance with right reason’,<sup>80</sup> stems partly from the moral nature of political decision-making and partly from the importance of the decisions at stake for society. Regarding the moral nature of political decision-making, Kavanagh states that ‘[s]ome political decisions involve a choice between states of affairs or actions which are morally right or wrong, better or worse, independently of what people prefer.’<sup>81</sup> Kavanagh names these decisions involving choices between what is independently “right” or “better”, and what is independently “wrong” or “worse” in a moral sense, ‘political decisions with a moral content’.<sup>82</sup> Since some political decisions have this “moral content”, ‘and can be judged good or bad, better or worse’, Kavanagh argues, ‘it seems clear that a good governmental decision-procedure must be acceptable from a moral point of view.’<sup>83</sup> To be “acceptable from a moral point of view”, the argument goes, a decision-making procedure or institution must be ‘likely, by and large, to produce

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<sup>72</sup> Kavanagh, ‘Participation and Judicial Review’ (fn18) 460.

<sup>73</sup> Kavanagh, ‘Democratic Scepticism’ (fn71) 125.

<sup>74</sup> *ibid*, 121.

<sup>75</sup> Kavanagh, ‘Participation and Judicial Review’ (fn18) 460.

<sup>76</sup> J Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 202.

<sup>77</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (OUP 1996) 34.

<sup>78</sup> J Raz, ‘Disagreement in Politics’ (1998) 43 *American Journal of Jurisprudence* 25, 45. See also L Alexander, ‘Is Judicial Review Democratic? A Comment on Harel’ (2003) 22 *Law and Philosophy* 277, 283 (‘Governmental institutions...are justified solely by the consequences they produce, including the consequences for rights violations’).

<sup>79</sup> Kavanagh, ‘Participation and Judicial Review’ (fn18) 458.

<sup>80</sup> *ibid*, 460.

<sup>81</sup> *ibid*.

<sup>82</sup> *ibid*, 461.

<sup>83</sup> *ibid*, 462.

morally right decisions'.<sup>84</sup> Regarding the importance of the decisions at stake, Kavanagh also argues that the 'moral quality of political decisions is sufficiently important to establish the instrumentalist condition' of good government.<sup>85</sup> The nature of many decisions is such that they 'inevitably affect the moral quality of our lives and institutions'.<sup>86</sup> Thus, an institution can only have the 'authority to make those decisions if they can generally make them well'.<sup>87</sup> By making a decision "well", Kavanagh means, as with "acceptable from a moral point of view", and as with decisions leading to "good government", reaching a 'morally correct' outcome.<sup>88</sup> Thus it is on these grounds that Kavanagh concludes that a decision-making procedure and institution is 'acceptable only insofar as it is designed to reach morally correct decisions'; if it is not likely to reach such decisions, it 'cannot be justified and should not be adopted'.<sup>89</sup>

### **3.4.2. Waldron - Rejecting the Instrumentalist Approach in Practice**

In the course of discussing instrumentalist responses to 'the problem of disagreement and authority' over rights, in a section of *Law and Disagreement* entitled 'The Trouble With Rights-Instrumentalism', Waldron begins by praising the idea behind such approaches.<sup>90</sup> Waldron stresses that he 'do[es] not want to deny that this [the instrumentalist approach] is an honourable approach'.<sup>91</sup> It is "honourable" for the reason that it takes the possibility of reaching the 'wrong answer' to questions of rights 'very seriously'.<sup>92</sup> Reaching 'wrong answers...on matters of principle' (by which Waldron means matters concerning the 'content and distribution of individuals' rights')<sup>93</sup> will mean that rights are 'violated'.<sup>94</sup> Thus, according to Waldron, the instrumentalist approach is admirable in seeking to avoid such harm altogether, or 'at least to minimize it'.<sup>95</sup> Praising the goal of seeking to avoid the harm of reaching "wrong decisions" in relation to rights accords with the justification for instrumentalism noted above; that the nature of the issues involved in decisions over rights are such that they have the potential to greatly affect our lives and that the moral quality of these decisions is therefore of great importance. Waldron puts a similar point more explicitly in a

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> Waldron, *Law and Disagreement* (fn3) 252.

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*, 243.

<sup>94</sup> *ibid.*, 252.

<sup>95</sup> *ibid.*

later article when we writes that '[b]ecause rights are important, it is likewise important that we get them right' and we must therefore 'take outcome-related' justifications put forward in the constitutionalist debate 'very seriously indeed.'<sup>96</sup> Thus, with this praising of the goal of instrumentalist approaches, Waldron seems to accept the justifications for the instrumentalist condition given by those advocating such an approach set out in the previous section. However, while initially praising the instrumentalist approach in theory, and accepting much of the ground on which it is justified by those putting it forward, Waldron goes on to object to its use in practice on several grounds.

### **3.4.2.1. Direct Instrumentalism as Question-Begging**

The first is that the instrumentalist approach 'seems to face the difficulty that it presupposes our possession of the truth in designing an authoritative procedure whose point it is to settle that very issue.'<sup>97</sup> Waldron gives the example of two competing views on the right to socio-economic assistance. According to Waldron, someone holding that individuals do have such a right and that it 'imposes limits on property rights', will 'probably respond differently' to the task of designing a set of procedures 'most likely to yield the truth about rights' than someone who believes the opposite.<sup>98</sup> Waldron further suggests that such substantive disagreements over rights 'explain most of the differences' in proposals for constitutional-design even 'among rights-instrumentalists.'<sup>99</sup> Following these points, Waldron concludes that 'there seems, then, something question-begging with using rights-instrumentalism' to design political procedures 'among people who disagree' on issues of rights and their implementation.<sup>100</sup> This first argument against an instrumentalist approach can be divided into two claims. The first is that it 'presupposes our possession of the truth' about rights and the moral issues involved.<sup>101</sup> The second is that the 'point' of an 'authoritative procedure...is to settle that very issue' and it is therefore 'question-begging' to adopt the instrumentalist approach in the context of disagreement.<sup>102</sup> Both claims will now be assessed in detail, along with responses of criticised instrumentalists, in order to consider how convincing Waldron's dismissal of instrumentalism is (without an anti-realist underpinning).

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<sup>96</sup> Waldron, 'Core of the Case' (fn18) 1373.

<sup>97</sup> Waldron, *Law and Disagreement* (fn3) 253.

<sup>98</sup> *ibid.* See also Waldron, 'Moral Truth' (fn2) 86.

<sup>99</sup> Waldron, *Law and Disagreement* (fn3) 253.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

a) *Claim 1 – The Instrumentalist Approach “Presupposes Our Possession of the Truth About Rights”*

Putting the instrumentalist approach into practice and assessing which decision-making institution and process is more likely to reach the “morally correct” or “best” decisions regarding rights is often presented as an empirical task. For example, Alexander states that ‘the question of who is better in the long run in protecting the rights we possess...is an empirical one, to be settled by the way the world is’,<sup>103</sup> while Kavanagh suggests that the ‘justification for judicial review must depend ultimately on empirical assumptions about the likelihood that courts will succeed’ in adequately protecting rights.<sup>104</sup> The word “empirical” suggests an approach which bases ‘conclusions on observation’ or ‘experience’.<sup>105</sup> Applied in the present context, the reference to an “empirical” approach thus suggests that the question of which institution is more likely to enhance rights protection and reach “morally correct” outcomes is one which can be answered from past experience. The records of various institutions are to be compared and an inference drawn as to which *is* more likely to reach the “correct results” from an inspection of which *has* more often reached the “correct results”.<sup>106</sup> This approach seems to be what Kavanagh has in mind when she writes that the ‘judicial record in upholding rights matters a great deal’ when assessing the justification for constitutional review.<sup>107</sup>

This method of putting the instrumentalist approach into practice does indeed require a standard of what the “morally correct result” is, or what it means to successfully “uphold rights”, regarding the decisions found in the past record of whichever institution is being assessed. Without such a standard it can be asked how one would know whether or not that institution has, in fact, reached the correct or best outcome in the decisions made. Given that this empirical approach relies on an assessment of how often competing institutions have or have not reached the desired results in the past as a basis for predicting how likely they are to reach the desired results in the future, not being able to identify which decisions are to count for or against each institution would be fatal to this approach. It is therefore argued that, insofar as instrumentalists rely on this empirical approach to make claims about which institution is more likely to reach the morally correct results on issues of rights, the first claim of Waldron’s argument against rights-instrumentalism – that it presupposes

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<sup>103</sup> Alexander, ‘Is Judicial Review Undemocratic?’ (fn78) 279.

<sup>104</sup> Kavanagh, ‘Democratic Scepticism’ (fn71) 104.

<sup>105</sup> L Esptein and G King, ‘The Rules of Inference’ (2002) 69 University of Chicago Law Review 1, 2.

<sup>106</sup> T Campbell, ‘Human Rights: A Culture of Controversy’ (1999) 26(1) Journal of Law and Society 6, 13-14.

<sup>107</sup> Kavanagh, ‘Democratic Scepticism’ (fn71) 118.

our possession of the truth about rights – can be accepted. Without a substantive standard of moral truth or superiority to use as a benchmark in assessing the past record of competing institutions, this empirical approach is practically unworkable.

b) *Claim 2 – The Point of an Authoritative Decision-Making Procedure is to “Settle That Very Issue”, Rendering the Instrumental Approach “Question-Begging”*

The second claim which can be drawn from Waldron’s first argument against the use of instrumentalist approaches – those which argue that decision-making authority should be given to the institution and procedure most likely to reach the “morally correct” or “superior” outcomes - in practice is that the point of an authoritative decision-making procedure in society ‘is to settle that very issue’, so that this approach is ‘question-begging’.<sup>108</sup> In order to assess this part of Waldron’s argument, precisely what is meant by “that very issue” which Waldron sees the point of a decision-making procedure in society as being to resolve must first be clarified. This claim that the purpose of an authoritative decision-making procedure is to “settle that very issue” immediately follows the first claim of Waldron’s argument; that instrumentalism “presupposes our possession of the truth”. Thus, the issue that Waldron sees the point of a decision-making authority as being “to settle” seems to be “the truth” and our possession of it about rights. However, this could be taken in a number of ways. It could suggest that the point of an authoritative procedure is to “decide what the truth *is*” (and who possesses it) in relation to rights and the moral issues involved, or it could be taken to mean that the point of an authoritative procedure is to “settle what (or whose) version of the truth is to be *taken and enforced* in society”.

Reading this claim alongside some of Waldron’s earlier comments regarding truth and political procedures in this chapter of *Law and Disagreement* (Chapter 11), it seems clear that Waldron intended his claim to be interpreted in the second way just offered. Waldron writes that ‘the political process cannot affect...the truth about that issue [of what rights we have or ought to have]’.<sup>109</sup> This assertion regards the “truth” of the matter about rights, and the political process of making and enforcing decisions about rights, as separate; the truth is not dependent on the outcome of the political process. If “the truth” and the outcomes of the political process are separate, it would not make sense to claim that the point of a political procedure is to determine what the truth *is*, because that would treat “the truth” as *dependent* on the political decision-making process. Furthermore, Waldron follows this comment with the claim that, because people disagree and ‘hold different views about rights and *since we need to settle upon and enforce a common view*

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<sup>108</sup> Waldron, *Law and Disagreement* (fn3) 253.

<sup>109</sup> *ibid*, 243.

about this', there is a need to set up an authority in society.<sup>110</sup> The words emphasised here suggest that we need to enforce a common view on rights in a society in which people disagree and that *therefore* there is also a need for an authoritative institution to make the decision as to what that view should be. The purpose of an authority is to fulfil this need to enforce a common view on rights, and the 'need for us to act in concert' and 'co-ordinate our behaviour' in the face of disagreement.<sup>111</sup> This is in line with the second interpretation offered of Waldron's argument above – that the "point" of an authoritative procedure is to settle the issue of what (or whose) version of "the truth" about rights is to be enforced in society in preference to competing views, rather than to determine what the truth *is*. Thus, on this interpretation, Waldron's first argument against instrumentalism is that it is question-begging to take and use a standard to guide the choice, design and justification of an institution whose very purpose it is to decide what standard should be taken and enforced in society; the outcome it is the point of an authority to choose is supposed from the start.

However, for the instrumentalist who holds that there are objectively right and wrong answers to issues of disagreement, this argument can be rejected as misguided in that it does not attach sufficient importance to the dangers of getting matters wrong (and therefore to the importance of getting matters right) when describing the purpose of a procedure. For example, while acknowledging Waldron's point that there is widespread disagreement in society on issues of rights and morality, Fabre argues that, 'if one allows for the possibility that someone may be wrong' and others right on these issues, then 'why not argue that in so far as he [or she] is wrong', their views on these issues 'should not prevail?'<sup>112</sup> On the same logic, why not hold that insofar as someone is right on these issues, their views should prevail over those whose are wrong? One can agree with Waldron (as Fabre does) that there is a need to settle on a particular view to be enforced in society, but while '[a]ny settlement is better than none', it does not necessarily follow that any settlement is *acceptable*.<sup>113</sup> For Fabre, it is of vital importance that the settlement is also 'one which can be said to constitute a *just* position.'<sup>114</sup> In fact, as was seen earlier while setting out the justifications given to support an instrumentalist approach, the key goal of these approaches is to reach the *morally correct* outcomes to issues of rights, rather than simply to reach *an* outcome. This was seen to be due partly to the importance of the issues at stake, and partly due to the fact that these decisions are taken to have a "moral content", meaning that they can be judged (objectively) "better" or

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<sup>110</sup> *ibid*, 243-244 [emphasis added].

<sup>111</sup> *ibid*, 7.

<sup>112</sup> C Fabre, 'The Dignity of Rights' (2000) 20(2) OJLS 271, 273.

<sup>113</sup> *ibid*, 274.

<sup>114</sup> *ibid*, 273.

“worse”, “right” or “wrong”, *independently* of the procedure used to reach them (**section 3.4.1**). In light of these justifications, Waldron is open to the argument that he attaches too much importance to the problem of controversy, and not enough to the need to make “correct” and “just” decisions. Furthermore, it could be suggested that this prioritising of morally correct and just outcomes is the logical result of the importance Waldron *himself* seems to attach to the substantive quality of decisions on rights. Waldron seems to accept this importance when he writes that, for example, ‘[b]ecause rights are important, it is likewise *important that we get them right*’,<sup>115</sup> and when he praises as ‘honourable’ the approach which takes the possibility reaching the ‘wrong answers’ on these matters, and hence violating rights, ‘very seriously’.<sup>116</sup>

Due to the controversial and morally-charged nature of the issues involved in questions of rights and principle, it is likely to be the case, as Waldron points out, that a particular view and outcome is regarded as “correct” or “just” by some, yet “incorrect” or “unjust” by others.<sup>117</sup> It is thus also likely to be the case that taking up a view in the process of choosing and justifying an institution to make the decision about what view is to be enforced in society – effectively presupposing that decision from the start - will be *seen* as question-begging *to those who disagree* and think another view should be taken and enforced. But, given the importance of the issues at stake and their potential to affect the quality of our lives and of society in general, and assuming the existence of “moral truths”, it could be argued (as Fabre does) that in such circumstances ‘one has to bite the bullet, and stand, in the face of others’ disagreeing with us, for what is just.’<sup>118</sup> In line with the goal of instrumental approaches – “morally correct” and “just” outcomes – an instrumentalist accepting the existence of “moral truths” regarding issues of rights is open to reply to Waldron that, as Alexander puts it, ‘respect cannot be demanded for erroneous moral judgments in the form of acceding to them.’<sup>119</sup> Some, maybe many, will disagree on controversial matters but, to those who accept the existence of “moral truths”, ‘[t]hose judgments may be wrong, in which case respecting them may entail allowing those whose judgments they are to impose immoral constraints...on other people.’<sup>120</sup> Effectively, the reply here is that “truth” and “justice” should not be held to ransom by those who disagree, or dropped as the primary goal of decision-making just because there will be those who disagree. Yet this is what Waldron’s argument regarding the question-begging nature of instrumentalism, to the realist instrumentalist at least, seems to amount to.

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<sup>115</sup> Waldron, ‘Core of the Case’ (fn18) 1373 [emphasis added].

<sup>116</sup> Waldron, *Law and Disagreement* (fn3) 252. See further, above, **section 3.4.2**.

<sup>117</sup> Waldron, ‘Freeman’s Defense’ (fn63) 36.

<sup>118</sup> Fabre, ‘Dignity of Rights’ (fn112) 282.

<sup>119</sup> Alexander, ‘Is Judicial Review Democratic?’ (fn78) 281.

<sup>120</sup> *ibid.*

It might also be added that standing for what is “just” or “morally correct” regarding issues of rights in the face of those who disagree, and enforcing these controversial standards in society on those who disagree, is an unavoidable side-effect of the task of co-ordinating behaviour in a society full of disagreement. As Waldron himself points out in introducing *Law and Disagreement*, given that law operates to order our ‘actions and interactions in circumstances in which we disagree...about how [they] should be ordered’, it should be of no surprise to find that it sometimes does so in a way which is ‘at odds with the sense of justice of some or many of those who are under its authority.’<sup>121</sup> It is ‘more or less bound to happen’ that the law being enforced will, at times, ‘conflict with the firm and conscientious moral convictions of the individual citizen.’<sup>122</sup> As well as being in line with what is an unavoidable side-effect of law operating as an authority in a society full of disagreement on controversial issues, it could be suggested that enforcing controversial (but “right”) standards on those who disagree is a *necessary and beneficial* task, not just because the substantive issues involved are of great importance, but for more general reasons given by Waldron to justify the authority of law in society. As Waldron himself argues, ‘[t]he authority of law rests on the fact that there is a recognizable need for us...to co-ordinate our behaviour in various areas with reference to a common framework’, a need which Waldron stresses is ‘not obviated by the fact that we disagree’ about what standards and framework we should be held to.<sup>123</sup> Thus, acting in the face of disagreement according to “correct” (again, assuming realism for the time-being), but undoubtedly controversial, standards and principles in the course of choosing decision-making institutions to make decisions to be enforced even against those who disagree could be argued to fall within what Waldron himself appears to see as an unavoidable side-effect of the necessary and beneficial situation of living under an authority such as law.<sup>124</sup>

In short, what the above arguments amount to is the claim that, if one is to take the dangers of getting decisions regarding rights “wrong”, to use Waldron’s words, “very seriously”, then one must treat avoiding this outcome as of *fundamental* importance when choosing and justifying a decision-making institution that is to settle the issue of what outcomes are to be enforced in society. Begging the question from the perspective of those who disagree about what rights involve, or should involve (but could be wrong to so disagree), should not be an issue if one is taking the moral quality

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<sup>121</sup> Waldron, *Law and Disagreement* (fn3) 7.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

<sup>124</sup> For a further example of Waldron’s Hobbes-style suggestion that living under an authority is inherently beneficial see Waldron, ‘Freeman’s Defense’ (fn63) 34 (‘for a variety of reasons we want it to be the case that eventually just one view prevails on a matter of dispute about rights. We don’t want the conflict, the lack of coordination, or the collective deadlock that results from intractable substantive disagreement’). See also T Hobbes, *Leviathan* (Richard Tuck edn, CUP 1996) (Chapter XIII – “Of the Naturall Condition of Mankind, as concerning their Felicity, and misery” – especially 88, on the dangers of living ‘without a common Power’).

of the decisions to be enforced in society sufficiently seriously. Furthermore, begging the question against those who disagree (but could be wrong to so disagree) on issues of rights and morality should not be an issue if one is also taking the need to co-ordinate conduct in society according to some standard – a need unaffected by the fact of disagreement – sufficiently seriously. Troublingly for Waldron, these considerations are ones which he himself has raised as important. Thus, there seems to be an arguable reply to Waldron’s criticisms of instrumentalism, relying on logic and ideas Waldron himself accepts.

However, the above reply to Waldron, to be convincing, also relies on a realist and foundationalist underpinning; on the idea that there exists independent, objective, standards of “moral truth”, “wrongness”, “rightness” or “justice”. The general idea of the reply is that disagreement should not distract us from what should be the goal of decision-making where rights are involved – the “moral truth” or “morally correct” outcomes. If one is taking this goal of getting matters “right” and the dangers of getting them “wrong” sufficiently seriously, the argument goes, begging the question against those who may disagree should not be an issue. This clearly relies on there *actually being* identifiable “morally correct” outcomes or “moral truths” which decision-making institutions can be seen as aiming for, which they can be assessed according to, and which can be prioritised over not begging the question against those who disagree. That this response relies on such realist assumptions becomes even clearer by reconsidering some of the specific arguments used in putting forward the reply to Waldron. For example, as noted above, Fabre’s criticism was that, ‘*if one allows for the possibility that someone may be wrong*’ and others right on these issues, then ‘why not argue that in so far as he [or she] is wrong’, their views on these issues ‘should not prevail?’<sup>125</sup> If one accepts *the possibility that someone may be wrong*, Fabre argues, ‘one has to bite the bullet, and stand, in the face of others’ disagreeing with us, for what *is* just.’<sup>126</sup> Similarly Alexander’s point was that ‘respect cannot be demanded for *erroneous moral judgments* in the form of acceding to them’ as respecting erroneous judgements ‘may entail allowing those whose judgments they are to impose *immoral constraints...on other people.*’<sup>127</sup> If one takes an anti-realist perspective such as that defended in **Chapter 2**, dropping concepts of “moral truth”, and the idea that something “*is* (rather than that someone thinks it is) just” or “morally right”, then either no sense can be made of the ideas emphasised in the quotes directly above, and in their argument that “moral correctness” should be taken as the fundamental goal of decision-making institutions, or what sense can be made leaves the problem of begging the question Waldron raised untouched and unanswered.

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<sup>125</sup> Fabre, ‘Dignity of Rights’ (fn112) 273 [emphasis added].

<sup>126</sup> *ibid*, 282 [emphasis added].

<sup>127</sup> Alexander, ‘Is Judicial Review Democratic?’ (fn78) 281 [emphases added].

No sense can be made of the response relying on the importance of getting decisions “morally correct” and treating these standards as the goal of decision-making if this is taken to mean “morally correct independently of what a particular individual or group sees as justified”. The very idea of such independent standards of moral correctness was discarded on pragmatic anti-realist grounds in **Chapter 2**. That leaves the reply to Waldron’s criticism of begging the question by presupposing a particular standard of moral truth in designing an institution whose point it is to choose the standards to be taken and enforced in society as only making sense if it is taken to mean that disagreement should not get in the way of reaching outcomes which are “morally correct” *according to what a particular individual or group* regards as such. However, another consequence of the perspective defended in **Chapter 2** is that there are no means of showing any particular moral standard to be “correct” in a way which does not rely on the question-begging assertions and reassertions of particular individuals or groups; there are only particular standards of moral correctness or moral truth, and the fact that particular individuals or groups consider them justified. The result is that competing standards of moral correctness, each ultimately grounded in nothing more than mere assertion and reassertion, and each unable to answer the sceptical “sez who?” critique (see **Chapter 2**, especially **section 2.2**) are equally eligible to be taken in society. Thus, relying on the idea that disagreement over what these standards of moral truth are (or should be) should not get in the way of enforcing these contested standards simply reproduces the problem raised by Waldron. Relying on such standards in practice begs the question against those who see *their own* standards as justified. Relying on such standards in choosing an institution to make decisions and co-ordinate action in society begs the question of *why these particular* standards should be treated as the goal of decision-making in this area in preference to the standards of others which, after all, turn out to be equally *(in)eligible* for this purpose. Thus, once the realist and foundationalist assumptions underlying the responses to Waldron’s criticism of direct instrumentalism are rejected, those responses can be seen to simply reproduce the problem of begging the question which formed the basis of that criticism in the first place. As a result, it is argued that the consequence of anti-realism and challenging the objectivity of moral judgements in this context is that Waldron’s criticism that direct instrumentalism is inherently question-begging remains unanswered, and is more convincing for it. Thus, the relevance of anti-realism here is that it makes Waldron’s first anti-instrumentalist case more convincing against the realism-grounded replies of criticised instrumentalists.

### 3.4.2.2. Indirect Instrumentalism as Controversial

Waldron's second argument against the instrumentalist approach in practice is directed against what he calls 'a more modest rights-instrumentalism'.<sup>128</sup> This approach holds that a decision-making institution should be chosen according to which is 'most likely to get at the truth about rights, *whatever* that truth turns out to be.'<sup>129</sup> Unlike the approach criticised in the previous section, this approach does not rely on a controversial standard of what the "moral truth" is or requires regarding issues of rights and morality to assess the capabilities of competing decision-making institutions to reach the "morally correct decisions". This indirect approach could therefore serve as another response to Waldron's first criticism that the instrumentalist approach presupposes our possession of the truth in a question-begging way. In fact, this is how the indirect approach has been presented in the constitutionalist debate. For example, responding to Waldron's first criticism, Kavanagh claims that 'we do not need a precise account of what rights we have and how they should be interpreted in order to make some instrumentalist claims.'<sup>130</sup> Some instrumentalist claims, she argues, can be based on 'general institutional considerations about the way in which legislatures make decisions in comparison to judges', including 'factors which influence their decision'.<sup>131</sup> Similarly, Raz responds to Waldron by arguing that conclusions on how likely it is that a decision-making institution will adequately respect rights can be justified by 'a whole variety of reasons...even absent knowledge of the content of the right.'<sup>132</sup>

An example of such a reason often relied on is the influence of public opinion on the decision-maker. Elected politicians, such as those in a legislature, are said to be subject to 'direct political pressure' in that their office is 'dependent on popular support' – they can be removed if the public does not support the way they have acted on key issues and lose confidence.<sup>133</sup> Kavanagh's concern is that this 'popular accountability...generates a risk that a popular decision will be chosen, even if is not the right decision.'<sup>134</sup> Judges, in contrast, 'are not elected by the people' and thus neither need 'popular support' to take office nor to remain in office.<sup>135</sup> It is therefore 'easier for judges to withstand popular pressure...and to make the right decision in the face of widespread public opposition' than it is for elected politicians,<sup>136</sup> because, unlike such politicians, their careers do not

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<sup>128</sup> Waldron, *Law and Disagreement* (fn3) 253.

<sup>129</sup> *ibid.*

<sup>130</sup> Kavanagh, 'Participation and Judicial Review' (fn18) 466.

<sup>131</sup> *ibid.*

<sup>132</sup> Raz, 'Disagreement in Politics' (fn78) 46.

<sup>133</sup> A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009) 345.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*

<sup>136</sup> *ibid.*, 347.

'lie in the balance if they thwart the will of their constituents.'<sup>137</sup> The same point is made by Raz when he points out, as one of the considerations possibly in favour of judicial-decision making on rights-issues, that 'there are ample reasons to suspect that members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have.'<sup>138</sup> Raz suggests that this makes it less likely that 'the correct content of rights' will be 'revealed' or 'discover[ed]'.<sup>139</sup> Other examples of institutional factors which are argued to make it less likely that the "correct" results will be reached include bias and self-interest on the part of those directly affected by their decision. For example, according to Waluchow, 'we can know...that decisions made by individuals whose interests are not directly at stake...are likely to be better than if such decisions were left in the hands of individuals whose interests are directly at stake.'<sup>140</sup>

Waldron's response to such indirect instrumentalist approaches is that 'it is almost as difficult to defend an impartial account' of what this approach requires 'as it is to find a non-question-begging version of direct instrumentalism.'<sup>141</sup> The reason for this difficulty, according to Waldron, is that 'we are not in possession of any uncontroversial moral epistemology' in a society full of moral disagreement.<sup>142</sup> Disagreement is so widespread that even 'professional epistemologists' do not have 'the sort of consensus about *paths* to moral truth that would be required for a non-question-begging instrumental defence' of procedures to be used 'among those who disagree'.<sup>143</sup> Again, as it was in criticising the more direct instrumentalist approaches discussed above (**section 3.4.2.1**) Waldron's point is that what factors make reaching "moral truth" more or less likely is a controversial matter subject to widespread disagreement – and that relying on a particular view in designing and justifying decision-making institutions is therefore question-begging. The immediate response, and again as it was in relation to Waldron's criticism of direct instrumentalism, is that controversy does not affect the "truth of the matter", nor the importance of getting issues over rights and morality "right" even in the face of disagreement because of the dangers of getting them "wrong". This argument is used by Raz to dismiss Waldron's point that epistemology is controversial

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<sup>137</sup> WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007) 163.

<sup>138</sup> Raz, 'Disagreement in Politics' (fn78) 46. As another example of an instrumentalist argument based on the influence of public opinion see MJ Perry, *The Constitution, The Courts, and Human Rights* (Yale University Press 1982) 102 ('As a matter of comparative institutional competence, the politically insulated...judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions').

<sup>139</sup> Raz, 'Disagreement in Politics' (fn78) 46.

<sup>140</sup> Waluchow (fn137) 251. See also *ibid.*

<sup>141</sup> Waldron, *Law and Disagreement* (fn3) 254.

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.*

as ‘irrelevant.’<sup>144</sup> Raz argues that the fact that ‘sound moral epistemology is controversial does not mean that we cannot know what it requires.’<sup>145</sup> For Raz, this fact only leads to the conclusion ‘that avoiding controversy is not a goal to be pursued.’<sup>146</sup> Thus, Waldron is again open to the accusation of letting controversy and disagreement get in the way of what, given the importance of decisions where rights are at stake, should be the primary goal – moral truth – and what should, in order to approach this goal, be taken as an indispensable tool in this task – sound epistemology, the requirements of which is something that, according to those making this response, it is possible to “know”, even in the face of disagreement.

However, as with the reply to Waldron’s criticism of direct instrumentalism discussed above, this response relies on the assumption that there is actually a “moral truth” to be pursued via an epistemology. Again, the consequence of the anti-realist perspective defended in **Chapter 2** is that the very idea of an independent identifiable “moral truth” is discarded. Thus if what Raz calls “sound” epistemology is supposed to be a tool to facilitate knowledge of what this independent, objective, “moral truth” requires, then it is flawed from the start. The anti-realist and anti-foundationalist perspective defended in **Chapter 2** also concluded that there is no moral assertion which can be defended against competing assertions supported by others in a non-question-begging and convincing way. Thus, if “sound” epistemology is supposed to be a tool to convincingly decide between competing subjective (as in dependent on the values and preferences of an individual) standards of “moral correctness”, then it would be presented as a tool to reach what the anti-realist and anti-foundationalist denies can be reached; a non-question-begging defense of a moral assertion which can successfully withstand the sceptical “sez who?” critique. As a result, Waldron’s rejection of indirect instrumentalist approaches is supported here. But while Waldron’s point is that what makes “moral truth” more likely – what “sound epistemology” requires - is a controversial matter subject to widespread disagreement, the argument here is that the *very idea* of a “sound epistemology” is misguided.

### **3.4.3. An Anti-Realist Rejection of Instrumentalist Approaches in Theory**

The argument presented in this section so far has defended Waldron’s conclusion regarding instrumentalist approaches in practice – that they can be dismissed as question-begging – against the replies of the criticised instrumentalists explicitly via the anti-realist and anti-foundationalist

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<sup>144</sup> Raz, ‘Disagreement in Politics’ (fn78) 47.

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

perspective taken in this thesis. However, while, as noted above (**section 3.4.2**), Waldron appears to accept the idea of, and much of the justification for, the instrumentalist approach in theory and seems to merely object to its use in practice, the consequence of the philosophical perspective defended here is that the very idea and justification of the instrumentalist approach is misguided. The idea of the instrumentalist approach is that authority and decision-making is justified only to the extent that it is likely to reach the “morally correct” outcomes regarding rights, or make decisions according to “right reason” (see above, **section 3.4.1**). The justification for the relevance of this instrumentalist condition was seen to be that, as Kavanagh puts it, “[s]ome political decisions involve a choice between states of affairs or actions which *are morally right or wrong, better or worse, independently of what people prefer.*”<sup>147</sup>

However, once this idea that there exist standards of “moral truth”, “moral rightness” or “moral superiority” independent of what particular individuals or groups prefer or declare them to be is set aside (as argued for in **Chapter 2**), then this justification, relying on those ideas, is fundamentally flawed. Contrary to Kavanagh, political decisions *cannot* be said to involve a choice between what is independently “right or wrong”, “better or worse” in a moral sense. This renders the instrumentalist approach advocating the decision-making institution most likely to make the morally “right” or “better” choice, and avoid the morally “wrong” or “worse” choice, irrelevant to decision-making over rights. Moreover, as well as rejecting the purported *relevance* of the instrumentalist condition to decision-making over rights and the moral issues involved, challenging the idea of independent standards of “moral truth”, and objectively defensible assertions of what it requires, has the consequence of rendering the instrumentalist condition meaningless. If the idea of a “morally” correct decision is dropped, then the instrumentalist approach loses its goal, and the instrumentalist condition - based on the primacy of this goal in decision-making - cannot even be stated. In fact, Kavanagh acknowledges this very point in the course of her defence of instrumentalism. Kavanagh notes that a potential objection to the instrumentalist idea that “[t]he [institutional] design most likely to yield morally right decisions, or is likely to yield the most morally right decisions, is most justified”<sup>148</sup> would be to hold that ‘there is no such thing as a “morally right” and “morally wrong” decision’, and accepts that such an objection (if made out) would render her statement of the instrumentalist condition ‘meaningless.’<sup>149</sup> Kavanagh does not defend herself against such an objection, but simply ‘assume[s] that there is such a thing as a morally right and wrong decision’, because this issue ‘is not’, as she sees it, ‘in contention with Waldron’ (whose arguments she was

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<sup>147</sup> Kavanagh, ‘Participation and Judicial Review’ (fn18) 460 [emphasis added].

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*, 460, n30.

considering in that article).<sup>150</sup> However, whether in contention with Waldron or not, this issue *is* in contention in this thesis, and thus the objection Kavanagh notes would render the instrumentalist approach “meaningless” *is* made here, based on the arguments of **Chapter 2**. Thus, as well as making Waldron’s criticisms of instrumentalist approaches to the constitutionalist debate *in practice* more convincing, even in the face of the replies made by instrumentalists, the consequence of the anti-realist perspective taken and defended here is that Waldron’s critique of instrumentalism *does not go far enough* in failing to reject the very idea and justification of the instrumentalist approach even in *theory*. The relevance of the rejection of realist theories and ideas via an anti-realist perspective such as that defended in **Chapter 2** is that instrumentalist approaches to the issue of decision-making authority in a constitution are misguided in both practice *and* theory.

### **3.5. Waldron’s “Right of Rights” and the Relevance of (Anti) Realism and (Non) Objectivity**

Having considered, at some length, Waldron’s negative arguments against the relevance of realism/anti-realism and objectivity to the arbitrariness of judicial-decision making on moral issues such as rights, and against instrumentalist approaches to authority and constitutionalism, this chapter will now consider his more positive contribution to the constitutionalist debate. This is the argument that decision-making over issues of rights should properly be left to majoritarian elected institutions such as Parliament, deciding on a basis of equality, because this more adequately respects the rights of citizens to participate in decision-making on an equal basis – what Waldron calls “the right of rights”<sup>151</sup> – than limiting these decisions to a narrow judicial elite through the institution of judicial review.<sup>152</sup> This forms the basis of Waldron’s more direct argument against the institution of judicial review, and in favour of the institution of elected majoritarian decision-making in society where issues of rights and morality are involved. Given the implications of this argument for the constitutionalist debate, and given the attention paid to some of Waldron’s other contributions here, it is one which it would be peculiar not to discuss in this thesis on the constitutionalist debate, and in the present discussion of Waldron. The discussion of Waldron’s “right of rights” argument will, however, be relatively brief. This is because, it is argued, from the anti-realist and anti-foundationalist perspective taken here, that Waldron’s “right of rights” argument can be quickly dismissed as fundamentally flawed; it relies on moral premises which, from this perspective, are incapable of a convincing, non-question-begging defence.

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<sup>150</sup> *ibid.* For evidence supporting Kavanagh’s claim that Waldron accepts the idea that moral decisions can be “right” or “wrong” independently of what people prefer, but also evidence against it, see above **section 3.3.1**.

<sup>151</sup> See Waldron, *Law and Disagreement* (fn3) Ch11 (232-254).

<sup>152</sup> *ibid.*, 213.

### 3.5.1. Establishing Participation as the “Right of Rights” – The Argument From Dignity and Autonomy

Waldron’s argument for participation as the “right of rights” draws on the attitude which Waldron claims is expressed towards right-bearers in the very justification of their having rights. Waldron argues that ‘the idea of rights is based on a view of the human individual as essentially a thinking agent’, with an ‘ability to deliberate morally’ and ‘transcend a preoccupation with his [or her] own particular or sectional interests.’<sup>153</sup> On this view, ‘any right’ is attributed in an ‘act of faith in the agency and capacity for moral thinking’ of the individual.<sup>154</sup> In short, each person is seen as a ‘potential moral agent, endowed with dignity and autonomy’.<sup>155</sup> The relevance of this in the decision-making context is that excluding individuals from decisions over rights and shifting such decisions from ‘representative institutions’ - such as legislatures - to the ‘courtroom’ and to a ‘handful of men and women...who, it is thought, can alone be trusted to take seriously the great issues that they raise’, is incompatible with this view of the right-bearer as a dignified and autonomous individual with the capacity to reason morally.<sup>156</sup> There is, Waldron argues, ‘something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard or too important to be left to the right-bearers themselves to determine, on a basis of equality.’<sup>157</sup> Even more strongly Waldron writes that viewing the individual as an autonomous and dignified moral agent is incompatible with the ‘insult, dishonour or denigration that is involved when one person’s views are treated as of less account than the views of others’ on matters that affect them too.<sup>158</sup> Yet such exclusion, Waldron’s argument goes, is the effect of denying individuals the right to equally participate, and, in the institutional context, is the effect of the institution of judicial rights-review of legislation of the elected institutions. In contrast, there is a ‘certain dignity in participation’ so that attributing a right to participate in decisions over rights, on equal terms, reflects the ‘respect’ owed to the individual as an ‘active, thinking being’ with moral capacity.<sup>159</sup> Thus, as Harel puts it, Waldron’s argument for the right to participate, from which his direct argument against judicial review as a breach of this right is made, amounts to the claim that ‘[p]olitical participation...is

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<sup>153</sup> *ibid*, 250.

<sup>154</sup> *ibid*.

<sup>155</sup> *ibid*, 223.

<sup>156</sup> *ibid*, 213.

<sup>157</sup> *ibid*, 252.

<sup>158</sup> *ibid*, 238.

<sup>159</sup> *ibid*, 251.

grounded in the dignity and respect we owe equally to all people' which also grounds the attribution of rights generally.<sup>160</sup>

### **3.5.2. Criticising Waldron's Right of Participation Argument**

Waldron's "right of rights" argument against judicial review, and in favour of elected legislatures making decisions over rights and the moral issues involved, has been criticised on a number of grounds. Kavanagh's response questions the supposed consequences of establishing a right to participate by arguing that, while participation is something that should be respected and regarded as important, it is not clear that it overrides the importance of the quality of decision-making over rights. For Kavanagh, it is not the case that "giving people a say"...is more important than the outcomes of [the] decision-making process.<sup>161</sup> Waldron's dismissal of instrumentalist arguments such as these has already been discussed above where it was argued that, without attacking the underlying realist and objectivist assumptions of instrumentalist approaches, that dismissal is highly questionable (**section 3.4.2**). However it was also argued, via an attack on those realist assumptions, that instrumentalist responses such as Kavanagh's are of little use (**section 3.4.3**). The criticism regarding the balance between participation and the instrumentalist condition is therefore not supported here, relying as it does on the misguided instrumentalist approach. Others have questioned the details of Waldron's characterisation of the basis on which rights are attributed and the image of the individual involved. For example, it has been suggested that, while rights may be based on an image of the person as a dignified and autonomous individual with the capacity for responsible moral reasoning, this is better stated as an attitude as to what individuals are *capable* of being, rather than what they in fact *are*. For Enoch, 'respect' is merited because of 'what, at our best, we can become', something which is 'perfectly consistent' with an attitude which pays attention to the dangers of individuals being, in fact, 'stupid, morally corrupt, almost bound to act wrongly' and 'dangerous'.<sup>162</sup> There is no contradiction in treating individuals as worthy of respect, and worthy of rights, because of 'what at our best we can be' while also holding that they should be 'distrusted because of what – the evidence shows – we are very likely to do', and on this basis taking measures to reduce these dangers.<sup>163</sup> However, while this criticism merely questions the *details* of

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<sup>160</sup> A Harel, 'Notes on Waldron's Law and Disagreement: Defending Judicial Review' (2006) 39(3) Israel LR 13, 17.

<sup>161</sup> Kavanagh, 'Participation and Judicial Review' (fn18) 453.

<sup>162</sup> D Enoch, 'Taking Disagreement Seriously: On Jeremy Waldron's Law and Disagreement' (2006) 39(3) Israel LR 22, 28.

<sup>163</sup> *ibid.* For this criticism, see also T Christiano, 'Waldron on Law and Disagreement' (2000) 19(4) Law and Philosophy 513, 536 and Harel (fn160) 19.

the dignity and respect for individuals on which Waldron grounds both his right of participation and rights generally, it is argued here that there is a more fundamental problem with Waldron's argument; his reliance on this (moral) premise that all individuals are dignified, autonomous and responsible moral agents and should be treated as such.

In the argument from respect for dignity and autonomy which Waldron uses to establish the right to participation he is effectively appealing to the dignity and autonomy of individuals as a foundation. Waldron also sees these ideas as grounding rights generally. In relying on such a foundation for his participation-right, from which this part of his attack on judicial review is developed, it must be one which can be convincingly defended. If the premise is weak, then so is the argument relying on the purported consequences of this premise. As a result, this aspect of Waldron's attack on judicial review and his positive argument in favour of entrusting decision-making over rights and the moral issues involved to the elected representative branches is only as strong as the defence of the premise that all individuals have such dignity and autonomy that ought to be respected.

The claim that individuals have an inherent dignity and moral capacity that ought to be respected is indeed, as Perry notes, often taken as fundamental to the very 'idea of human rights'.<sup>164</sup> For example, repeated references to these ideas can be found in many human rights instruments and declarations such as the Universal Declaration of Human Rights (which in its preamble refers to the 'recognition of the inherent dignity...of all members of the human family'),<sup>165</sup> or the International Covenant on Civil and Political Rights (which states in its preamble that the rights found there 'derive from the inherent dignity of the human person').<sup>166</sup> However, it is nonetheless a claim that needs defending, for as Perry also notes, 'not everyone...does agree that the well-being of all human beings...is of fundamental importance' and 'not everyone agrees that he or she owes every human being respect or concern.'<sup>167</sup> What can be said to such individuals who do simply disagree and question the very idea that all individuals have an inherent dignity and moral capacity that ought to be respected? What can be said to those who restrict this idea to a narrower class of individuals on the basis of particular characteristics they take to be relevant, instead of accepting the claim that one should 'extend the respect you feel for people like yourself to all featherless bipeds'?<sup>168</sup> To put it bluntly, what can be said to those who respond to Waldron's foundational premise regarding the

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<sup>164</sup> MJ Perry, *The Idea of Human Rights* (OUP 1998) 13.

<sup>165</sup> (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>166</sup> (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>167</sup> Perry, *Idea of Human Rights* (fn164) 36.

<sup>168</sup> R Rorty, 'Human Rights, Rationality, and Sentimentality' in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* 1993 (Basic Books 1993) 125.

dignity and respect owed to human individuals regardless of outcome, with the sceptical rejoinder “sez who”? (see **Chapter 2, section 2.2**)

Perry suggests that most defenders of the idea of human rights (himself included) – and the respect for dignity on which it is commonly based – turn out to believe that ‘the fundamental wrong’ when their idea of rights is violated is that ‘the very order of the world – the normative order of the world – is transgressed.’<sup>169</sup> However, claiming that the idea that all individuals have dignity and moral capacities that ought to be respected has such objective authority would fall squarely within Waldron’s own definition of realism; that there are ‘real properties’<sup>170</sup> or ‘moral facts which determine the truth or falsity of the judgments people make’ so that there can be said to be anything more than ‘moral judgements and the people who make them.’<sup>171</sup> As such, Waldron cannot appeal to such a defence – claiming to ground his claim in “the way things are”, “objective truth”, “intrinsic natures” or an independent ‘Ultimate Reality’<sup>172</sup> – if he is to remain neutral on the realist/anti-realist issue, in line with his earlier irrelevance case. Such a defence would also be incompatible with the tenor of that irrelevance case which, it was argued (in **section 3.3**), actually amounted to an implicit attack on realism itself. For example, an appeal to independent objective authority for his claim concerning the dignity of individuals would seem to go against his earlier claim that ‘realists...are quite unable to demonstrate the truth of their judgements or show how they correspond to moral reality’ and that they should therefore qualify their claims with the admission that it is “only [their] opinion”.<sup>173</sup> If one takes this earlier argument seriously, then Waldron must be “quite unable to demonstrate the truth” of the judgement *he* relies on concerning the dignity and respect owed to individuals. If, however, Waldron *were* to claim such objective authority for his premise regarding the dignity and respect owed to individuals then his argument would be subject to the criticisms made of realist approaches in the previous chapter, arguing against the very ideas of “objective reality” or “the way things are”. Thus, from the anti-realist perspective taken and defended in this thesis, Waldron’s argument from participation as the right of rights, would, as well as being inconsistent with his earlier arguments concerning realist claims made when setting out his irrelevance case, be reliant on the misguided realist approach, and therefore dismissible as itself misguided.

The alternative is that Waldron is relying on a view as to the dignity and respect owed to individuals which cannot be said to amount to anything more than his own subjective view, in which case the

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<sup>169</sup> Perry, *Idea of Human Rights* (fn164) 38.

<sup>170</sup> Waldron, *Law and Disagreement* (fn3) 171.

<sup>171</sup> *ibid*, 165.

<sup>172</sup> Perry, *Idea of Human Rights* (fn164) 13.

<sup>173</sup> Waldron, *Law and Disagreement* (fn3) 180.

“sez who?” critique - challenging his authority in making such claims – remains unanswered. In fact, it was the argument of the previous chapter, after considering attempts to overcome this critique – particularly Gewirth’s influential argument from dialectical necessity – that moral claims *cannot* be shown to amount to anything more than the questionable assertion and reassertion of those claims. It is suggested that Waldron’s premise regarding the dignity and respect owed to individuals – as a moral and normative claim – is no different. Waldron’s appeal to dignity and respect is indefensible through anything more convincing than the assertion and reassertion of that claim and Waldron’s agreement with it. This begs the question, “why *this* claim” – why should this moral claim, and its consequences for the constitutionalist debate be taken in preference to the competing claims of those who disagree, which turn out to be equally (in)eligible in that they too can be defended through mere assertion and reassertion? From the anti-realist and anti-foundationalist perspective defended earlier, therefore, Waldron’s premise seems to be, to use a Waldronian term, arbitrary. Given that his “right of rights” argument relies on this indefensible and arbitrary premise – that individuals have rights because of the respect for dignity and autonomy they are owed, and therefore they have the “right of rights” on this same basis – that argument for participation as the fundamental right is itself indefensible and unconvincing. Thus, it is argued here that the consequence of the anti-realist and anti-foundationalist perspective is that Waldron’s positive argument in favour of his participatory “right of rights” – which forms this part of his case against judicial review and in favour of elected-majoritarian decision-making – is an unconvincing and questionable solution to the constitutionalist debate.

### **3.6. Conclusion**

The purpose of this chapter was to begin to apply the anti-realist and anti-foundationalist perspective defended in the previous chapter to the constitutionalist debate, and some of the key issues within it. Firstly, Waldron’s claim that the realist/anti-realist issue, and the issue of moral objectivity, are irrelevant to the issues involved in the constitutionalist debate was considered. Waldron’s irrelevance claim was, however, rejected on the grounds that the arguments used to support it in effect amount to an implicit attack on realism itself. As well as having the consequence of not proving the point that the realist/anti-realist issue is irrelevant to the constitutionalist issue, this implicit attack was argued to render Waldron’s irrelevance case incoherent and self-contradictory, and thus inherently *incapable* of proving its point. Following this, some more general comments were made regarding the inconsistency of Waldron’s stance on the realist/anti-realist issue; a problem highlighted by and forming an interesting background to, Waldron’s problematic

irrelevance case. It was seen that Waldron's irrelevance arguments implicitly take a stance hostile to the claims of realists. In line with that stance, some of Waldron's other writings contain statements openly aligning himself with anti-realist theories and rejecting realist concepts. However, in other writings still, Waldron seems to make some realist assumptions and claims, use the very realist concepts and ideas he at other times rejects. Thus Waldron seems to move between a problematic implicit anti-realist irrelevance position, an open anti-realist position, and a realist position.

Having rejected Waldron's argument that the realist/anti-realist debate has no significant consequences for key issues involved in the constitutionalist debate, the consequences of the realist/anti-realist issue were then considered in relation to the issue of authority – another issue of concern for Waldron. It was seen that the responses to Waldron's criticisms of instrumentalist approaches to authority and constitutionalism relied on an assumption of core realist ideas such as independent "moral truth" or "rightness". It was therefore argued that a consequence of rejecting these realist assumptions was that Waldron's criticisms of putting the instrumentalist approach into practice – that it is question-begging in the context of disagreement over rights and appropriate epistemology – become more convincing. With that, it was suggested that the relevance of the anti-realist perspective taken here is that instrumentalist approaches to authority and constitutionalism should be rejected in practice. However, it was further argued that, from this perspective, Waldron's criticisms of the instrumentalist approach do not go far enough. The very idea of, and justification for, the instrumentalist approach to authority and constitutionalism, was seen to, like the instrumentalist responses to Waldron's criticisms, rely on the realist concepts of "moral truth" and "moral correctness". A consequence of rejecting these concepts is that the relevance of the instrumentalist condition is not established, relying as it does on the idea that decisions over rights have a "moral content" in that they involve choices between actions and states of affairs which are morally "right" or "wrong", "better" or "worse" independently of what people prefer. Furthermore, rejecting the idea of "moral truth" and "morally correct" decisions renders the core instrumentalist condition – that these standards are to be treated as the goal of decision-making and the standards that a decision-making institution must be conducive to in order to be justified – meaningless. Finally, Waldron's more direct argument against judicial review and in favour of elected majoritarian decision-making over issues of rights and morality, based on his claim that participation is the "right of rights" was considered. It was however argued that when taken back to its underlying premise – that humans are owed respect for their dignity as autonomous individuals with moral capacity – it relies on nothing more convincing than the assertion and question-begging reassertion of this moral claim. It is one of those claims which, according to the perspective taken here, cannot be defended against the sceptical critic or against competing claims which turn out to be equally eligible.

Ultimately, therefore, it is concluded here that the both the instrumentalist approach, and Waldron's "right of rights" approach to the constitutionalist debate are misguided, explicitly as a consequence of the philosophical perspective defended in the previous chapter, and which Waldron has failed to show is irrelevant to the issues involved.

## Chapter 4

### Constitutionalist Arguments From Democracy

#### 4.1. Introduction

Both sides of the legal-political constitutionalist debate commonly put forward democratic arguments in an attempt to establish their stance as superior to the opposing constitutionalist school's. The tendency to use such arguments is perhaps unsurprising given the 'normative valence' associated with the concept of "democracy",<sup>1</sup> which in modern times has become something of an 'achievement word'.<sup>2</sup> The appraisive value of "democracy" has led one commentator to describe it as 'the world's new universal religion'.<sup>3</sup> While such a label perhaps goes too far, it is clear that "democracy" is a 'powerful term' in society.<sup>4</sup> For example, its perceived value is strong and widespread enough to have led the General Assembly of the United Nations to establish the 'International Day of Democracy',<sup>5</sup> dedicated to its promotion and highlighting its status as a 'universal core value'.<sup>6</sup> Such widespread support for the concept makes "democracy" a powerful ally to have on side, and the 'accusation of being antidemocratic' a particularly 'damning' one.<sup>7</sup>

However the problem with arguing from "democracy", it is argued, is that it is an example of what Gallie described as an 'essentially contested concept',<sup>8</sup> a concept whose very definition is the subject of great dispute, with 'no clearly definable general use' that can be 'set up as the correct or standard' one.<sup>9</sup> The resulting 'myriad usage'<sup>10</sup> of the term creates the possibility that it can be used to support many, often opposing, arguments. In this chapter, it will be argued that this is the case in the constitutionalist debate; "democracy" is understood and defined differently by members of both sides, and, depending on which conception one starts from, can logically support *both* political and

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<sup>1</sup> D Collier, FD Hidalgo and AO Maciuceanu, 'Essentially Contested Concepts: Debates and Applications' (2006) 11(3) *Journal of Political Ideologies* 211, 212.

<sup>2</sup> WB Gallie, 'Art as an Essentially Contested Concept' (1956) 6 *The Philosophical Quarterly* 97, 109.

<sup>3</sup> PE Corcoran, 'The Limits of Democratic Theory' in G Duncan (ed), *Democratic Theory and Practice* (CUP 1983) 14.

<sup>4</sup> E Chemerinsky, 'Foreword: The Vanishing Constitution' (1989) 103 *Harv LR* 43, 76.

<sup>5</sup> United Nations General Assembly Resolution 62/7 (8 Nov 2007) UN Doc A/RES/62/7, para.6.

<sup>6</sup> UN, 'Democracy and the United Nations' (UN Democracy Day Information Kit) available at: <<http://www.un.org/en/events/democracyday/pdf/presskit.pdf>> accessed 27 October 2013, 4.

<sup>7</sup> E Chemerinsky, 'The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review' (1984) 62 *Tex LR* 1207, 1260.

<sup>8</sup> See WB Gallie, 'Essentially Contested Concepts' (1955-1956) 56 *Proceedings of the Aristotelian Society* 167.

<sup>9</sup> *ibid*, 168.

<sup>10</sup> O Hidalgo, 'Conceptual History and Politics: Is the Concept of Democracy Essentially Contested?' (2008) 4(2) *Contributions to the History of Concepts* 176, 177.

legal constitutionalism. For this reason it will be concluded that arguing from “democracy” advances neither constitutionalist case, nor the constitutionalist debate generally, as it results in opposing sides arguing past one another via their differing conceptions of a term subject to irresolvable contestation. It will therefore be rejected as an unuseful way to tackle the constitutionalist debate.

To set out this argument, core examples of democratic arguments from both political and legal constitutionalists will first be discussed and the different conceptions of “democracy” relied on will be drawn out, the aim being to demonstrate the differing constructions relied on by both sides (**sections 4.2 and 4.3**). Secondly, in arguing that neither side can convincingly claim to be using the concept in a more accurate or superior way, Gallie’s claim of its essential contestability will be supported (**section 4.4**). To do so, it will be suggested that in the absence of a standard generally agreed definition (**section 4.4.1**) arguments over democracy ultimately amount to assertions of one set of values against others, with no means of deciding between them (**section 4.4.2**). This inability to set up particular value and normative assertions as superior to their sceptical denial or competing assertions is a consequence of the pragmatic anti-realism and anti-foundationalism defended in **Chapter 2**. Finally, possible counter arguments from those claiming to advance a superior conception of democracy insulated from the values of a particular individual or group (**section 4.5**), or based on values we all accept (**section 4.6**), will be examined.

#### **4.2. Political Constitutionalist Arguments From Democracy**

A popular argument among critics of legal constitutionalism is simply that ‘it is undemocratic’, and therefore ‘undesirable’.<sup>11</sup> This argument is a recurring theme in the closely-related judicial review debate, ‘dominated by...a conviction that judicial review is a deviant institution in a democratic society’,<sup>12</sup> and much of which has been dedicated to attacking judicially-enforced legal limits on the elected branches with, or defending such limits against, this claim.<sup>13</sup> Those accusing advocates of such legal restraints of ‘hiding a dirty little secret’ of a ‘discomfort with democracy’<sup>14</sup> clearly see this “democratic” argument as a critical blow to legal constitutionalism. Such a thought follows from the

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<sup>11</sup> A Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 25.

<sup>12</sup> Chemerinsky, ‘Vanishing Constitution’ (fn4) 46.

<sup>13</sup> For examples see: JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); ‘Symposium: Judicial Review Versus Democracy’ (1981) 42(1) Ohio St LJ 1; S Fredman, ‘Allies or Subversives? The Judiciary and Democracy’ (1998) 32 Israel LR 407; D Grimm, ‘Constitutional Adjudication and Democracy’ (1999) 33 Israel LR 193; A Lever, ‘Democracy and Judicial Review: Are They Really Incompatible?’ (2009) 7(4) Perspectives on Politics 805.

<sup>14</sup> RM Unger, *What Should Legal Analysis Become?* (Verso 1996) 72.

appraisive value of “democracy” noted above (**section 4.1**); the air of legitimacy that the description “democratic”, and therefore the air of illegitimacy that the label “undemocratic”, brings leads to these political constitutionalists invoking their “democratic” argument as some sort of ‘trump card’<sup>15</sup> in the constitutionalist debate. For example, Tomkins expressly considers his “democratic” criticism to support his case that ‘legal constitutionalism is...dangerously misguided’.<sup>16</sup> However, when one looks to the arguments used to support this attack, it becomes clear that it is a very specific conception of “democracy” and “democratic legitimacy” that legal constitutionalists are accused of contravening.

As put by Tomkins, the “democratic” political constitutionalist argument is that, ‘in a democracy, those who are empowered...to resolve political disputes are required to be politically accountable’.<sup>17</sup> Those who are given this power in a legal constitution – judges via the process of constitutional review – are not politically accountable as they are not themselves elected, nor ‘responsible to any...body’ that is.<sup>18</sup> Therefore, the argument goes, legal constitutionalism is democratically objectionable.<sup>19</sup> The second part of Tomkins’ “democratic” criticism is that, in a “democracy”, each decision-maker ‘should act as a representative (in the sense of “delegate”) of the people’.<sup>20</sup> Again, the argument is that the judiciary fail to meet this requirement because to be representative in this sense requires that ‘the people should nominate or elect the decision-maker’.<sup>21</sup> The judiciary are unelected, and so are not representative in the sense Tomkins claims is needed in a “democracy”. This focus on the unelected nature of the judiciary is shared by Waldron’s “democratic” argument. Waldron claims that legislators are ‘evidently superior as a matter of democracy and democratic values’ to the judiciary, again, because they ‘are regularly accountable to their constituents’ through elections, and treat their ‘electoral credentials’ as important to their decision-making role.<sup>22</sup>

In sum, these political constitutionalist arguments from “democracy” ultimately amount to the claim that legal constitutionalism is “undemocratic” because it gives decision-making power in questions over which we disagree to those who are not electorally accountable to, and electorally representative of, the public. Such a focus on the unelected nature of the judiciary reveals the particular, thin, conception of “democracy” relied on by the political constitutionalists putting these arguments forward. The argument rests on the idea that “democracy” means something

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<sup>15</sup> DM Kahan, ‘Democracy Schmemocracy’ (1999) 20 *Cardozo LR* 795, 805.

<sup>16</sup> Tomkins, *Our Republican Constitution* (fn11) vii.

<sup>17</sup> *ibid*, 26.

<sup>18</sup> *ibid*, 25.

<sup>19</sup> *ibid*, 26.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale LJ* 1346, 1391.

approaching what Perry describes as ‘electorally accountable policymaking’,<sup>23</sup> and, in line with Schumpeter’s classic minimalist account of “democracy”, that democratic legitimacy requires ‘the election of the men [and women] who are to do the deciding’.<sup>24</sup> It does indeed follow from this specific conception of “democracy” and its requirements that when the unelected, and therefore electorally unaccountable, courts overturn the decisions of the elected, and therefore electorally accountable, political institutions, substituting the policy choices and judgements of a committee of judges for those of ‘the people’s representatives’, they are acting contrary to “democracy”.<sup>25</sup> It also arguably follows from this that those who advocate a constitutional model giving the courts this power to act undemocratically are *themselves* acting in a way harmful to “democracy”; they are opposing “democracy”.

However, the specific conception that this argument depends on is ‘not the only possible way...to define democracy’ and it is far from as uncontroversial or self-evident as these arguments imply.<sup>26</sup> For example, the focus on accountability and representation through voting and elections as the paramount aspect of “democracy” and “democratic legitimacy” has been rejected as ‘simply false’<sup>27</sup> and ‘depend[ing] on an exaggerated sense of the importance of voting to legitimation of power in a democratic society’.<sup>28</sup> On this argument, elections are merely one means of selecting people to hold positions of power and responsibility in a “democratic” society.<sup>29</sup> As Manin notes, some, including the likes of Aristotle, Montesquieu and Rousseau, have even gone as far as rejecting voting as ‘intrinsically *aristocratic*’, rather than *democratic*.<sup>30</sup> Such a view was taken by those commonly cited as having ‘invented democracy’,<sup>31</sup> or at least as providing the classic example of it – the Athenians.<sup>32</sup> In the Athenian regime, many powers were entrusted to citizens via a lottery.<sup>33</sup> Lotteries were seen as inherently democratic for they ‘gave all eligible citizens an equal chance of holding office’.<sup>34</sup> In contrast, election by voting involves choosing a candidate based on whatever characteristic or

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<sup>23</sup> MJ Perry, *The Constitution, The Courts, and Human Rights* (Yale University Press 1982) 4.

<sup>24</sup> J Schumpeter, *Capitalism, Socialism and Democracy* (3<sup>rd</sup> edn, Allen and Unwin 1950) 296.

<sup>25</sup> R Berger, ‘Ely’s “Theory of Judicial Review”’ (1981) 42 Ohio St LJ 87, 87.

<sup>26</sup> Chemerinsky, ‘Vanishing Constitution’ (fn4) 71.

<sup>27</sup> Lever (fn13) 809.

<sup>28</sup> *ibid*, 810.

<sup>29</sup> *ibid*, 809.

<sup>30</sup> B Manin, *Principles of Representative Government* (CUP 1997) 134 [emphasis added]. See, for example: Aristotle, *Politics* (B Jowett tr, OUP 1905) 166 (‘that all offices are filled by election and none by lot, is one of these oligarchical characteristics’); C Montesquieu, *Spirit of the Laws* (T Nugent tr, Hafner 1966) 11 (‘suffrage by lot is natural to democracy, as that by choice is to aristocracy’); J Rousseau, *The Social Contract and Other Later Political Writings* (CUP 1997) 125 (‘election by lot is more in the nature of Democracy [than election by choice]’).

<sup>31</sup> J Laws, ‘Law and Democracy’ [1995] PL 72, 73.

<sup>32</sup> HB Mayo, *An Introduction to Democratic Theory* (OUP 1960) 35.

<sup>33</sup> Manin (fn30) 8.

<sup>34</sup> Lever (fn13) 809.

quality a voter regards as valuable and which ‘the other candidates do not possess....to the same extent’ (or at least risks such practices by basing the allocation of office on the votes of citizens regardless of how they choose to make their decision).<sup>35</sup> The issue, the argument goes, is that ‘a quality that is favourably judged...and is not possessed by others constitutes a superiority’,<sup>36</sup> and a system based on allocating power according to superiority, some of which will be affected by conditions and characteristics outside the control of the judged individual via the natural and social lotteries, is describable as *aristocratic*.<sup>37</sup> This argument is not merely one of the past, generally agreed in modern times to be misguided; there is an increasing school of *modern* theorists who advocate the introduction of selection by lot, at least partly, to restore ‘the democratic nature of public service’ and ‘exercise a beneficent democratic influence’.<sup>38</sup> With this in mind, Manin asks “‘Why do we not practice lot, and nonetheless call ourselves democrats?’”.<sup>39</sup> The answer, it is suggested here, is that “we” take a different conception of “democracy”.

The underlying strong egalitarian premise of the conception of “democracy” or “democratic” relied on by this lottery argument will be discussed below (**section 4.4.2, pp92-94**), but for now it is merely highlighted to demonstrate that “democracy” is not as clear-cut as the above political constitutionalist arguments imply. It is not self-evident, nor uncontested, that elections are the most “democratic” process for allocating power, nor even that they provide “democratic” legitimacy at all to the decision-makers chosen via this process. Failing to acknowledge this disagreement over “democracy” by arguing *from* (rather than *for*) a particular interpretation, makes the argument unproblematic for those likewise arguing from their own conception. For example, for those taking the above lottery argument, the political constitutionalist criticism that decision-makers who are unelected are “undemocratic”, or at least less “democratic”, than those who are elected becomes irrelevant, for it is based on a conception of “democratic legitimacy” that they reject. Such an argument from “democracy” therefore fails to advance the political constitutionalist case in that it can only be a blow to opponents (or support political constitutionalism on its own terms) for those starting from the same conception on which it relies. This is also evident from the legal constitutionalist response that reliance on the courts is actually *in accordance with* “democracy”.

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<sup>35</sup> Manin (fn30) 139.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, 149.

<sup>38</sup> BR Barber, *Strong Democracy: Participatory Politics for a New Age* (Twentieth Anniversary Edn, University of California Press 2003) 291. See also G Delannoi, O Dowlen and P Stone, *The Lottery as a Democratic Institution* (Policy Institute, University of Dublin, Trinity College Dublin 2013) for discussion of the growing popularity of democratic lottery in recent times.

<sup>39</sup> Manin (fn30) 9.

### **4.3. Legal Constitutionalist Arguments From Democracy**

A legal constitutionalist response to the above political constitutionalists' accusations of advocating an undemocratic system is simply to claim the exact opposite; that judicially-enforced legal limits upon the elected branches are actually conducive, even essential, to "democracy". One method is to take a thick definition of "democracy", referring to the 'rule of democratic values', not merely the rule of elected majorities.<sup>40</sup> These values, which together form what Barak describes (in Dworkinian fashion) as 'the internal morality' of "democracy",<sup>41</sup> include respect for 'human rights...ethical values...and appropriate ways of behavior'.<sup>42</sup> More specifically, this "internal morality" is founded upon 'the dignity and equality of all human beings',<sup>43</sup> respect for which requires more than equal participation in the political process through voting in elections to a supreme legislature.<sup>44</sup> Such respect requires that the 'political decisions' reached *themselves* 'treat everyone with equal concern and respect'.<sup>45</sup>

For Dworkin, the requirement of treating all with equal concern and respect means that each and every individual 'must be guaranteed fundamental...rights [that] no combination of other citizens can take away', notwithstanding that they may form a majority.<sup>46</sup> As a result, allowing the courts to have the final word on the compatibility of legislation enacted by the elected branches with these fundamental rights and values is not "undemocratic". On the contrary, Dworkin argues that *denying* such a role, with the effect of leaving individual rights at the mercy of temporary political majorities, is contrary to 'true democracy',<sup>47</sup> a view echoed by Barak when he states that 'democracy cannot exist' without insulating individual rights and values from 'the power of the majority'.<sup>48</sup> It is not enough to rely on the 'grace of the self-restraint' of legislative majorities; formal legal restraints on the exercise of legislative supremacy is needed.<sup>49</sup>

As is clear from the reference to "true" democracy, Dworkin directly accuses those putting forward the "democratic" political constitutionalist arguments above (**section 4.2**), based on elected-majority rule through the supremacy of political institutions, of 'misunderstand[ing] what democracy is'.<sup>50</sup>

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<sup>40</sup> A Barak, *The Judge in a Democracy* (2<sup>nd</sup> edn, Princeton University Press 2008) 24.

<sup>41</sup> *ibid*, 25.

<sup>42</sup> *ibid*, 24.

<sup>43</sup> *ibid*, 25.

<sup>44</sup> *ibid*, 33.

<sup>45</sup> R Dworkin, *A Bill of Rights for Britain* (Chatto & Windus 1990) 35.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid*.

<sup>48</sup> Barak (fn40) 33.

<sup>49</sup> *ibid*, 34.

<sup>50</sup> Dworkin, *Bill of Rights for Britain* (fn45) 32.

Similarly strongly, Abella claims that there is a tendency in the controversy over the constitutional role of the courts for ‘important concepts’ to be ‘conveniently disregarded’.<sup>51</sup> This is followed by the statement that participants need to be reminded that ‘democracy is not – and never was – just about the wishes of the majority’, but rather includes ‘the protection of rights, through courts, *notwithstanding* the wishes of the majority’.<sup>52</sup> The claim here thus seems to be that those who reject a judicially-enforced legal constitution restraining elected majorities as “undemocratic” are guilty of “disregarding” the *actual* concept of “democracy”, which, to the contrary, *requires* substantive legal restraints on majoritarian politics to uphold rights. In short, to Abella and Dworkin, those such as Tomkins, arguing from a concept of elected majority policy-making, are not really arguing from “democracy” at all.

Yet those supporting the political constitutionalist arguments above, and the conception of “democracy” they rely on, could just as easily accuse those following the “democratic” legal constitutionalist arguments of *themselves* “misunderstanding” the concept, and offer a reminder of what “democracy” *truly* means. In fact, Lord Sumption seems to do precisely that. In discussing the use of “democracy” as a term of ‘approval’ for ‘values which may or may not correspond to those which a democracy would in fact choose for itself’, Sumption responds that giving force to these values is ‘democratic only in the sense that the Old German Democratic Republic was democratic’.<sup>53</sup> Putting the specifics of the German Republic to one side, Sumption is simply arguing that giving force to particular values is not to act “democratically” because “democracy” ‘[p]roperly speaking...is a constitutional mechanism for arriving at decisions for which there is a popular mandate’.<sup>54</sup> Thus, the response to the claim that “democracy” requires particular values to be upheld even in the face of majority opposition is a denial that “democracy” means anything of the sort, followed by a reminder of what “democracy” properly is; a process for reflecting popular mandate. This response is simply a reassertion of the original claim which the likes of Dworkin were responding to; that legal constraints are “undemocratic” because particular substantive values are placed beyond the reach of elected majorities and under the control of the unelected judiciary.

A stalemate appears to have been reached. Political constitutionalists favouring the supremacy of the elected branches start from a formal, thin, conception of “democracy”, focussing on the

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<sup>51</sup> RS Abella, ‘The Judicial Role in a Democratic State’ (2001) 26 Queen’s LJ 573, 577.

<sup>52</sup> *ibid.*

<sup>53</sup> Lord Sumption, ‘The Limits of Law’ (27<sup>th</sup> Sultan Azlan Shah Lecture, Kuala Lumpur, 20 Nov 2013) available at: <<http://www.supremecourt.gov.uk/docs/speech-131120.pdf>> accessed 29 Nov 2013, 11.

<sup>54</sup> *ibid* [emphasis added].

electoral accountability of the decision-makers, and accuse legal constitutionalists of being undemocratic or else misunderstanding the concept. At the same time, legal constitutionalists favouring the supremacy of the *judicial* branches and limiting the elected political ones start from a thicker, substantive, conception of “democracy”, based on protecting particular rights and values, and accuse political constitutionalists of being undemocratic and misunderstanding the concept. As a result, it is suggested that arguing from “democracy” takes the constitutionalist debate no further forward as both sides come off both better *and* worse.

#### **4.4. Democracy as an Essentially Contested Concept**

In response to the argument above, that both sides of the constitutionalist debate can, and do, use “democracy” to support their case, each taking a different conception, it may be suggested that this is not an issue once we establish what the standard or correct usage is. If the *actual* definition of “democracy” were found, the arguments of those who misunderstand the term could simply be dismissed, as Dworkin, Abella and Sumption each attempt to do to their opponents. However, it is argued here that no such definition exists. “Democracy” is an example of what Gallie described as ‘essentially contested concepts’;<sup>55</sup> concepts with appraisive value, but ‘no clearly definable use...which can be set up as the correct or standard use’,<sup>56</sup> giving rise to ‘endless disputes’ over their proper use.<sup>57</sup> In establishing democracy’s essentially contested character, a sample of the ‘legion’ of different interpretations of the concept<sup>58</sup> will first be highlighted to demonstrate the lack of a standard, generally agreed, definition to appeal to (**section 4.4.1**). Secondly (**section 4.4.2**), it will be argued that this contestation is irresolvable as the version one supports depends on their particular, value-laden, political theory. Particular conceptions of “democracy” are only “true” or “superior” to those who share the values that justify it. As a result, arguments over “democracy” ultimately descend into an exercise of ‘pure assertion and counter-assertion’<sup>59</sup> of the values that form the premises of each side’s argument. With no non-question-begging means of deciding between such value-assertions (according to the pragmatic anti-realist and anti-foundationalist argument set out in **Chapter 2**), it is argued, the contest over “democracy” is irresolvable.

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<sup>55</sup> Gallie, ‘Essentially Contested Concepts’ (fn8).

<sup>56</sup> *ibid*, 168.

<sup>57</sup> *ibid*, 169.

<sup>58</sup> EL Rubin, ‘Getting Past Democracy’ (2001) 149(3) *University of Pennsylvania Law Review* 711, 724.

<sup>59</sup> A MacIntyre, *After Virtue: A Study in Moral Theory* (3<sup>rd</sup> edn, University of Notre Dame Press 2007) 8.

#### 4.4.1. Democracy – A Norm of Contestation

One method of establishing particular uses of a term as “incorrect” or “inferior” is to show that they are out of line with the way it is ordinarily used, or that other competing conceptions are more in line with ‘standard usage’.<sup>60</sup> This approach depends on there actually being ‘a single, easily recognized type of political community’<sup>61</sup> that can be set up as the benchmark-norm of “democracy” from which a particular use of the term can be said to deviate. However, as Hailsham points out, ‘[a] moment’s reflection’ is enough to show that such a norm does not exist.<sup>62</sup> When one looks at the various ways “democracy” has been used over time, and is still used today, what one finds is not a norm of “democracy”, but a norm of contestation. The history of “democracy” as a concept is one of fundamental disagreement, which more than 2000 years of discussion has not been able to resolve, leaving it with what Dahl describes as a ‘hopeless variety of definitions’.<sup>63</sup>

Turning to the democratic theory literature, a vast amount of different meanings given to “democracy” can be found. These include (to name but a few): procedural democracy (‘the election of the men [and women] who are to do the deciding’),<sup>64</sup> participatory democracy (seeking to counter elitist elected-representation by involving citizens more directly in government, via selection processes such as lotteries),<sup>65</sup> communal democracy (requiring that those governed each have an ‘equal place in [the] concern and respect’ of the government via a system of legally guaranteed and enforced rights),<sup>66</sup> cosmopolitan democracy (treating “democracy” as a global system),<sup>67</sup> radical democracy (a left-wing model seeking to move away from hierarchical state-based political mechanisms),<sup>68</sup> and, more recently, Islamist democracy.<sup>69</sup> The different models each have ‘significantly diverging views’ on how society is, or should be, structured, and put forward differing normative and moral justifications for “democracy”.<sup>70</sup> While only a few of the wide variety of ideas on what “democracy” is or should be have been mentioned, they serve to illustrate the fatal

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<sup>60</sup> Kahan (fn15) 797.

<sup>61</sup> Lord Hailsham, *The Dilemma of Democracy* (William Collins Sons & Co Ltd 1978) 33.

<sup>62</sup> *ibid.*

<sup>63</sup> RA Dahl, *On Democracy* (Yale University Press 2000) 37.

<sup>64</sup> Schumpeter (fn24) 296.

<sup>65</sup> See Barber (fn38).

<sup>66</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (OUP 1999) 70.

<sup>67</sup> See H Patomäki and T Teivainen, *Possible World: Democratic Transformation of Global Institutions* (Zed Books 2004).

<sup>68</sup> M Kurki, ‘Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion’ (2010) 12(3) *International Studies Review* 362, 373. For an example, see E Laclau and C Mouff, *Hegemony and Socialist Strategy* (Verso 1985).

<sup>69</sup> See L Sadiki, *In Search of Arab Democracy: Discourses and Counter-discourses* (Hurst and Company 2004).

<sup>70</sup> Kurki (fn68) 373.

difficulty that arguments appealing to a standard or agreed definition of the concept face; no such standard definition exists.<sup>71</sup>

An attempt may be made to identify the “correct” definition of “democracy” by stripping back the normative and political theory to ‘go back to the word’s etymological meaning’.<sup>72</sup> If successful, this would cut through the disagreement demonstrated through the lack of a standard use of the concept, and allow arguments relying on a conception straying from this more accurate definition to be dismissed. As translated from the original Greek (δημοκρατία), “democracy” is generally agreed to mean something along the lines of ‘rule by the people’<sup>73</sup> or ‘power of the people’.<sup>74</sup> However, as Sartori points out, this literal translation is merely a ‘word-word definition’;<sup>75</sup> it ‘correlates’ the word “democracy” to another set of words as ‘having the same meaning’,<sup>76</sup> but does not tell one what the practical implications of these words are for “democracy” as a ‘thing’.<sup>77</sup> As a result, the etymological meaning fails to provide a precise and useful standard to work from when trying to clarify what “democracy” is.

For example, how the “the people” is to be defined in practice is itself a matter of disagreement and variation. Does “people”, for the purposes of “democracy”, refer to ‘the whole adult population, or only those who possess enough property’, as was common in the 19<sup>th</sup> century “democracies”?<sup>78</sup> Is the exclusion of particular groups, such as women, enough to render the system “undemocratic” (bearing in mind such exclusion until relatively recent times in ‘countries that were universally recognised as democratic, including France and Switzerland’,<sup>79</sup> and, one may add, the UK)? On a more topical note, should convicted prisoners currently serving their sentence be included in “the people”, as has been declared by various courts applying the European Convention on Human Rights?<sup>80</sup> Or is this another privilege that is ‘lost’ by those who have ‘broken their contract with society’?<sup>81</sup>

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<sup>71</sup> Kahan (fn15) 797.

<sup>72</sup> G Sartori, *Democratic Theory* (Wayne State University Press 1962) 17.

<sup>73</sup> AH Birch, *The Concepts and Theories of Modern Democracy* (Routledge 1993) 45. See also Hidalgo (fn10) 178.

<sup>74</sup> Sartori, *Democratic Theory* (fn72) 17.

<sup>75</sup> G Sartori, *The Theory of Democracy Revisited* (Chatham House Publishers Inc 1987) 7.

<sup>76</sup> R Robinson, *Definition* (Clarendon Press 1954) 17.

<sup>77</sup> Sartori, *Theory of Democracy Revisited* (fn75) 7.

<sup>78</sup> Birch (fn73) 48.

<sup>79</sup> *ibid.*

<sup>80</sup> For examples see: *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41; *MT and Greens v United Kingdom* (2011) 53 EHRR 2; *Scoppola v Italy* (2013) 56 EHRR 19.

<sup>81</sup> HC Deb 10 February 2011, vol 523, col 494 (David Davis).

The implications of “rule” or “power” are also unclear from the words themselves. For example, is “power” or “rule” achieved by voting for elected representatives, as those favouring the thin conception of “democracy” relied on by Tomkins may argue (see **section 4.2**), does it require more direct involvement of citizens, as those advocating participatory democracy may argue, or is it sufficient for the decision-makers to be appointed provided they ‘striv[e] to personify what is best in their society’?<sup>82</sup> Is it necessary for the decisions reached by those in power ‘to reflect or embody the popular will’, and if so, how is “popular will” to be ‘defined and...identified in practice?’<sup>83</sup> Does “rule by the people” require each person to be treated with equal concern and respect in only the *procedural* element (the selection of those who exercise governmental power), or does it require the *actions* of those in power to treat all with equal concern and respect through a system of rights and guarantees, ensuring the ‘basic interests and needs’ of all are met?<sup>84</sup> As these questions, and the various answers given by different people and at different times, demonstrate, appealing to the literal (as generally agreed) meaning of the word “democracy” does not allow ‘definite or useful conclusions’ about what “democracy” *is* to be drawn.<sup>85</sup> The etymological meaning therefore cannot provide a standard or correct definition of “democracy” sufficient to resolve the debate over the concept. It simply raises more contested questions.

#### **4.4.2. Defining “Democracy” – Irresolvable Contestation**

Having failed to find a single standard usage of the term “democracy” to set up as a benchmark-norm to assess “democratic” arguments against, and rejected the etymological route as of little help, the next question is ‘whether it is possible to find arguments and criteria’ pointing to the ‘best interpretation’ of the concept.<sup>86</sup> It is argued here in relation to democracy that, as Gallie put it regarding essentially contested concepts generally, ‘it is quite impossible to find a general principle for deciding which of two contestant uses....really “uses it best”’.<sup>87</sup> It will be suggested that the disagreement over “democracy” is irresolvable as the process of choosing one conception over another is an inherently value-laden one, dependent on the preferred political theory of the individual doing the choosing.

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<sup>82</sup> Lever (fn13) 809.

<sup>83</sup> Birch (fn73) 48.

<sup>84</sup> Dworkin, *Freedom’s Law* (fn66) 70.

<sup>85</sup> Sartori, *Democratic Theory* (fn72) 17.

<sup>86</sup> Hidalgo (fn10) 177.

<sup>87</sup> Gallie, ‘Essentially Contested Concepts’ (fn8) 189.

As Waldron notes in relation to differing conceptions of private property, ‘the conception...we adopt is...the upshot of the arguments we are convinced by’.<sup>88</sup> The arguments we are convinced by are those which have a ‘connection with the considerations that ultimately matter to us’.<sup>89</sup> Gaus builds on this idea and extends it to contested concepts generally; these considerations, the ‘things that really matter to us’, which together form our ‘political theory’, lead us to interpret or describe elements of a concept in a particular way.<sup>90</sup> But, as different individuals have different values and ideas of what is important that the conception must connect with, this justificatory process establishing a particular conception as superior to others is an inherently subjective, relative, one. However convincing the justification for a particular conception is to a particular individual, it ‘will not move those’ starting from a different political theory.<sup>91</sup> From *their* perspective, the same conception will be *unjustified*, for it will fail to connect with *their* values and ideas of what is important. Returning to “democracy” specifically, it is argued here that this value-laden justificatory process underlying the conception one holds or agrees with becomes clear from a closer examination of some of the conceptions and interpretations mentioned in the discussion so far.

Dworkin’s idea of a “true democracy”, in which the decisions of elected majorities must respect particular rights, values and ethical standards (see above, **sections 4.3** and **4.4.1**), is a good example. This idea seems to be the result of Dworkin’s particularly strong egalitarianism as made explicit in *Taking Rights Seriously*.<sup>92</sup> There, Dworkin starts from what he describes as ‘the liberal conception of equality’,<sup>93</sup> which he simply ‘presume[s] we all accept’.<sup>94</sup> This conception holds that everyone must be treated with ‘equal concern and respect’,<sup>95</sup> a requirement which Dworkin goes on to interpret in a particularly strong way. Dworkin rejects the idea that ‘equal treatment’ alone (by which he means the equal distribution of goods or opportunities, such as voting power) suffices.<sup>96</sup> Instead, ‘more fundamental’<sup>97</sup> to his liberal conception of equality is the requirement of ‘treatment as an equal’, which, rather than stopping at the level of opportunity to participate in decision-making, applies to those decisions themselves.<sup>98</sup> This particular form of egalitarianism is one of the considerations held by Dworkin which, it is suggested, his conception of “democracy” is moulded to realise in the way described by Gaus above. This becomes clearer if one considers the consequences of stopping at the

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<sup>88</sup> J Waldron, *The Right to Private Property* (Clarendon Press 1988) 433.

<sup>89</sup> *ibid.*

<sup>90</sup> GF Gaus, *Political Concepts and Political Theories* (Westview Press 2000) 40.

<sup>91</sup> *ibid.*

<sup>92</sup> R Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

<sup>93</sup> *ibid.*, 273.

<sup>94</sup> *ibid.*, 272.

<sup>95</sup> *ibid.*, 273.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*, 274.

<sup>98</sup> *ibid.*, 273.

“equal opportunity” interpretation of Dworkin’s egalitarian premise. On such an interpretation, a system which, unlike Dworkin’s, requires nothing in particular of the *outcomes* made via an equal *process*, in effect allowing elected temporary majorities to get their way, would not be regarded as a ‘brutal and alien’ or ‘fake’ form of “democracy” as Dworkin describes it.<sup>99</sup> Such a system would instead be seen as a prime example of a “democracy”.

For example, such a commitment to equality of *opportunity* appears to underlie Waldron’s claim that a supreme legislature is ‘superior as a matter of democracy and democratic values’ to the judiciary.<sup>100</sup> In setting up his core case against judicial review, Waldron refers to a ‘culture of democracy’, which he goes on to explain means a culture which values ‘political equality’.<sup>101</sup> In describing this “democratic” value of equality as a strictly ‘process-related’ one, achieved through the ‘right to vote’ and have ‘one’s voice counted’,<sup>102</sup> Waldron stops where Dworkin starts; at the level of process and opportunity. So while Waldron agrees with Dworkin that equality is a value essential to “democracy”, it is read as adequately achieved through ensuring that all have a formally equal opportunity to have a say in the decision-making process, through the system of elections to a representative and ultimately supreme majoritarian institution. Thus it is Waldron’s commitment to equality of *participation* (which, as noted in **Chapter 3, section 3.5**, is in turn based on his view of the individual as an autonomous agent with moral capacity and dignity deserving of respect) which leads him to see electoral accountability as the key to “democracy”, and the electorally accountable legislature as more “democratic” than the unelected judiciary. The differing political theories of Waldron and Dworkin, informed by a commitment to differing conceptions of equality, therefore explain their different ideas on what “democracy” is. In other words, their political theories and values fuel their disagreement.

An even stronger egalitarian commitment can be seen to underlie the arguments of those who go further than Dworkin in viewing the system of elections, not merely as insufficient for a “true democracy”, but as inherently *undemocratic*. As highlighted above (**section 4.2**), the argument for the undemocratic nature of elections is that allowing those in power to be chosen by voters, based on whatever characteristics or qualities they value, is to allow them to be advantaged and treated as superior based on factors which may be at least partly outside their control. As Manin puts part of the case, ‘there is nothing to prevent voters from deciding...purely on the basis of the candidates’ natural endowments, to the neglect of their actions and choices’, who to vote for, and who to give

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<sup>99</sup> Dworkin, *Freedom’s Law* (fn66) 71.

<sup>100</sup> Waldron, ‘Core of the Case’ (fn22) 1391.

<sup>101</sup> *ibid*, 1361.

<sup>102</sup> *ibid*, 1373.

power to.<sup>103</sup> For example, Manin argues, even if some members of the electorate carefully compare the different policies proposed by each candidate, ‘the personalities of the contenders inevitably play a part’;<sup>104</sup> not everyone proposing even the most overwhelmingly popular policy is ‘equally likely to be elected’.<sup>105</sup>

The above argument ultimately amounts to the claim that it is an injustice to allow some people to be disadvantaged, while others are advantaged, by factors which do not result from their actions; those which are at least partly outside of their control. This, it will be noticed, is a typical luck egalitarian argument. While there are a variety of different forms of the luck egalitarian political theory,<sup>106</sup> its ‘core idea’ is that unequal advantages and disadvantages between individuals ‘are acceptable if they derive from the choices [they]...have voluntarily made’, and conversely that ‘inequalities deriving from unchosen features of [their]...circumstances are unjust’, and unacceptable.<sup>107</sup> The unchosen circumstances of concern to luck egalitarians are taken to include social characteristics, such as the class or wealth of the family one is born into, natural endowments, such as intelligence, talent,<sup>108</sup> and even the ‘willingness to make an effort’ to earn advantages, which some consider as at least partly influenced by the unchosen factors of ‘happy family and social circumstances’.<sup>109</sup> The focus on the unequal allocation of political power as an advantage or disadvantage,<sup>110</sup> and the particular concern over the influence of factors other than ‘the efforts, actions, and choices’ of those subject to this allocation,<sup>111</sup> reveals the commitment of those advancing the argument that elections are undemocratic to these luck egalitarian values, also premised on the ideal of allocating advantages and disadvantages as much according to voluntary actions and choices as possible. The rationale behind the proposed “democratic” method of power allocation put forward in place of election by choice also reveals a commitment to the above luck egalitarian values. The use of the “democratic” method of sortition, or selection by lot, is preferred for giving all an ‘equal chance of holding office’.<sup>112</sup> On this argument, the resulting reduction of the influence of unchosen characteristics - the goal of luck egalitarianism - makes the lottery a fairer way of distributing the benefit (or burden, depending on how it is seen) of public office.<sup>113</sup> Thus, it is the

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<sup>103</sup> Manin (fn30) 138.

<sup>104</sup> *ibid*, 141.

<sup>105</sup> *ibid*, 142.

<sup>106</sup> For a useful survey of disagreements between those grouped under the heading of “luck egalitarian”, see E Anderson, ‘What is the Point of Equality?’ (1999) 109(2) *Ethics* 287.

<sup>107</sup> S Scheffler, ‘What is Egalitarianism?’ (2003) 31(1) *Philosophy and Public Affairs* 5, 5.

<sup>108</sup> *ibid*.

<sup>109</sup> J Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 64.

<sup>110</sup> Manin (fn30) 135.

<sup>111</sup> *ibid*, 138.

<sup>112</sup> Lever (fn13) 809.

<sup>113</sup> G Delannoi, O Dowlen and P Stone (fn38) 17.

luck egalitarian political theory which underpins the arguments of those putting forward a definition of “democracy” criticising the use of elections; arguments which hold that ‘true democracies choose public officials through lotteries that give everybody an equal chance’ to serve.<sup>114</sup> Luck egalitarianism and its component values form the considerations which their idea of “democracy” is moulded to achieve.

A final example of the influence of one’s political theory on the conception of “democracy” one agrees with comes from the arguments of those advocating qualifications on voting. As highlighted above (**section 4.4.1, p89**) a common feature of 19th century “democracies” was a property qualification for opportunities to formally participate in the political process through voting. The rationale for this “democracy” offered by contemporary liberals reveals the influence of yet another political theory. Those in support of such a system regarded ‘admission to the franchise’ as dependent on having sufficient ‘political knowledge and ability’ to ‘allow the voter to make an intelligent use of his vote’.<sup>115</sup> Property qualifications were rationalised as a ‘rough-and-ready test’ of such ‘political “merit”’.<sup>116</sup> For example, after claiming that political power should be allocated in a way which prefers those ‘who would more fitly exercise such power’, Bagehot went on to argue that while property qualifications were an ‘imperfect test of intelligence’, they were a test nonetheless.<sup>117</sup> Similarly, Macaulay supported a property qualification on the basis that the poorly educated ‘poor class of Englishmen’ were at risk of having their judgement blinded, particularly in the conditions of hardship and ‘distress’ in which they lived.<sup>118</sup>

While the logic of using property as an indicator of intelligence is open to question, in the sense that more effective methods could perhaps be proposed, it is the broader goal distributing political power according to competence or intelligence, and the political theory behind this, which is of interest here. As Miller notes, supporting the unequal distribution of voting rights ‘as a privilege’ to be earned by ‘displaying proof of one’s competence to take part in government’<sup>119</sup> reflected the classical liberal theory prominent at the time. The ‘basic principle’ of this classical version of liberalism is that benefits must be deserved or earned rather than distributed on an equal basis.<sup>120</sup> Thus, in contrast to the conceptions of “democracy” discussed directly above, which were seen to

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<sup>114</sup> CL Eisgruber, ‘Democracy and Disagreement: A Comment on Jeremy Waldron’s “Law and Disagreement”’ (2002) 6 *Journal of Legislation and Public Policy* 35, 40.

<sup>115</sup> D Miller, ‘Democracy and Social Justice’ (1978) 8(1) *British Journal of Political Science* 1, 9.

<sup>116</sup> *ibid.*

<sup>117</sup> W Bagehot, ‘Parliamentary Reform’ in N St John-Stevás (ed), *The Collected Works of Walter Bagehot: Volume VI* (The Economist 1974) 208-9.

<sup>118</sup> TB Macaulay, *Speeches on Politics and Literature* (JM Dent n.d) 3.

<sup>119</sup> Miller (fn115) 10.

<sup>120</sup> *ibid.*, 3.

rely on egalitarian values, support for a “democracy” in which “the people” is restricted to those of particular characteristics, such as intelligence or ability, relies on inegalitarian values (or at least anti-luck-egalitarian values). This example shows yet again the consequences of one’s political theory and values on the conception of “democracy” or ideas of what is or is not “democratic” that one holds.

The point of drawing out the values relied on by the various conceptions of “democracy” discussed here is to demonstrate that defining “democracy” is a ‘deeply political, normative and ideological matter’<sup>121</sup> and that, as a result, disagreement over what “democracy” *is* is largely due to the different political theories and values of those defining it. Each conception will be seen as justified or “true” by those who share the values that underpin it, and unjustified or “false” by those who do not. Thus, arguments over “democracy” are, at a deeper level, arguments over the normative and moral beliefs we hold as individuals. Once the debate reaches this level it reveals itself as ultimately an assertion of one set of values against another. In other words, argued back to the premises of each side, the contestation over “democracy” is seen to be what Macintyre describes as a ‘matter of pure assertion and counter-assertion’.<sup>122</sup> With no non-question begging means of deciding between competing value assertions (see **Chapter 2** where the philosophical perspective behind this claim was defended) and each side unwilling to back down, ‘for that would be to give up too much of what we hold important’,<sup>123</sup> it is argued that the disagreement over the concept of “democracy” is irresolvable. No side of the constitutionalist debate can claim to have an independently superior conception of “democracy” on their side, meaning there is no means of convincingly dismissing the “democratic” arguments of either side. The concept of “democracy” supports both political *and* legal constitutionalism.

It will be noticed that this essential contestability argument does, as Gray points out, depend on the philosophical perspective he calls ‘ethical nonnaturalism’.<sup>124</sup> This is because the above argument depends on there being no objective, or non-question-begging, means of establishing particular value-assertions as superior, or correct, over competing assertions of the same nature. This idea was set out and defended in **Chapter 2** via a pragmatic anti-realist and anti-foundationalist perspective. For now, however, this chapter will finish with an examination of the claim that an *objectively* superior (as in subjective-value-free, or alternatively, based only on values which are generally agreeable) conception of “democracy” can be found. If successful, this claim would rebut the

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<sup>121</sup> Kurki (fn68) 371.

<sup>122</sup> Macintyre (fn59) 8.

<sup>123</sup> Gaus (fn90) 40.

<sup>124</sup> JN Gray, ‘On the Contestability of Social and Political Concepts’ (1977) 5(3) Political Theory 331, 340.

argument of this chapter that “democracy” is an essentially contestable concept due to its inherently value-laden nature.

#### **4.5. Rawls’ “Objective” Theory of Justice Argument**

The irresolvable contestability of “democracy”, and the resulting stalemate of opposing constitutionalist arguments each claiming to have the concept on their side, described so far in this chapter, may be avoidable if an *objective* argument establishing a particular conception as superior can be made. Rawls’ argument from the original position, a hypothetical choice situation in which rational participants determine the principles of justice for the ‘basic structure of society’,<sup>125</sup> as presented in *A Theory of Justice*, attempts to do this. The outcome of Rawls’ argument is that particular rights, liberties and values, demanded by justice, must be de-politicised. In Rawls’ words, ‘the rights secured by justice are not subject to political bargaining’.<sup>126</sup> A “democracy” which ‘did not embody these liberties’ would ‘not be a just procedure’,<sup>127</sup> and, as justice is ‘the first virtue of social institutions’, must therefore be rejected.<sup>128</sup>

Of particular interest here is the method used by Rawls to reach his “just” conception of “democracy”. Following a similar line to traditional contract theorists, Rawls defers to a hypothetical original position. In this extra-societal position, rational participants meet to ‘determine once and for all what is to count...as just and unjust in society’.<sup>129</sup> The decision takes place behind a ‘veil of ignorance’, meaning that the participants are ignorant of characteristics such as their ‘place in society’, their ‘class position or social status’, natural endowments such as ‘intelligence, strength, and the like’ and also their ‘conceptions of the good’.<sup>130</sup> The purpose of these restrictions is to ensure that the decision-making process is ‘fair’ in that ‘no one is advantaged or disadvantaged...by the outcome of natural chance or the contingency of social circumstances’,<sup>131</sup> and that a person’s ‘particular inclinations and aspirations, and...conceptions of their good do not affect the principles adopted’.<sup>132</sup> Thus, the legitimacy of the principles of justice Rawls proposes comes from their being the result of a “fair” process which, via the veil of ignorance, leaves aside influences which are

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<sup>125</sup> Rawls, *Theory of Justice* (fn109) 10.

<sup>126</sup> *ibid*, 4.

<sup>127</sup> *ibid*, 173.

<sup>128</sup> *ibid*, 3.

<sup>129</sup> *ibid*, 11.

<sup>130</sup> *ibid*.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid*, 16-17.

‘arbitrary from a moral point of view’, and ensures they are those which ‘would be chosen by rational persons’.<sup>133</sup>

For Rawls, then, the original position setup gives the principles of justice he proposes the force of what he calls an ‘Archimedean point’; a point from which the structures of society can be judged, free from irrelevant or arbitrary influences.<sup>134</sup> However, it is argued that such an Archimedean point in fact ‘eludes’ Rawls; his objectively rational principles of justice actually turn out to reflect *his* particular ‘political and moral perspective’ and the values within it.<sup>135</sup> This, it is argued, is the result of two problems with the original position method; the influence of one’s values and biases in determining what it would be “rational” for the original participants to decide in that position – a problem with simulating the original position, as is required to put it into use and draw conclusions from it (**section 4.5.1**), and the value-laden nature of the very construction of the original position (**section 4.5.2**).

#### **4.5.1. Simulating the Original Position**

As noted above, the authority of Rawls’ principles of justice (as presented in *A Theory of Justice*) comes from his claim that they are what would be rationally chosen by members of the original position, free from the arbitrary biases and influences of the world which the veil of ignorance seeks to exclude. However, the problem with this claim is that, while the hypothetical *original participants* may be free of these influences, the person taking Rawls’ thought experiment is not. The person simulating the original position is very much a part of the *real* world, without the luxury of a veil of ignorance, and therefore subject to all the morally arbitrary (as Rawls sees them) characteristics and conceptions of the good which the original position is designed to avoid. Furthermore, as the person simulating the original position is the ‘only actual participant’ in Rawls’ method,<sup>136</sup> the discovery of what the hypothetical participants would rationally decide is more likely to be a reflection of what *that particular thinker regards* as “rational”. As Walzer puts it, the principles which emerge turn out to be the ‘products of his [or her] own thinking’.<sup>137</sup> The claimed objectivity of the original position therefore becomes something of an exercise in hypothetical subjectivity – an exercise in attributing to the original participants decisions and conclusions which the present thinker would themselves prefer.

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<sup>133</sup> *ibid*, 14.

<sup>134</sup> *ibid*, 230.

<sup>135</sup> S Lukes, *Essays in Social Theory* (Columbia University Press 1977) 190.

<sup>136</sup> M Walzer, ‘Philosophy and Democracy’ (1981) 9(3) *Political Theory* 379, 389.

<sup>137</sup> *ibid*.

In fact, this is a problem Rawls does appear to recognise. ‘Of course’, he writes, ‘when we try to simulate the original position...we will presumably find that our deliberations and judgments are affected by our special inclinations and attitudes.’<sup>138</sup> Yet after briefly mentioning this difficulty, Rawls quickly goes on to dismiss it with the claim that ‘none of this affects the contention that in the original position rational persons...would make a certain decision’.<sup>139</sup> The only hint of a justification for this dismissal offered by Rawls is that the proposition that the rational participants would make a certain decision ‘belongs to the theory of justice’; he regards it as a separate, apparently ineffectual question, ‘how well human beings can assume this role in regulating their practical reasoning’.<sup>140</sup> However, it is argued that these issues (what the participant would decide, and the ability of the theorist to escape the biases and inclinations that it is the very purpose of the original position to avoid) cannot be separated in the way Rawls attempts. Given that the original participants and their discussions are entirely hypothetical, and given that the world itself does not offer an independent description of what is “just” or “rational” (see **Chapter 2**, especially **section 2.3.2**) the *only* means of establishing what their decision would “rationally” be is for an actual person to simulate the situation. The *only* available source of the outcomes is the decisions of whoever takes Rawls’ thought experiment. As a result, the issue of who makes those speculations and what influences them is *necessarily* connected to the issue of what decisions the participants of the original position would make. The two are one and the same. It is therefore argued that Rawls is too quick in his (rather brief) dismissal of the problem of the possible influence of one’s own attitudes and inclinations on the outcomes of the original position thought experiment.

The effect in practice of the attitudes and inclinations of a particular thinker on what they see as “rational” for the original participants to require of justice, it is argued, becomes clear through a comparison of the differences in the conclusions of Rawls and Nozick, particularly concerning Rawls’ difference principle. One of the principles of justice according to which the institutions of society can be criticised, which Rawls claims ‘persons in the initial situation would choose’, holds that ‘inequalities of wealth and authority’ are only just if they ‘result in compensating benefits for everyone, and in particular for the least advantaged members of society’.<sup>141</sup> What is of particular concern here is the argument Rawls uses to show that this ‘difference principle’<sup>142</sup> is one which would be rationally adopted by those in the original position. Rawls argues that the principles he proposes ‘seem to be a fair basis on which the better endowed’ or socially more fortunate, ‘could

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<sup>138</sup> Rawls, *Theory of Justice* (fn109) 127.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*, 13.

<sup>142</sup> *ibid.*, 65.

expect the willing cooperation of others'.<sup>143</sup> Rawls' logic supporting this argument is that, since it is necessary to 'everyone's well-being' that there is a 'scheme of cooperation' in society, advantages should be divided in whatever way is necessary to secure 'the willing cooperation of everyone...including those least well situated'.<sup>144</sup> This cooperation can only be expected if the terms of cooperation are reasonable. The less well off therefore have a 'veto', allowing them to demand that the advantages of those better off only be accepted if they are benefited by them, and which it would be rational for those who are better off to accept in order to achieve the cooperation they need.<sup>145</sup>

However, the conclusion of this argument (Rawls' difference principle) does not, by itself, follow from the premise (that the cooperation of all is beneficial). As the willing cooperation of *everyone* is to *everyone's* advantage (the 'better endowed gain by cooperating with the worse endowed' and vice versa),<sup>146</sup> those who are better endowed or more advantaged could just as easily demand the exact opposite of Rawls' "reasonable" principle. Nozick mirrors Rawls' argument and points out that it is just as logical for the better off to demand that *they* get as much as *they* possibly can in return for *their* cooperation.<sup>147</sup> If the willing cooperation of all is to the advantage of everyone, it would also be rational for the least well off to accept these terms; that is, it would be to their advantage. Thus, the logic Rawls uses to establish his difference principle as "rational" is, it turns out, neutral between his proposed principle and its opposite. As a result, Rawls' conclusion that the difference principle is what would be rationally chosen by those in the original position *cannot* be due to simple logic, unaffected by influences other than those allowed in the original position itself. Something else from outside that position is having an effect, for if the conclusion followed merely from the logic or setup of the original position itself the outcome would be dictated, but, as has been argued here, the logic could lead to at least two incompatible outcomes. Again, as Rawls is the only actual person in his simulation of the original position, it is something specific to Rawls which is having the decisive effect leading to one conclusion over the other.

It is suggested that it is Rawls' own values, attitudes and moral preferences which lead him to leap from logic neutral between requiring either the position of the least or most well off to be maximised to the conclusion that it should "rationally" be the least well off. As Nagel suggests, the assumption that 'the worst off need further benefits to co-operate willingly while the best off do

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<sup>143</sup> *ibid*, 13.

<sup>144</sup> *ibid*.

<sup>145</sup> *ibid*, 131.

<sup>146</sup> R Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 192.

<sup>147</sup> *ibid*, 195.

not' is simply a repetition of egalitarian principles.<sup>148</sup> The only difference between the arguments that the best off should be expected to sacrifice their benefits unless they work to the advantage of the least well off and the argument that they should not, 'is the relative position of the parties'.<sup>149</sup> While Nagel happens to agree that this is 'a vital difference', he points out that it is not one that is self-evident, but one which 'depends on a moral judgment'; that it is only "fair" that the better off in society should be expected make sacrifices which lessen inequality.<sup>150</sup>

That this is a subjective judgement is again exemplified by comparing the differing judgement resulting from a different person's simulation of the original position. For Nozick, not only is Rawls' difference principle not dictated by the rationality of the original participants, it is also 'unfair'.<sup>151</sup> While accepting that cooperation with others in society is beneficial, Nozick considers the possibility of intra-group cooperation where the better endowed cooperate with each other and the lesser endowed do the same, 'with no cross-cooperation'.<sup>152</sup> Nozick then considers which group would gain the most from the general cooperation between both groups Rawls envisages. As the better off group includes those with greater abilities, talents, natural resources and accomplishments than the worse off group, 'it is difficult to avoid concluding that the *less* well endowed gain more than the better-endowed do' from general cooperation.<sup>153</sup> The less endowed have access to the greater benefits created by the more endowed, which they would not otherwise have access to themselves, while the more endowed only gain access to the lesser benefits created by the lesser endowed, while having to give up some of their greater benefits. For Nozick, as the least advantaged are 'already benefiting most' from general cooperation, Rawls' argument allowing them to demand even further benefits to the detriment of the most advantaged who would be required to limit their gains is, contrary to how Rawls sees it, unfair.<sup>154</sup> In short, the sacrifice demanded of the more endowed is unacceptable, *notwithstanding that it may lessen inequality*. Nozick, in approaching the original position from a different perspective, one which rejects Rawls' particular egalitarian moral judgements and inclinations, comes out with a radically different conclusion to Rawls of what would be "rationally" or "fairly" decided in the original position.

The above examples demonstrate that, while claiming that the issues of how well one can avoid being influenced by their own attitudes and inclinations while simulating the original position and

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<sup>148</sup> T Nagel, 'Rawls on Justice' (1973) *Philosophical Review* 220, 232, n8.

<sup>149</sup> *ibid*, 232.

<sup>150</sup> *ibid*.

<sup>151</sup> Nozick (fn146) 204.

<sup>152</sup> *ibid*, 193.

<sup>153</sup> *ibid*, 194.

<sup>154</sup> *ibid*, 195.

the claim that certain conclusions would rationally be reached in that position are separate, Rawls' own arguments actually show the opposite. Rawls' particular conclusion that the difference principle would be "rationally" adopted in the original position *depends* on those attitudes and inclinations, as is exemplified by comparing the reasoning and conclusions of Nozick who rejects those inclinations. Rawls' own values influence his idea of what would be "rationally" or "fairly" agreed in the original position. Rawls therefore fails to show that it is possible to objectively simulate his thought experiment.

#### 4.5.2. The Value-Laden Construction of the Original Position

The argument in the previous section was that it is not possible to escape the influence of one's own attitudes, inclinations and conceptions of the good while simulating the original position. However, even putting this objection to one side and assuming that Rawls' thought experiment, with its conditions and restrictions via the veil of ignorance, will produce a certain, indisputable, set of justice principles according to which a "democracy" can be criticised, it is further argued that the setup of the original position itself reflects Rawls' own values. The construction of Rawls' original position is the result of the very influences, values and biases it seeks to avoid, and the very disagreements it seeks to resolve once and for all. As a result, even if a certain set of principles *are* the result of this hypothetical situation, they will be the result of a value-laden situation contaminated by the subjective influences it claims to avoid, and will themselves be so contaminated. If so, they would fail to provide an objective means of preferring one conception of "democracy" over another as more just.

Rawls justifies his construction of the original position and veil of ignorance as necessary to 'rule out' the possibility of outcomes 'that it would be rational to propose...only if one knew certain things that are irrelevant from the standpoint of justice'.<sup>155</sup> This is in line with Rawls' concern to ensure that neither a person's 'particular inclinations and aspirations' nor their conceptions of the good 'affect the principles adopted', according to which the basic structure of society and its institutions can be appraised.<sup>156</sup> It is with this aim in mind that Rawls goes on to impose restrictions on the knowledge and character of the original participants via the veil of ignorance. Rawls spends little time justifying each of these restrictions, merely asserting that they are 'reasonable', 'natural', 'innocuous or even trivial'.<sup>157</sup> It is argued here, however, that the restrictions Rawls imposes are far from self-evident

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<sup>155</sup> Rawls, *Theory of Justice* (fn109) 17.

<sup>156</sup> *ibid*, 16-17.

<sup>157</sup> *ibid*, 16.

and far from uncontroversial as he assumes. They may be “natural” or “reasonable” to Rawls, but, it is suggested, he overlooks their controversial nature to others.

For example, one of the restrictions that Rawls imposes on the original participants is knowledge of one’s conception of the good.<sup>158</sup> However, even accepting Rawls’ premise that no one should be able to use “morally arbitrary” or contingent characteristics to their advantage in the original position (this premise will be criticised below at pp103-106),<sup>159</sup> this restriction on knowing one’s conception of the good is nonetheless highly questionable. As Nagel points out, to allow participants to be influenced by their conceptions of the good in putting forward or accepting particular principles of justice would *not* be to allow them to seek ‘special advantages’ for themselves.<sup>160</sup> As long as the participants remain ignorant of their identity and place in society (restrictions which are indeed part of Rawls’ veil of ignorance),<sup>161</sup> to opt for principles on the basis of one’s conception of the good would be to opt for principles ‘that advance the good for everyone, as defined by that conception’.<sup>162</sup> It is therefore argued that, even on Rawls’ logic, his restriction on knowing one’s conception of the good in the original position is puzzling. It is further argued that excluding knowledge of one’s own conception of the good reveals Rawls’ ‘strong individualistic bias’; it replaces knowledge of specific conceptions of the good with Rawls’ preferred ‘liberal, individualistic conception’.<sup>163</sup>

This bias is evident from Rawls’ assumption that, despite not knowing what their specific conceptions of the good are, the original participants can nonetheless be confident that these conceptions will be protected by his first principle of justice.<sup>164</sup> This principle guarantees the equal division of ‘primary goods’, by which Rawls means ‘equal basic liberties for all, as well as fair equality of opportunity and equal division of income and wealth’.<sup>165</sup> The problem, as Nagel points out, is that the primary goods Rawls’ first principle protects ‘are not equally valuable in pursuit of all conceptions of the good’.<sup>166</sup> It may be the case that they serve ‘many different *individual* life plans’, but they are less conducive to conceptions of the good which desire ‘certain well-defined types of *social* structure,’ or require society to work ‘*concertedly* for the realization of certain higher human

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<sup>158</sup> *ibid*, 11.

<sup>159</sup> *ibid*.

<sup>160</sup> Nagel, ‘Rawls on Justice’ (fn148) 226.

<sup>161</sup> Rawls, *Theory of Justice* (fn109) 11.

<sup>162</sup> Nagel, ‘Rawls on Justice’ (fn148) 226.

<sup>163</sup> *ibid*, 228.

<sup>164</sup> Rawls, *Theory of Justice* (fn109) 131.

<sup>165</sup> *ibid*, 130.

<sup>166</sup> Nagel, ‘Rawls on Justice’ (fn148) 228.

capacities'.<sup>167</sup> This individualistic bias is reinforced by the characterisation of the original participants as 'mutually disinterested',<sup>168</sup> effectively ruling out possible conceptions of the good which 'depend...on the relation between one's own position and that of others'.<sup>169</sup> Put together, these biases mean that the original position exercise, from the very start, presupposes a conception of the good 'according to which the best which can be wished for someone is the unimpeded pursuit of his own path, provided it does not interfere with the rights of others', and rules out more cooperative conceptions.<sup>170</sup> For Rawls, this is clearly not an issue. As he rather forcefully put it elsewhere, if a conception of the good 'is unable to endure and gain adherents under institutions of equal freedom and mutual toleration' one must 'question...whether its passing is to be regretted'.<sup>171</sup> Yet to those who hold such conceptions of the good, which form a part of their 'moral identity' (just as much as Rawls' rejection of those same conceptions forms part of his), the liberal bias against them *is* a matter to be regretted.<sup>172</sup> As a result, it is argued that this aspect of the original position reflects ideas which are certainly not "innocuous" as Rawls suggests; it is the result of a disputable, questionable, conception of the good.

Another example revealing the value-laden nature of the original position's construction comes from Rawls' premise that no one be advantaged by natural characteristics or qualities. Rawls makes clear that the aim behind his theory of justice is to nullify 'the accidents of natural endowment and the contingencies of social circumstance'.<sup>173</sup> As Nozick notes, this 'quest' shapes Rawls' theory and 'underlies his delineation of the original position'.<sup>174</sup> For example, this is the key reason Rawls offers for imposing his veil of ignorance rendering the original participants ignorant of their natural endowments, abilities, place in society and conceptions of the good.<sup>175</sup> The justification behind Rawls' aim to find a conception of justice nullifying the effects of accidents of nature and fortune appears to be simply that 'inequalities of birth and natural endowment are undeserved'.<sup>176</sup> As these contingencies are 'arbitrary from a moral point of view', any effects they have are also undeserved and it is an 'obvious injustice' that they should be used to one's advantage.<sup>177</sup> For Rawls, such arbitrariness must be corrected; allowing outcomes to be affected by 'arbitrary contingencies' would

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<sup>167</sup> *ibid* [emphases added].

<sup>168</sup> Rawls, *Theory of Justice* (fn109) 12.

<sup>169</sup> Nagel, 'Rawls on Justice' (fn148) 228.

<sup>170</sup> *ibid*.

<sup>171</sup> J Rawls, 'Fairness to Goodness' (1975) 84(4) *Philosophical Review* 536, 549.

<sup>172</sup> WA Galston, 'Pluralism and Social Unity' (1989) 99(4) *Ethics* 711, 717.

<sup>173</sup> Rawls, *Theory of Justice* (fn109) 14.

<sup>174</sup> Nozick (fn146) 215.

<sup>175</sup> Rawls, *Theory of Justice* (fn109) 118.

<sup>176</sup> *ibid*, 86.

<sup>177</sup> *ibid*, 63.

not be 'fair'.<sup>178</sup> But again, while such logic may 'seem[] reasonable'<sup>179</sup> to Rawls, from *his* perspective, he simply ignores its controversial nature to others, from *their* perspective .

For example, Nozick, rather than regarding Rawls' idea as "innocuous", rejects it as unsupported by any 'cogent argument'.<sup>180</sup> As he points out, Rawls' claim that natural endowments, abilities and so on, are morally arbitrary or undeserved and must therefore be nullified, involves an assumption that assets and holdings should be equal 'unless there is a (weighty) moral reason why they ought to be unequal'.<sup>181</sup> Rawls' logic is, in effect, a presumption of equality. Only if this presumption can be rebutted via a moral argument he finds convincing (specifically that one *deserves* a particular distribution of natural assets), will Rawls accept differences in the distribution of those assets, and the resulting advantages gained from putting them to use. But why *this* presumption; 'why is equality the rest...position of the system, deviation from which may be caused only by moral forces?'<sup>182</sup> For Nozick, attempts to justify such an equality presumption often amount to an *assertion* 'that differences between persons are arbitrary and must be justified'.<sup>183</sup> It is suggested here that Rawls is no different. When one looks for an attempt to justify his premise, what one finds are repeated assertions that 'there is no...reason to permit the distribution of income and wealth to be settled by the distribution of natural assets',<sup>184</sup> or that there is something 'intuitively' defective about a system allowing advantages to be influenced by 'the outcome of the natural lottery'.<sup>185</sup>

Reliance on such assertions leaves Rawls open to mere counter-assertion. Why not, as Nozick does, start from an assumption that 'people are *entitled* to their natural assets', by virtue of the same fact that they were born with them?<sup>186</sup> If one does this, then, using the same logic as Rawls, it can be said that as people are entitled to what they are naturally given they are also entitled to any advantages resulting from this, and that, turning Rawls' claim around, there is no reason *not* to permit the distribution of advantages to be influenced by the distribution of natural assets. This shows the weak foundation of one of Rawls' most fundamental ideas; Rawls' premise can be rejected merely by shifting the focus from desert to entitlement. Thus, the effect of holding intuitions contrary to Rawls again becomes clear; the aspects of the original position which reflect these inclinations are

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<sup>178</sup> *ibid*, 104.

<sup>179</sup> *ibid*, 16.

<sup>180</sup> Nozick (fn146) 226.

<sup>181</sup> *ibid*, 222 [emphasis added].

<sup>182</sup> *ibid*, 223.

<sup>183</sup> *ibid*.

<sup>184</sup> Rawls, *Theory of Justice* (fn109) 64.

<sup>185</sup> *ibid*.

<sup>186</sup> Nozick (fn146) 225 [emphasis added].

rejected, and the resulting outcomes unsupported. Rawls' appeals to what "seems reasonable", or "intuitive", it is argued, provide little support; they merely repeat the fact that *he* supports his own premises and inclinations (which, of course, he would). Moreover, they will simply be rejected by those who see Nozick's entitlement alternative as "reasonable" or "intuitive". As a result, it is argued that, taken back to its underlying premises, Rawls' construction of the original position to nullify the effects of the natural lottery relies on nothing but assertion, supported by little more than his repetition of the fact that *he* prefers those assertions. Ultimately, it relies on his own egalitarian preferences and inclinations.

Putting the above arguments together, that simulating the original position to reach "rational" principles of justice is an exercise influenced by, even dependent on, the subjective values of the present thinker, and that the very construction of the situation which is claimed to produce those principles is similarly value-laden, it is submitted that Rawls' thought experiment fails to provide the "Archimedean point" he desires. Instead, as Lukes puts it, Rawls' theory of justice turns out to express a 'particular political and moral perspective' – that of an individualistic liberal egalitarian.<sup>187</sup> The principles of justice turn out to be yet another value-laden basis on which to assess the basic structures and institutions of society. As a result, Rawls' theory of justice (as presented in *A Theory of Justice*) fails to escape the argument put forward above (section 4.4.2) that assessing different conceptions of "democracy" is an inherently value-laden and subjective exercise, which, it was argued, contributes to the concept's essentially contestable nature.

#### **4.6. Rawls' "Inter-Subjective" Political Liberalism Argument**

While Rawls' original position and the resulting principles of justice have been criticised for failing to provide a non-subjective standard by which to assess the structures of society, including "democracy", his later work offers an alternative source of authority for his standards. While, as Rawls admits, *A Theory of Justice* 'regards justice as fairness...as [a] comprehensive, or partially comprehensive, doctrine[]',<sup>188</sup> one which appeals to 'metaphysical or epistemological doctrine[s]',<sup>189</sup> or as Zuckert puts it 'what we might be tempted to call ultimate truths of philosophy or religion',<sup>190</sup> the theory as presented in *Political Liberalism* attempts to avoid this. According to Rawls, his theory

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<sup>187</sup> Lukes (fn135) 190.

<sup>188</sup> J Rawls, *Political Liberalism* (Columbia University Press 1993) xvi.

<sup>189</sup> *ibid*, 10.

<sup>190</sup> MP Zuckert, 'Is Modern Liberalism Compatible with Limited Government? The Case of Rawls' in RP George (ed), *Natural Law, Liberalism, and Morality* (Clarendon Press 1996) 64.

of justice no longer seeks to establish itself as having a 'true foundation'.<sup>191</sup> Justifying a doctrine with such claims is 'not the business of political liberalism'.<sup>192</sup> Instead, Rawls now seeks to justify his conception of justice via an explicitly value-laden perspective; that which forms the 'public political and social attitudes of society'.<sup>193</sup> In other words, the aim of Rawls' theory of justice is no longer to provide some kind of value-free Archimedean point from which to assess the institutions of society, the results of which are authoritative because they are derived from an 'extrasocietal source of moral truth'.<sup>194</sup> The authority for a conception of justice is now seen as deriving from its congruence with the shared 'settled convictions' of society.<sup>195</sup> This source of authority is in line with the pragmatic purpose Rawls, at this time, sees for political philosophy; 'to provide a shared public basis for the justification of political and social institutions' to help ensure stability in society despite trenchant disagreement over the truth of competing comprehensive doctrines.<sup>196</sup> To achieve this, Rawls seeks to construct a standard of justice which is agreeable to a society generally by basing it on 'deeper bases of agreement embedded in [its] public culture'.<sup>197</sup>

The key question here is whether Rawls succeeds in justifying *his* theory of justice by appealing to publicly accepted convictions. If Rawls has indeed found a generally agreeable standard of justice which can be used to assess the institutions of society, then he will have found a means of cutting through the disagreement over "democracy" using premises on which, it turns out, we fundamentally agree after all. It would follow that, contrary to what has been argued in this chapter so far, disagreement over "democracy" *can* be resolved in a way that avoids relying on controversial and contested values. An inter-subjectively more just, and therefore superior, conception of "democracy" could be found.

#### **4.6.1. Justifying the Original Position**

Rawls' methodology remains similar to that in *A Theory of Justice*; the principles are worked out via the original position, unchanged from Rawls' earlier work. The veil of ignorance is still there to 'abstract from...the contingencies of the social world' and to counteract 'contingent advantages and accidental influences'.<sup>198</sup> The purpose of the original position, however, is now explicitly to act as 'a

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<sup>191</sup> Rawls, *Political Liberalism* (fn188) xviii.

<sup>192</sup> *ibid.*

<sup>193</sup> J Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14(3) *Philosophy and Public Affairs* 223, 230.

<sup>194</sup> J Hampton, 'Should Political Philosophy be Done Without Metaphysics?' (1989) 99(4) *Ethics* 791, 793.

<sup>195</sup> Rawls, *Political Liberalism* (fn188) 8.

<sup>196</sup> J Rawls, 'The Idea of an Overlapping Consensus' (1987) 7(1) *OJLS* 1, 1.

<sup>197</sup> Rawls, 'Justice as Fairness' (fn193) 229.

<sup>198</sup> Rawls, *Political Liberalism* (fn188) 23.

means of public reflection and self-clarification'; a means of modelling and working out the implications of the 'considered convictions' of society for justice and what it requires of public institutions.<sup>199</sup> In short, Rawls seeks to use the original position as a link between the settled and agreed convictions of society – *our* fundamental attitudes – and *his* principles of justice. To show that it can serve as such a link, Rawls justifies his construction of the original position as itself in line with 'our considered convictions'.<sup>200</sup> The idea is that, as it models the convictions and values on which society fundamentally agrees, identifying what principles would result from the original position would be to identify 'the conception of justice that we regard – here and now – as fair'.<sup>201</sup>

The specific conviction which Rawls invokes to justify the restrictions of the veil of ignorance is that society is 'a fair system of cooperation between free and equal persons', which he claims is 'implicit in the public culture' of our society.<sup>202</sup> As Rawls explains elsewhere, 'the constraints imposed...and the manner in which the parties are described, are to represent the freedom and equality as understood in such a society'.<sup>203</sup> For example, the restrictions on the participants' knowledge of their natural abilities and endowments to nullify any advantages or disadvantages flowing from these (as Rawls describes them) "morally arbitrary" factors are now justified as necessary to 'model' the 'fundamental idea of equality as found in the public political culture' of society.<sup>204</sup> So while this restriction was criticised above as unconvincingly argued for as based on Rawls' *own* questionable assertion that it is an 'obvious injustice' to allow advantages and disadvantages to result from the contingencies of the natural lottery,<sup>205</sup> reflecting his own egalitarian preference for desert over entitlement (**section 4.5.2**), the claim is that it is not based merely on *Rawls'* preferences, but *society's* too. It is one of those considered convictions over which, it turns out, we fundamentally agree.

However, even accepting the premise that there is widespread agreement in society that citizens are "free and equal" (or should be), the conclusion that advantages resulting from natural talents and abilities should be nullified (and therefore excluded via the veil of ignorance), does not necessarily follow. Such a conclusion merely 'models one *possible* conception of the concept of equality';<sup>206</sup> one

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<sup>199</sup> *ibid*, 26.

<sup>200</sup> *ibid*, 24.

<sup>201</sup> *ibid*, 26.

<sup>202</sup> *ibid*, 15.

<sup>203</sup> J Rawls, 'Kantian Constructivism in Moral Theory: The Dewey Lectures' (1980) 77(9) *Journal of Philosophy* 515, 520.

<sup>204</sup> Rawls, *Political Liberalism* (fn188) 79.

<sup>205</sup> Rawls, *Theory of Justice* (fn109) 63.

<sup>206</sup> Zuckert (fn190) 78 [emphasis added].

which holds that to allow one person advantages others do not receive, or to treat them differently, on the basis of natural abilities is to violate the principle of “equality”. As Zuckert points out, Rawls has ‘perceived an agreement at the level of concept’, in this example, the general concept of equality, and then attempted to interpret it as ‘an agreement at the level of conception’, with specific requirements.<sup>207</sup> Yet “equality” is a controversial concept. There is a wide range of competing ideas over what makes people equal, and precisely ‘what the claim of equality entitles them to’.<sup>208</sup> This disagreement stems from the ambiguity of the concept. The basic idea of “equality” and its requirements which has ‘dominated Western thought’ is something like “‘likes should be treated alike’”.<sup>209</sup> However this alone cannot form the basis of any conclusions about what is or is not acceptable or fair. The statement is meaningless unless one *determines what it means to be “alike”*, which similarities *are* relevant, and what it means to “*treat alike*”. Yet such determinations ‘do not exist in nature’; they are established only when made by people<sup>210</sup> (the argument that determinations such as these do not exist, or have content, independent of what particular individuals or groups assert them or that content to be, was defended in more detail via the pragmatic anti-realist and anti-foundationalist perspective in **Chapter 2**). The problem is that these are determinations over which people disagree, resulting in many different conceptions of “equality”.<sup>211</sup> If Rawls is to successfully show that his construction of the original position to nullify the effects of natural endowments and any advantages gained is one of our fundamental convictions evident from the public culture of society, he must show, not merely that the (vague) *concept* of “equality” is a fundamental idea on which there is agreement, but that *his particular conception* is subject to such agreement. If not, then the claim that the original position models the considered convictions of society would fail. The most that could be claimed is that this aspect of the original position models Rawls’ *individual interpretation* of a generally agreeable concept, rather than the concept itself. With that claim would return the problem of defending this particular interpretation, which in turn, would raise the problem of defending the particular moral and normative assertions and preferences underlying it, a problem which the pragmatic anti-realist and anti-foundationalist perspective defended in this thesis sees as irresolvable.

With the vague and contested nature of “equality” as a concept in mind, one would expect to find some kind of detailed analysis of the public culture of society *demonstrating* that the conception

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<sup>207</sup> *ibid*, 77.

<sup>208</sup> *ibid*.

<sup>209</sup> P Westen, ‘The Empty Idea of Equality’ (1982) 95(3) *Harvard LR* 537, 543.

<sup>210</sup> *ibid*, 545.

<sup>211</sup> See, for example, D Rae, *Equalities* (Harvard University Press 1981) 133 (suggesting as many as 108 interpretations of “equality”).

evidently preferred is that which treats natural abilities as unacceptable grounds on which to treat people differently, and on which to allow advantages to be gained. One would expect to find some detailed analysis of the public culture of society Rawls claims to rely on to demonstrate that this public culture specifically supports his particular characterisation of “equality”. However, when one looks for such analysis, it is in vain. Instead, one merely finds assertions such as ‘citizens are equal in virtue of possessing the two moral powers [capacity for a sense of justice and conception of the good]’, or that ‘features relating to...native endowment’ are ‘irrelevant’,<sup>212</sup> followed by a reference to a previous chapter discussing the veil of ignorance in which Rawls ‘assume[s]’ that it is ‘one of our considered convictions’ that having native endowments such as ‘intelligence’ is no reason to propose or accept a conception of justice which allows those with such characteristics to be advantaged.<sup>213</sup> Putting that line of argument together, Rawls’ *assertion* that features relating to native endowment or historical circumstances are irrelevant is backed up with a reference to a previous statement where Rawls himself admits he is simply making an *assumption* that such an idea is in fact one of society’s considered convictions. It is submitted that, without specific analysis of examples taken from the public culture which Rawls claims his original position models, his *assumptions* that his interpretations match the considered convictions of society remain unsupported.

Moreover, it has been suggested that if Rawls were to engage in a more detailed examination of the public culture of society, he would find evidence for a conception of equality that contradicts the one he relies on. For example, Galston points to the institution of employment to support his claim that a prominent feature of our (Western) public culture is that ‘individuals are permitted to achieve unequal rewards by developing their natural talents and persuading others to....remunerate them’.<sup>214</sup> Advantages and benefits are founded, at least partly, on natural endowments supervised only by attempts to ensure equal opportunities to develop these talents and abilities.<sup>215</sup> This can be contrasted with Rawls’ interpretation, evident in both *A Theory of Justice* and *Political Liberalism*, which treats advantages gained from natural endowment as problems to be corrected. Thus, as well as relying on interpretations of concepts not adequately shown to be supported by the culture of society, Rawls may in fact be relying on interpretations which could be seen as *rejected* by that culture.

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<sup>212</sup> Rawls, *Political Liberalism* (fn188) 79.

<sup>213</sup> *ibid*, 24-25 [emphasis added].

<sup>214</sup> WA Galston, ‘Moral Personality and Liberal Theory: John Rawls’s “Dewey Lectures”’ (1982) 10(4) *Political Theory* 492, 515.

<sup>215</sup> *ibid*.

Either way, it is argued that Rawls' attempt to ground the original position in the settled convictions of society to give authority to his principles of justice as a generally agreeable standard by which to assess institutions fails. Rawls has not successfully shown that he is merely 'making our intuitions explicit' or 'providing a foundation for what we already believe'.<sup>216</sup> As a result, the conclusion reached in relation to *A Theory of Justice*, that the original position and the principles which result reflect the questionable attitudes, inclinations and values of Rawls himself, remains. Rawls' standard of justice cannot serve as an objective or inter-subjectively justified means of choosing between competing conceptions of "democracy".

#### **4.7. Conclusion**

While "democratic" arguments are common in the political-legal constitutionalist debate, with both sides seeking to justify their desired constitutionalism as more "democratic" than the others', the main argument of this chapter has been that this is a problematic way to proceed in the debate. What "democracy" actually *is* or requires is a subject over which there is widespread disagreement. This was demonstrated through highlighting the many different ways the concept is defined and used, resulting in a lack of an agreed standard to appeal to. It was further argued that this disagreement is irresolvable, fuelled as it is by the competing political theories and values of its participants. A particular conception of "democracy" is superior only to those who share the particular values which justify it. This was demonstrated by drawing out the political theories and value-laden premises underlying various conceptions of "democracy". Rawls' early attempts to find an objective standard by which to assess the structures of society, "democracy" included, and justify his preferred model, were rejected as premised on the kind of value judgements he claims could be avoided, particularly in judging what is "rational" in the original position, and constructing this position itself. Rawls' later attempts to ground his original position, and the principles he claims would result from it, on ideas which are fundamentally accepted in society, in effect claiming that his standard of justice reflects some kind of inter-subjective agreement, was rejected as unconvincingly argued. The possibility that Rawls' standards of justice could be used to cut through disagreement over "democracy" and set up a particular conception as superior (as a matter of justice), was therefore rejected. The result is that, with both sides of the constitutionalist debate relying on a specific idea of what "democracy" is to support their arguments, and with no objective and no non-question-begging means of deciding which side really uses the concept correctly or best - a judgement which, again, was seen to be a value-laden one, relying on the political and moral values

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<sup>216</sup> *ibid.*

of the individual making the judgement, judgements and values and so which, according to the perspective set out in **Chapter 2**, cannot be grounded in anything more than the questionable assertion and question-begging reassertions of particular individuals or groups - “democracy” supports both political *and* legal constitutionalism. Arguing from this disputed concept is therefore, it is submitted, an unuseful way to proceed in the constitutionalist debate for it cannot convincingly support any side over the other.

## Chapter 5

### Conclusions

The aim of this thesis has been to critically examine the constitutionalist debate over where and how decision-making power in a constitution should be distributed, particularly regarding rights-issues. This examination was taken from a pragmatic anti-realist, anti-foundationalist, and ultimately sceptical, philosophical perspective. This perspective, holding that there exists no convincingly defensible moral position or premises, was set out and justified in detail in **Chapter 2**. It was concluded there that moral and normative claims, when questioned, can rely on nothing more convincing and nothing more stable than the question-begging reassertion of those premises by particular individuals or groups, and the fact of one's preference for those premises. The argument for this conclusion began by identifying the problem of defending moral and normative claims. The problem was seen to be that of how one can respond to the sceptical questioning of particular claims, either denying the claim outright and questioning the standing of the individual putting it forward to make authoritative moral assessments – bluntly put by Leff as the “sez who?” critique - putting forward an alternative but incompatible claim, or both. Two possible responses were considered, but rejected as incapable of adequately dealing with this problem.

Firstly, a realist foundationalist approach, offering the possibility of grounding particular claims as more accurate representations of an independent “reality”, “way things are”, or “intrinsic nature” of particular concepts and notions was rejected via a pragmatic anti-realist argument. This argument, inspired by the work of Rorty, did not claim, as might be expected, that there “is” no such thing as an independent reality or an objective content of particular notions to be represented or approximated, but that the ubiquity and unavoidability of description makes confidently distinguishing between the “way things are”, or objective qualities sought after by realists and the meaning one prefers to give to these notions, problematic. The pragmatic idea is that if one cannot confidently distinguish the thing in itself – “reality”, or an “intrinsic nature”- from the meaning we each give to these, then holding onto the ideas of such independent realities or “things in themselves” is pointless. One cannot be sure whether these independent qualities are acting as a constraint and whether they are being more or less accurately approximated by particular claims and descriptions. The approach whose goal is the more accurate representation of independent ground, a standard which can be used to choose between competing claims in a way which avoids relying on the mere assertion of particular individuals or groups - thereby rendering the “sez who?” response irrelevant – runs into the problem that what is being represented cannot be shown to be anything more than ourselves;

that what is doing the work in this exercise is anything more than our own preferred descriptions and the meaning we prefer to give to those “objects” the realist seeks. The idea that the world can have a preferred description of itself was quickly dismissed by pointing out that description requires language and that language requires a speaker. With this in mind, it should perhaps be unsurprising that the “sez who?” critique could not be avoided in the way the rejected realist approaches attempt; *someone* always has to “say”. This pragmatic argument was seen to differ from that attacked as self-refuting and contradictory by critics. It is *not* an argument that there *really is* no such thing as “the way things really are”, that the reality is that there is no “reality”, or that it is a matter of independent fact that there are no “independent facts”. Rather, it is an argument *against* these very concepts and ideas, and as such, not only *is not* made here, but actually *cannot* be made, for they use concepts the pragmatist discards.

Having rejected the realist approach, based on the idea of escaping our own belief and description to reach independent ground with which they can be compared and on the basis of which competing normative claims can be independently adjudicated, the seminal argument of Gewirth was considered. Gewirth’s influential approach was considered in detail due to the nature of the method relied on and the promises it offers for the task of defending moral claims. Gewirth’s argument from dialectical necessity was explicitly presented by him as a means of establishing a supreme moral principle – one which all actions and judgements must conform with – *without* resorting to the kinds of realist claims rejected earlier. His approach was not to claim objective authority, or correspondence to qualities independent of the perspective of individuals, but rather to ground a supreme principle of morality in logic purportedly unavoidable and obligatory from *within* the perspective of all agents as demonstrated through the dialectically necessary method. Relying on a chain of claims unavoidable from within the perspective of any purposive agent would allow the “sez who?” critique to be rebutted with the response “*you* say, or else you contradict yourself and ultimately end up saying nothing of meaning”. Unfortunately, however, it was seen that Gewirth’s argument for his supreme principle does not live up to this promised standard in that at least one of the judgements – the crucial rights claiming judgement – is not the unavoidable and logically necessary consequence of the previous judgement in the dialectical chain. As a result, the purportedly unavoidable progression towards Gewirth’s principle stops, leaving that principle as optional and in need of defense. Gewirth’s attempt to offer an obligatory principle on the basis of which moral disputes could be adjudicated, in a way which avoids appealing to questionable realist concepts and ideas, was therefore rejected as unsuccessful on his own terms. The problem of

defending moral and normative assertions thus remained unresolved. On this basis, Leff's sceptical conclusion of the lack of 'any defensible moral position on, under, or about anything'<sup>1</sup> was adopted.

Having set out and defended this sceptical perspective and conclusion, its consequences for the constitutionalist debate were considered. **Chapter 3** considered Waldron's argument that the anti-realist/realist issue considered in the first part of this thesis, and on which an anti-realist stance was taken, is irrelevant to the constitutionalist debate. Given that an aim of this thesis was to explore the constitutionalist debate *from* an anti-realist and sceptical perspective, Waldron's claim that it is effectively devoid of consequences had to be considered carefully. Careful consideration showed, however, that his irrelevance argument amounted to what was in effect *an anti-realist*, or at least realist-hostile, argument. As well as not proving his point, it was argued that this had the effect of rendering Waldron's irrelevance argument incoherent, paradoxical and therefore *incapable* of proving his point. After rejecting Waldron's argument as to the irrelevance of realism/anti-realism and (non)objectivity to the issues at the heart of the constitutionalist debate, its *relevance* to some of those issues was considered. The popular instrumentalist approach – according to which decision-making power should be distributed and justified according to the quality of the substantive outcomes a particular setup is likely to reach – was rejected. As well as defending Waldron's critique of such approaches *in practice* against responses which were seen to rely on realist assumptions and ideas, it was argued that a consequence of the acceptance of the sceptical perspective taken here was that such approaches are misguided *in theory*. Its justification, based on the prizing of "morally correct" outcomes, was seen to lose force once the very idea of a "morally correct" outcome was set aside. In fact, it was argued that the perspective taken here has the effect of rendering the very idea of the instrumentalist approach – treating such "morally correct" outcomes as the goal of decision-making and of constitutional design – meaningless. It was therefore rejected as a misguided approach to the debate.

**Chapter 4** considered another form of argument in the constitutionalist debate – arguments from "democracy". These arguments, seeking to establish a particular constitutionalist case as "democratic", and opponents' as "anti-democratic" (or at least *less* "democratic"), were seen to be common among various sides of the constitutionalist debate. The discussion of a selection of these arguments from both legal and political constitutionalists in support of their opposing constitutional models drew out the particular and differing conceptions of "democracy" and "democratic legitimacy" relied on. This revealed that, depending on how one defines "democracy" and its

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<sup>1</sup> A Leff, 'Law and Technology: On Shoring up a Void' (1976) 8 Ottawa LR 536, 538.

requirements, it could be used to support opposing constitutionalist cases. Because of this it was suggested that, unless it can be established which argument relies on a more accurate or superior conception of “democracy”, such arguments are of little use in the constitutionalist debate. It was argued, adopting Gallie’s “essential contestability” analysis, that no particular conception of “democracy” could be established as superior to another. This analysis was supported on the basis that “democracy” is a value-laden concept. The conception one agrees with, or takes to be the “true” conception, was seen to be dependent on the particular political and moral perspective of the individual. This was demonstrated via a deconstruction of particular constitutionalist arguments and the versions of “democracy” relied on. As the argument of **Chapter 2** was that such moral claims cannot be convincingly defended against opposing claims and values, it was concluded that the argument over “democracy”, which was seen to amount to an argument over the values we hold as individuals, is one over which there is no “correct”, or convincingly defensible, outcome. No conception of “democracy” can be established as anything more than question-begging and arbitrary, so that the constitutionalist arguments relying on it cannot be shown to be anything more than questionable; there is no convincing means of dismissing opposing arguments, also relying on the questionable preferences of those putting them forward, as misguided. On this basis, constitutionalist arguments from “democracy” were rejected as of little use in the constitutionalist debate as capable of supporting many opposing constitutionalist cases.

It will have been noticed, no doubt, that the argument here has been overwhelmingly negative; starting with the sceptical philosophical perspective *against* the defensibility of moral positions, and then, from this perspective, *against* the use of instrumentalist approaches, and *against* democratic arguments. This raises the question of where this leaves the constitutionalist debate and the issues within it. If current approaches are unsatisfactory, then what is the way forward? After all, the issues with which the rejected approaches were attempting to deal remain, in particular the questions of where decision-making power in a constitution should lie, and how it should be distributed and exercised. What *positive* contribution (if any) can the perspective taken and used to criticise current approaches make to these issues and to this debate? As a preliminary note, once the use of arguments relying on questionable normative and moral premises is rejected as inherently unable to provide convincing solutions to the constitutionalist debate, it is suggested that the pragmatic way to proceed is to take the underlying problem of defending moral and normative positions as the starting point and attempt to establish a constitutionalist case on this basis. That way a constitutionalist case could be made out in a way which avoids the problems of convincingly defending normative and moral claims and values set out in this thesis. This task, undoubtedly a

difficult (perhaps even impossible) one, is not one which could be dealt with in this (relatively) short thesis. However, having cleared much of the ground through this critical examination of the constitutionalist debate as it currently stands, and having raised the question of what a constitutionalist case acceptable to the philosophical perspective taken would look like, the author intends to make a more positive contribution to this task in future research. This research - taking the form of a scholarship-funded PhD at Durham Law School, for which study has already begun - will mark a move away from the constitutionalist debate as it currently exists, and, taking the negative conclusions put forward here as a starting point, will focus on the construction and justification of a constitutional model compatible with the philosophical perspective used to criticise that current debate. That is, this research will consider the question: What would, and what could, a sceptic's constitution look like?

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