Epistocratic Paternalism

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1. Introduction

Many people, including me, think that political democracy is of great importance. And we all know the traditional puzzle about whether, even if democratic decisions would produce less democratic arrangements than available alternatives would, democracy remains the required political arrangement. Is democracy required even if voters would decide against democracy?[1] In this aphoristic form, we see a pattern that I will explore in this paper. The case in which what is at stake is the continuation of democracy itself is a fine version of this pattern, but I will not concentrate on those stakes in particular. More generally, my question is how robust the requirement of democracy might be in the face of alternatives that would perform profoundly better. In particular, I will suppose that there are alternatives in which some people are given more voting power on the ground that they are better able than others to make good decisions. Some might doubt that this is true, and I won't consider that question, though I am not one of them. By supposing it might be true for the sake of argument, we can pointedly ask how weighty we should think a requirement is, and on what grounds.

The democratic idea that people ought to share equally in political rule is in stark tension with the fact that that people are not, and would never be, even roughly equal in their ability to contribute competently to the morally momentous decisions that governments make. I am not among those, ancient and contemporary, who are persuaded that this challenge to democracy is fatal.

[1] I do not know its source, and it can be formulated in slightly different ways.

But I do think that better understanding of the power of the challenge is needed, if only to help in developing an answer that is clearer and more powerful than what we have so far.[2] To do this right, I think, it is helpful to postpone the effort to give an answer, and take seriously, for methodological purposes at least, the possibility that there will not be one.

In this paper, I am hoping to understand better how the prospect of superior rule by the wise, what I'll call *epistocracy*, challenges a sweeping commitment to democracy. It might seem that the challenge can be put aside simply by arguing that the justification of democracy is based on wholly non-instrumental normative considerations. Among non-instrumental accounts, it is common to speak of a right to equal power over political outcomes, or to equal or non-hierarchical social and/or political arrangements. Such accounts often acknowledge that democracy might also have some instrumental value, but they seem to suggest that its justification is not contingent on that. If it were, the challenge from epistocracy would have to be more directly engaged. I will explain how an important set of non-instrumental accounts—accounts that emphasize a non-instrumental claim against being asymmetrically ruled by others—need to address the epistemic dimension. I think this can be exhibited by considering an analogy, imperfect as analogies are, with the common view about paternalism, broadly conceived. Even if a right against paternalism is grounded, non-instrumentally on the individual's claim of a kind of sovereignty, the right of paternalism is limited by certain considerations about the person's competence. In the absence of the relevant competence the right against paternalism doesn't apply, or is overridden. Putting it very generally for now, if the person is sufficiently bad over a certain range of decisions, and some external agent is sufficiently capable of avoiding serious errors by interfering, interference is sometimes permitted on that basis. The case of children is the obvious example, and there may be others, though this is somewhat controversial. The right against paternalism is not, it's fair to say, *grounded* in epistemic considerations, but the question of the agent's epistemic competence is nevertheless a crucial part of the account.

Sovereignty accounts of the requirement of democracy are accounts that ground the requirement in some variety of a right to collective self-governance. The analogy with paternalism helps, I believe, to see how even sovereignty based justifications of democracy do not obviously avoid the need to defend democracy's epistemic value, at least to some adequate degree, at least as compared with the prospect of what we might call epistocratic paternalism. That's the rough idea, which I now go on to lay out in a less condensed way. From there I will go on to extend the point beyond sovereignty accounts also to those emphasizing a right to equal power over outcomes, or a right against social hierarchy.

There is a sort of Holy Grail in the tradition of democratic theory, namely to show how properly democratic arrangements, as such, can avoid people being

[2] I don't mean to concede that my own attempt at an answer in *Democratic Authority* (PUP 2009) is mistaken, but I won't pursue it here, though it comes up briefly toward the end.

ruled against their will. The idea mentioned a moment ago, of "collective self-rule" evokes this aspiration. The Grail seems to me to be safely hidden, and I doubt I'm alone. Certainly, political rule need not be any form of slavery. However, we sometimes lazily say that the right against slavery is the right to be subject only to one's own will. But that would also be a right against democracy. Democracy is not freedom from subjection to others, but a particular pattern of subjection: each is subject to the authority and power of the citizens collectively, and so mostly to the aggregated wills of other people.[3] Roughly, democracy is a case of *symmetrical legal subjection*.[4] If there is a right to democracy it may be, in part, a right against asymmetrical legal subjection. I will argue in a later section that the important question cannot be Rousseau's question, namely, how there can be political rule without anyone's legal subjection to others. A better question is how such subjection might be justified, and, in particular, how democracy might contribute to an answer.

I will be considering the idea of an individual right against asymmetrical subjection. It is commonly thought, in our time, that we have such a right even if some people know better than others what the law ought be and how to achieve it. This is similar, in a way, to a right against paternalism: interference in a person's choices is generally not justified even to avoid the person making mistakes. As I have said, paternalism can be justified in special cases by what I will call a *competence gap*, as in the case of children, where intervention would tend to avoid sufficiently serious mistakes. But then, why not also the right against asymmetrical legal subjection? Why couldn't it be justified in a similar way, when privileging the power of those who know better would remedy a sufficiently pronounced incompetence by the others? That suggests a way of justifying epistocracy. It would be a form of asymmetrical subjection, and the analogy with paternalism brings into engagement considerations that are often seen as pointing in different directions in democratic theory: a right to equal or symmetrical say over political decisions, on one hand, and the importance of an epistemic dimension—the substantive quality of the procedure's decisions on the other.[5] I will consider how differences between epistocracy and paternalism mean that their justifications will be different despite the notable similarity. Finally, I consider, with those differences in mind, whether and when there might be a justification for epistocracy on the grounds of a sufficient competence gap in the case of equal suffrage democracy. Or, put another way, how might the best case for epistocracy on such grounds be turned back in favor of democracy? I will not consider the general question of how such a case for epistocracy might be answered, but just to avoid misunderstanding, I am by no means suggesting that it can't. I am just arguing that it must.

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[3] See Viehoff in PAPA 2014, hoping to count proper democracy as "nonsubjection."

[4] I say, "roughly," since democracy might entail more than this.

[5] The importance of the quality of the decisions is better called the instrumental dimension, but we will be thinking of the epistemic subset: where better decisions are produced by people intentionally figuring them out.

The central case of paternalism is interference with someone's choices with a rationale of promoting or protecting the interests of the interfered agent in cases of their self-regarding action. Classic anti-paternalism is, roughly, the position that such interference tends to be wrong. I will assume, with the classic view, that other-regarding actions will be less insulated from interference, and that will play a big role. The epistemic justification for paternalism in the political case might seem to be especially plausible, since political decisions are profoundly other-regarding.[6] So, as I have said, the question arises whether a competence gap of the right kind would also place a limit on a right—parallel to a right against paternalism—against asymmetrical legal subjection. That is, if democratic citizens—and so the democratic process—is below a certain level of competence, and there is an alternative undemocratic arrangement—such as epistocracy—whereby political outcomes would be sufficiently improved, does that consideration (other things equal) override the right against asymmetrical subjection? As I explain next, the condition that I will regard as analogous to such classic paternalism will include, more broadly, any rationale of improving the decision in question—not only for the sake of the agent's own interests.

In one respect, my ambition here is modest, arguing in the first instance against an extreme view. I want to explore what I think is a robust challenge to an absolute or extremely weighty requirement of democracy. The challenge is simple: what if some non-democratic arrangement would produce profoundly better and even more just outcomes, even a more just (at least in other ways) society? An absolutist requirement of democracy probably does not appeal to many theorists. But the pattern of that simple challenge shows that there is a serious question about how much weight a *pro tanto* requirement of democracy could plausibly have as against better performing alternatives such as, suppose, epistocracy.

2. Paternalism and the improvement rationale

I am defining paternalism broadly for my purposes, without specific reference to promoting the interfered agent's own interests. That's the most commonly discussed case, but I am construing paternalism to involve interference aimed at producing an improvement (as compared with the individual's uninterrupted choice) which is more general. One kind of improvement is to the interfered agent's own interests, of course, but another is improvement, from a moral point of view, over what would have been the agent's decision. There is also the overarching standard of what we might call rational improvement—improvement from the standpoint of all the reasons that apply to the interfered agent, which I assume would include prudential and moral reasons among others. In that way, interference for the sake of moral improvement could be

[6] Daniel Viehoff makes essentially the same point: I might have an interest in contributing to our shaping our collective life through voting, but I also have an interest in shaping my own life and so being immune from the decisions of other voters. See, "Democratic Equality and Political Authority," *** p. 350.

subsumed by the rationale of rational improvement. I will put this broader thing aside and focus on prudential or moral improvement as follows:

> *Improvement rationale:*
> An improvement rationale for interfering with an agent's choices takes, as a motivating reason for such interference, the (supposed) fact that such interference would avoid prudential or moral mistakes by that agent.

3. Weak Anti-paternalism and the Proviso

People often have a right[7] to act without interference, at least so long as their action does not involve others in certain ways, such as risking harm to them. The relevance of harm to the question of a right against interference is contested. Since there are cases, such as harmless trespass, that most people believe may be regulated by law, the idea that only harmful or dangerous acts may be regulated would not explain it.[8] An alternative is to emphasize acts that interfere with the freedom of others to use their means and powers as they see fit—call this "individual sovereignty," following Ripstein. Accordingly, I will use the idea of "self-regarding" versus "other-regarding" acts in a flexible way, leaving open whether it is best filled out according to harming others, or according to violating their individual sovereignty—two different ways in which an act might be, so to speak, with regard to others. Self-regarding actions, then, are not those that are other-regarding in either of those ways. It will be helpful to stipulate what I will call,

> *The Autonomy Principle*
> A person's self-regarding choices, presumptively (or *pro tanto*) may not be interfered with.

This may be too simple in a number of ways, but having it in place will allow us to consider the issues that are my main concern.

My question is whether and when an improvement rationale can permit departures from symmetrical legal subjection—much as an improvement rationale can sometimes paternalism. I will call that *epistocratic paternalism*. The counterpart in the case of ordinary or *legal paternalism* would be the question when, if ever, the improvement rationale for interference in individual choices by law is justifying.

One way of thinking about the right against paternalism is to hold that the improvement rationale can itself *make wrong* some interference that would not be wrong if not for that particular motive. If that rationale is regarded as wrong-making, we can speak of *strong* anti-paternalism. However, there is also another strand in our anti-paternalist thought, namely that the improvement motive, which might seem to be a permitting rationale for interference, is not. That is

[7] A "claim right," in the Hohfeldian nomenclature.

[8] *** Ripstein, "Beyond the Harm Principle" P&PA

obviously different from thinking that the presence of the improvement rationale is wrong-making itself. On this latter idea, what is wrong is the interference, not interference from the motive of improvement. I will call that,

> *Weak anti-paternalism*
> Even avoiding mistakes of the interfered agent—thereby promoting the agent's own prudential interests or moral imperatives—is (*pro tanto*) not necessarily enough to justify interference with an agent's choices.

For my purposes in this paper, it is weak anti-paternalism that I am interested in. So I emphasize the apparent failure, at least often, of the improvement rationale to do its supposed justifying work.

On the other hand, interference in an individual's choices from the motive of an improvement rationale is not always wrong, as we have seen. For one thing, young children may be interfered with, at least by certain agents. More generally, when the agent is below some threshold of competence, and interference would to a sufficient degree avoid serious error, paternalism is sometimes justified. Call this the *competence gap proviso* to the right against paternalism. Despite the compact name I am giving it, I want to emphasize that the exception case is probably not simply the gap between the competences of the interfered and interfering agents. It's not as if one agent is permitted to interfere in a in the choices of a quite competent agent on the ground that the interfering agent is even better. So, there is plausibly also a threshold of competence of the agent above which the proviso does no kick in. But for brevity, call it the "sufficient competence gap," *competence gap*, for short.

The question these observations are meant to set up is this: If a sufficient competence gap can sometimes justify paternalism, can a competence gap sometimes be sufficient to justify epistocracy?

4. Collective self-governance

The most direct analogy between paternalism and epistocracy would posit a collectivity of all subjects somehow organized into a single genuine moral agent, with its own right to make choices without interference from others. Epistocratic interference would be interference by other agents, possibly from amongst the members of the collective agent—which would still make them *other* agents on this view—in the collective agent's political decisions, on the rationale that these others could do better than the collective agent itself. This collective agent might be held to have a right to be wholly self-governing. The objection to epistocracy might naturally arise, then, that it is a case of impermissible paternalism—at least in our extended sense of interference in another's agent's choices on the basis of an improvement rationale.

I will not spend much time on this proposal, but limit myself to a few remarks about this vivid but unviable approach, the idea of the collective as an agent with rights of its own, including a right to self-governance.

a) This strong collective agent view does not correspond to any currently advocated philosophical account of the requirement or justification of democracy.

b) It is certainly recognizable, perhaps mainly in the form of what I regard as erroneous interpretations of Rousseau's doctrine of the General Will. I will have occasion to comment below on how I think the interpretation is mistaken, but that discussion will arise in another setting, namely on the question of whether, owing to democratic political procedures, each *individual* is self-governing. (In short: yes, Rousseau thinks they are, but no, it is not in virtue of the democratic structure of political procedures.)

c) While the idea of a genuine collective agent (as distinct from the utility of such an idea in, for example, law) seems to remain an open question among philosophers, this would not yet be enough to explain how it might also be a subject of moral concern in its own right, where this is not reducible to concern for entirely different agents, namely, the individual members.

d) Even if there were such a collective agent, and it literally governed itself as it had a right to do, this would not yet provide any basis at all for thinking the individual members are, in any respect, self-governing. Rule of one agent, and individual, by another agent, a collective, posits no agent that governs itself. The central normative question in the broadly liberal tradition has been how an individual might justifiably be subject to political power or authority, and this collectivist gambit is silent on that matter.

e) Finally, and despite all that, since the central idea in this paper is how the idea of paternalism suggests a salient line of argument for epistocracy, if some version of this strongly collectivist approach were somehow viable, then it is relatively straightforward how the paternalism objection goes. It is less straightforward without a simple collective agent whose autonomy is in question.

So, I go on, now to extent the paternalism analogy to less directly analogous understandings of democracy and epistocracy.

5. Symmetrical Subjection as a Baseline

There is an analogy between epistocratic interference with symmetrical subjection, and legal interference with individual choice, which I will lay out in this section. On that basis, there is something to be said for an individual right against epistocratic paternalism. In this section I exhibit the analogy, and consider that form of argument against epistocracy.

Consider an undemocratic political system in which some adults' legal right to vote is less than that of others, or is denied outright, on the ostensible ground

(which might be true) that doing so would be an improvement, morally or prudentially, in the political decisions. That form of epistocracy involves an improvement rationale, and that suggests a connection to issues about paternalism. But how does this vote-weighting count as *interference* at all, which is a standard element in the idea of paternalism? Our question about whether epistocracy is justifiable is not meant to be limited to the case where equal voting is already in place and being reformed; that would be obvious interference. But if equal voting is not already a status quo that epistocracy would upset—indeed if epistocracy is even already the status quo—why think of equal voting, in particular, as a baseline—a condition by contrast with which epistocracy is something like an interference?

There is a basis for doing so. Notice, first, that there are two points of possible interference in our purview: Our main topic is the parallel between epistocracy and paternalism, where the epistocrats interfere—or something like it—in democratic choices—call this *epistocratic interference*. But for a moment consider the more standard case of interference by law in people's choices. Call this *legal interference*. To simplify, I will suppose that interference by law is sometimes permissible but only in the case of democratically made law. If so, what might it be about democracy that can render some interference in people's choices permissible?

It is notable, as I have said, that the democratic power of legal interference is *symmetrical*. In democracy, even though any given person is subject to the interference of the others, this is also true of everyone else. And this seems to be a possible key to its justification. Even if it is justified partly on that basis, it is far from a case of non-subjection, as I have also said. To put it more explicitly now, the subjection relationship in democracy is, as I am calling it,

> *Symmetrical Subjection*: No one has legal power over another person that that person doesn't also have over them.

Suppose there is a *right against asymmetrical subjection*. That could explain why some democratic law, a kind of interference, is permissible, while no other law is. This is not yet an argument that such symmetry is the justification, but consider it a hypothesis for now. If there is a right against asymmetrical subjection at least in the context of law, then symmetrical legal subjection can serve as a kind of normative *baseline* for evaluating deviations from it. In that sense, epistocracy would be a deviation from a rightful baseline condition of symmetrical subjection. Such a deviation from symmetrical subjection would presumably take place on the basis of an improvement rationale.

Just as cases of paternalistic legal interference in individual decisions remain cases of interference even if there never was a pre-interferences status quo ante, epistocracy can fruitfully be seen as interference with people's right against asymmetrical subjection whether or not it is any change in the status quo. The sense in which paternalism is interference is, also, not that it is a deviation from a pre-interference status quo. The promulgation of paternalistic laws is interference in the familiar sense that it is a restriction of people's freedom of choice.

The structural similarity to paternalism is now pretty clear. A natural thought that is parallel to weak anti-paternalism—the claim that the improvement rationale is not sufficient to justify interference with an individual's choices—would be that the fact that epistocratic intervention would lead to an improvement in outcomes is not enough to justify the deviation from symmetrical subjection, though—we should keep in mind—with the right size and kind of competence gap it might be.

The epistocracy/paternalism parallel looks like this:

> *Autonomy principle (refined)*
> Each person has a right against (legal or other) interference with her choices, even in the case of an improvement rationale, though subject to some limit involving a sufficient competence gap.
>
> *Democracy principle*
> Each person has a right against asymmetrical legal subjection, even in the case of an improvement rationale, though subject to some limit involving a sufficient competence gap.

Having exhibited what I hope is a fruitful analogy, and one that might be used to ground an objection to epistocracy on the ground that it is, or is akin to, impermissible paternalism, we see that to be a weak argument. The moral objection to legal paternalism is normally thought to stem from a strong claim individuals have to autonomy of a certain kind. But exercising one's share of political power is to participate in the legal subjection of others (even if it's symmetrical). As I have argued, appeals to such things as "collective self-government" should not lull us into thinking that a person's vote is only self-regarding, a case simply of governing oneself. When we drop the idea that the demos is a moral being with a right and capacity to rule itself, we see instead that democracy involves people ruling each other. The claim, against interference, that each might have to exercise their share of that ruling power is, far less strong than it is in cases that are not so momentously other-regarding.

6. Epistocracy and the Competence Gap

Since the right against paternalism has limits based on what I called a "competence gap," isn't it plausible, to repeat, that the right against asymmetrical subjection must have a similar limit? The case of children may seem to prove it, in this case as it does in the case of individual paternalism. Why else do we believe that children do not have a right to vote? The competence gap may explain it: the fact that they are below a pertinent level of competence to vote well (in the interests of themselves or others), combined with the fact that there would be a sufficient improvement under the alternative of adult-only suffrage. If so, then there would be an important question: what is the threshold and the sufficient superiority such that the right is overridden?

The denial of the franchise to children is not the kind of deviation from democracy whose possible justification we are mainly wondering about, and so

it would be unhelpful to define it as a form of epistocracy despite some similarity. Rather, let us define epistocracy, still somewhat loosely, as follows:

> *Epistocracy*
> A political system in which law and policy is directly or indirectly authorized by its subjects, but where there is an unconventionally high competence threshold for the right to vote.

If epistocracy is objectionable, it is not because it proposes a competence threshold on the right to vote. That is common ground as proven by the case of children. So the central question about epistocracy seems to me to be this: On what grounds is the conventional competence threshold justified as a limit on the right against asymmetrical subjection, whereas no significantly higher threshold is justified?

At this point, where the analogy between paternalism and epistocracy has been deployed to the benefit of epistocracy against democracy, we can now note (again) an opening that remains for the case against epistocracy. It is tempting, I think, to suppose that epistocracy is like paternalism in their both being forms of asymmetrical subjection. In that case, epistemic limits to one would suggest epistemic limits to the other. But this would be a mistake: legal paternalism, in a democracy, is not a case of asymmetrical subjection. Its permissibility does not indicate any exception to a right against asymmetrical subjection. This raises the question, though it does no more than that, whether this opening can be exploited against epistocracy, by showing that the right against asymmetrical subjection is more robust against epistemically based exceptions than is the right against paternalism.

7. Equal Power vs. Symmetrical Subjection

There is another model that figures in thinking about the justification of democracy, and that is the idea of each person having an equal share of power over political outcomes.[9] Distinguishing between symmetrical subjection and equal power over outcomes will avoid certain kinds of confusion, and will also lead to some refinement of the former idea. In this section I want to explain how equality of individual power over political outcomes is not, *as such*, asymmetrical subjection, which is not a kind of arithmetic equality of anything, but a form of hierarchy. When the question is about individual power over the whole range of political outcomes, as in the case of voting, then since many of those are laws applying to all, where there is unequal power there is also something structurally different and arguably more in need of justification, namely asymmetrical subjection. The distinction between so-called distributive and relational equality, which is now familiar in the literature about "relational egalitarianism" can be usefully applied to the idea of equal power over political outcomes.

One way to think of equal power is in the case of a decision procedure over

[9] Or equal opportunity for power, or influence, etc.

which each individual in some domain of people has, at least in virtue of the formal procedures, an equal probability, should they participate, to be decisive over the decision. In that respect, power over the decision is distributed equally, in an arithmetic sense: the power each possesses can be quantified, and we can speak of each having the same quantity.[10] Call this *equal outcome power*, and distinguish it from a different idea of equal power that is salient in the context of political decision-making, especially law.[11] What we might call *equal interpersonal power*[12] is where, over some range of matters and some set of people, no person has power over any other that the other does not also have over them. Equal outcome power notably makes no reference to some people's power over other people, only to power over outcomes of a decision procedure. To avoid confusion with the simple and familiar idea of equal outcome power, it will be helpful to speak in this case, as I have already, of, symmetrical subjection. Asymmetrical subjection, naturally enough, is simply the case of subjection that is not symmetrical in that way.

Is power over the law always subjection—power over other people? It is not clear that it is. Suppose there is a procedure that decides on the names to be given to buildings and streets. (This is not always a small matter, as we know from debates over buildings that had been named for prominent figures in the Confederacy or the Civil War.) If those decisions are made by voting and universal suffrage, then each has an equal chance of being decisive, should they participate, in a given naming decision. But this is not clearly any kind of power that any of the voters has over the others. It is not a power to coerce them, for example, or to spend coercively raised taxes (names are free).

This contrasts with a majority voting procedure to decide speed limits on local roads. Those decisions will come with coercively enforced laws, a clear imposition of power over everyone subject to those laws. So, while power over the law is not always power over others, often it is. In either case there is a question of equal or unequal outcome power, but in the latter cases there is also the question of symmetrical or asymmetrical subjection.

The moral case for equal outcome power as such, whatever it might be, is not guaranteed to be the same as the case for symmetrical interpersonal power. For example, Tom Christiano defense equal outcome power as such, and not on the ground that outcome power is power over others. The importance of equal power over outcomes, on his view, is as an essential public

[10] let it be a fraction of a fixed total, or an absolute quantity in a potentially changing total.

[11] Here, of course, I am adapting some points that have become familiar in discussions of "relational egalitarianism." I resist that name for the following reason…

[12] I do not call it "equal relational power," because the idea of distributive equality is, in a well-established respect, a "relational" (sometimes called "comparative") standard—concerning how much some people have relative to or compared to how much others have. Some proponents of distributive equality interpret the idea non-relationally or non-comparatively as taking a prioritarian form (see Arneson's advocacy of a prioritarian version of luck egalitarian, in article on Anderson).

acknowledgement of the political system's equal regard for everyone's interests.[13] Perhaps, then, one of these cases is stronger than the other.

An important case is where the salient inequality cannot be captured by the idea of equal outcome power at all, but only by the idea of asymmetrical interpersonal power. The possibility of this case assures us of the difference between the two kinds of political equality. In a democratic system of lawmaking, since laws apply to everyone (in a given domain) and many laws exercise power over people (unlike the case of naming decisions), anyone who has more power than others over the outcome—perhaps they have doubly weighted votes—also, and distinctly, has more power over the others than they have over her. One natural case is where the ones with more such power are also equally subject to the laws. The present point is that some might nevertheless have asymmetrical power over others even so. Another case would be if there were a set of people who are not subject to the system of laws, or less subject to it in some way. Then, even if each had equal outcome power over the laws, others would be subject to this subset in an asymmetrical way. There can be cases of both unequal outcome power and unequal subjection. For example, monarchs might, in some systems, not be subject to the laws of their own state, or at least not to all of them. Another example, would be officials from a colonizing state having extra power in a colony. The asymmetry of interpersonal power is obvious in those cases. However, conceivably even those who are outside the reach of the laws might have only *equal* outcome power to the others—say, one person one vote. Nevertheless, they have power over the others that is not possessed by the others over them.

Asymmetrical legal subjection, then, takes at least these two independent forms: *differential degree of subjection to the laws*, and *differential degree of power over the laws*. In cases where only those subject to the law have any power over it, the power over it, or the subjection to it, might nevertheless be unequal, in which case there is asymmetrical subjection.

8. Subjection and the general will

Having used the idea of legal subjection freely up to this point, it will now pay to look more closely at this idea. First, in this section I take up a purportedly Rousseauean argument that democracy does away with subjection. Second, in the next two sections, I refine the idea of subjection, its relation to interference, and its difference from domination. We better know what is meant by subjection if we wish to understand symmetrical subjection.

The common association of the idea of democracy with the idea of freedom (as in "a free people" in virtue of democracy) may tempt us to think that under democratic government none is subject to others. I have asserted at the start that this would be a mistake, that each remains subject to all, which is not the absence of subjection. However, it may seem that Rousseau's conception of democracy and the general will holds that under the right conditions, democracy

[13] *The Constitution of Equality*, ***

is the absence of subjection to others. I think that would be to misread Rousseau.

Rousseau writes,

> [E]ach man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has. (I.6)

So far, this well describes what we might have thought of as a kind of symmetrical subjection. Even so, it does not (yet) describe an absence of subjection, nor does it yet represent Rousseau's theory of political freedom. Rousseau's self-imposed challenge was to confront the fact, as he saw it, that no rational person would willingly subject herself to the wills of the others, and yet this is the best that previous philosophy had been able to deliver. And Rousseau did go on to argue that under proper political arrangements each "remain[s] as free as before," [***] so long as laws were determined by a democratic process in which each person offered their best judgment as to what was consistent with the "general will." Under favorable conditions and motivations the result of a majority vote would be virtually guaranteed to correctly ascertain the general will. Finally, since the general will's content is also a privileged part of the content of every person's own will (the rest of which he called their "private will") subjection to law is subjection to the general will, a special part of one's own will, and so is not against one's own will. On that basis, each (including anyone who voted the other way) is free, not under any will but her own, even as she is a subject of political rule. "So long as the subjects have to submit only to conventions of this sort, they obey no-one but their own will." (II.4.8)

Each step in this argument is vulnerable, but suppose we grant all of it. It holds that each is free, but not because the subjection is symmetrical by virtue of majority rule, but because, apart from whether that is so, the laws are authorized by the general will. The general will is not a pure procedural outcome of—i.e., constituted by—the democratic procedure. Since actual political procedures are fallible, there can remain a general will that they fail to ascertain. (This is clear in Book II.) That is enough to show that the general will is not constituted by any actual political procedure. Democracy, Rousseau thinks, is contingently the most reliable epistemic method, but its role in the account of political freedom is only epistemic. The general will might, in principle, be best ascertained by a knowing oracle or elite, and rule according to it would still render each person free in the same way, namely as subject only to "the general will that is [hers]."[***] Whether or not he is correct that rule by the general will (however it might be discovered) counts as freedom, or that democracy would reliably discern the general will, in any case there is no Rousseauean argument that symmetrical legal subjection, as such, renders each person free from subjection to others. This is just as well, since that would not be plausible. At least unless all are governed according to the general will, each would remain under the collective politically organized power of all, even against one's own

will. Symmetrical subjection does not, as such, keep people from subjection, even in Rousseau. The question, then, is whether, nevertheless, its symmetry still somehow contributes to its justification.

If we substitute a different term, "domination" for "subjection" then we risk losing sight of important questions. As ordinarily used, it seems to me, "symmetrical domination" might be an oxymoron, with asymmetry built into the concept of domination. If so, domination disappears when subjection is symmetrical. But that does not directly show anything normative, such as that people are free from each other so long as no one has any kind of power over you that you don't also have over them. That may not be a case of domination for semantic reasons, but it might yet be a case where each is subject to the other, and so whether each is free is hardly settled. It is at least as plausible that neither person is. Fortunately, this point is preserved in Pettit's influential use of "domination" (which I will consider more closely below) as a term of art in political philosophy, according to which a person is dominated by another just so long as she is in a position where the other could interfere with her choices, without this being under her own control, and do so with impunity. It is clear that two people could be, and often are, in this relation to each other, at least if they are both outside the reach of law or other sanctions. Being symmetrical, this relationship may not fit the ordinary concept of domination (a minor matter), but that symmetry, and that fact about language, hardly frees such people from subjection to the arbitrary interference of the other.

9. Subjection and interference

I want, next, to look more closely at the relevant notions of subjection and interference, in order situate them with respect to the republican idea of domination. First, I lay out what I am counting as interference, subjection, and rule. Then I compare this nascent model to one built around the idea of domination.

A promulgated law that forbids certain individual choices for the agents' own good is a kind of interference with people's choices. If the law forbids using a certain drug, for example, then the choice interfered with by the law is the choice whether to take the drug. For this to be the case, notice that the interference with that choice does not consist in the state's punishing anyone. The punishment comes only after the choice to take the drug, and so the punishment itself has not interfered with that choice by that person. The punishment interferes with other choices, such as whether to spend a certain amount of money on a vacation or on a legally imposed fine. So if paternalistic laws are wrong because they interfere, then promulgated law, of the kind accompanied with a threat of punishment, is already interference, even if there is no violation and punishment.

Subjection, as I am using it here, means subjection to interference, and so being under law is subjection. The idea of subjection of one person to interference by another (or others) has a modal logical structure. A person is subject to legal interference by others insofar as it is *possible* for them to make laws that apply to

her. That is, one is subject to another's interference, not in virtue of what actually happens, but in virtue of what would be the case under certain possibilities. This isn't the only way of speaking of subjection, since we might speak as if a person is in a standing condition of subjection, meaning that their life is such that the other *does* interfere, even if not at every moment. And that condition of standing liability to interference could, in principle, be symmetrical. But what I say about law being interference even apart from any actual enforcement is a different case. What I have in mind is the promulgated law, not the law's mere existence. That is, if there is a law but its existence and any threats involved have not been made known to the people subject to it, then it is not yet legal interference in their choices. One is *subject to legal interference* insofar as there is another, or others, who *can* make laws that would be promulgated and apply to you. I will say that one is subjected to, or a subject of, a *law* by its mere existence, but *interfered* with by it only if it is promulgated, even apart from whether it is enforced on that person. To be *ruled* by another is to be subject to their interference by law.

So, as I have said, being subject to the state's interference by law might refer to either of two things, which we can now name: One would be that the state will or might interfere with a person by enforcing the law through some punishment. Call this *enforcement interference*. The other would be that the state interferes with a person's choice by legally requiring a certain choice and threatening punitive enforcement. Call this *threat interference*. Promulgated law is the latter form of interference.

10.Domination, Subsidiarity, and Subjection

I return now, to the comparison of subjection with that of domination as defined by, especially, Philip Pettit. In a recent formulation, Pettit writes,

> Someone, A, will be dominated in a certain choice by another agent or agency, B, to the extent that B has a power of interfering in the choice that is not itself controlled by A.[14]

The modal notion of subjection, as I have explained it above, is roughly a correlate of what Pettit calls "domination" (which has a similar modal structure). I focus on subjection to law. To be ruled by another is to be subject to their interference by the making and promulgating of law. That would be a case of what Pettit calls domination, so long as the ruled person cannot control the power of the other to make laws, which is normally the case.

That name "domination" can be misleading, as I say, given that we have seen that the phenomenon of subjection can be symmetrical, whereas the connotations of "domination" suggest otherwise. Also, "domination" sounds like quite a bad thing, whereas there is more openness to debate, I think, about when it is a moral violation or injustice to be subject to the interference of another. At any rate, I do not assume that the relation of subjection is always a

[14] Pettit, Philip. *On the People's Terms* (The Seeley Lectures) (Kindle Locations 1237-1238). Cambridge University Press. Kindle Edition.

wrongful relation. Since democracy seems to be a symmetrical case of it, and democracy does not seem always wrong, that is a notable counterexample to that proposition. I do not even assume asymmetrical subjection is always wrong, though I pursue the hypothesis that, where the subjection is to law, there is a strong presumption against it.

Now, the Pettit framework surprisingly does not seem to place the law itself in the relevant category of interference. So someone's power to make laws with attendant coercive threats of punishment, is not, I think, acknowledged to be within the kind of power that is under normative scrutiny. The focus, instead, is on someone's power to fine me or jail me, etc.[15] As I have said, while punishment or coercion does interfere with choices of mine, law itself interferes with choices of mine too, apart from any enforcement interference. They interfere with different choices.

At the core of my argument in this paper is that democracy entails subjection, but that it might be justified. By contrast, Pettit does not believe that democratic subjection to law involves what he defines as domination at all. I am not persuaded, though there is not space to pursue that question here.[16] If, as I am inclined to think, it does involve that kind of domination, then, at least when it is symmetrical, it is not, intuitively, a morally troubling relation, contrary to Pettit's own view of domination. But if subjection, as I would call a very similar relation, can sometimes be justified, the possibility is left open that it can be justified that all are subjected to the others…

11. The recurring pattern of the epistocratic challenge to political equality

In this final section, I move past whatever illumination their might be in an analogy between epistocracy and paternalism. I want to mention briefly three other philosophical settings for the defense of, which I won't address in detail, in order to see how the epistocracy challenge arises in a recurring pattern. In this way, we get a better idea of how a very broad family of arguments derived from some requirement of equality among persons can naturally be challenged—maybe not decisively, but that is what needs determining—on epistemic grounds.

i.

Here is a simplified form of argument, stated in my own terms, and adapted to my purposes, drawn from recent work of Niko Kolodny. I mention it only to help in exhibiting the broad pattern of the kind of challenge to democracy on epistemic grounds.

1. There is a right against broad social hierarchy.
2. Non-democratic forms of political rule are, or produce, broad social hierarchy.

[15] I'm not sure about this. I can't yet find text to settle this one way or the other.

[16] See Simpson's argument in P&PA ***, and my review of "…People's Terms," *Australasian Journal of Philosophy*, 92:4 (2014), 799-802.

3. *Therefore*, there is a is a right against non-democratic political rule.
4. Epistocracy is a non-democratic form of political rule.

5. *Therefore*, there is a right against epistocracy.

The interest here, it seems to me, is as an effort to avoid relying on a dogmatic assertion of a right to political democracy itself. The thought seems to be that if we think about broad social hierarchy, it may be easier to see how and why avoiding it can have significant importance against the possibility of inegalitarian political procedures, even if they would perform better.

Now, the right to any form of equality, such as the absence of social hierarchy could, in principle, be absolute. In that case, no matter how disastrously the entailed (suppose) democratic form of governance might perform, then even if there is an alternative political procedure that would perform far better—say, much better for every person, or with outcomes that are more just—it is required that the alternative be declined and those advantages be forgone. This makes democratic absolutism sound implausible. But of course, a challenge of the same form waits in the wings for an alleged requirement of democracy of any great strength, even if not absolute.

Notice that even if, as in this example, the kind of equality being appealed to in such arguments is "relational" or hierarchical rather than arithmetic, there is something here reminiscent of the famous leveling down objection for arithmetic equality principles. Here, the counterpart question is this: does the sort of symmetry required by that kind of relational equality have value of a kind and weight that it can outweigh even significance advantages in substantive justice?[17]

It may be something like this point that motivates Kolodny to look for what he calls, "Something Further," (his own capitalization) about any given form of hierarchy besides its simply being, formally, hierarchical. This leads him to hold that hierarchy is worrisome insofar as it impinges on people, and this in turn makes it especially significant amongst those who share a social setting and *experience* the attitudes and other effects that come with hierarchy. In a single social environment then, we have something relatively concrete to be concerned about which would be threatened by epistocracy, and which can weigh, at least to some extent, even against the promise of substantively better political outcomes that might be produces by certain hierarchical political arrangements such as some forms of epistocracy.

This is not the place to study that account further. I would only observe a way in which the bump in the rug can pop up yet again. A requirement, with some significant weight, of political democracy is held to be grounded in a requirement, with some weight, of social non-hierarchy. That plausibly helps make a case for forgoing at least some outcome advantages of epistemically better political arrangements. The bump in the rug is this: How robust is the egalitarian requirement that is doing the work? It may depend partly on how

[17] Or, even benefits to all, as in the classic leveling down problem.

pronounced a social hierarchy is necessitated by certain epistocratic arrangements. The pattern, at any rate, goes like this: Is it so important to avoid that degree of social hierarchy that it is worth forgoing significant advantages in the substantive quality and even justice of political decisions? It is just a question, of course, and it does not answer itself, of course.

ii.

And now, in fairness, let me explain how the pattern shows up for my own preferred defense of democracy against epistocracy. This is not an effort to defend this defense of democracy, but only to lay out enough of it to see how a challenge arises that fits the pattern.

I posit a principle of a broadly Rawlsian kind, according to which at least fundamental elements of the imposed order are not permissibly imposed unless there is a justification that is acceptable to the wide range of views we should regard as so-qualified. The details won't matter here, and I call it a qualified acceptability requirement. So, even if some form of epistocracy (I especially consider an epistocracy of the educated) would indeed make better and more just laws, that kind of political inequality would not be permissible unless that case for it were beyond qualified disagreement. Next, I argue that it would not be plausibly disqualified—even if you don't think it would be correct—to suspect that such things as selection effects might well skew the demographics of the "educated" in a way that throws into doubt their epistemic superiority with respect to making better and more just political decisions. Thus…moving right along… democracy is required after all.

The familiar pattern of the epistemic challenge to democracy appears again here, as follows: what is so important about justification to all qualified views (at least many of which are mistaken, by the way) even if this means forgoing the significantly better and more just decisions that could be made by the true, but controversial epistocrats?

Even as the pattern repeats itself, we might also start to discern the two main ways in which the challenge might be answered, and they are not exclusive. One, or course, is to establish that the moral importance of the relevant kind of manifest equality indeed outweighs the moral importance of having the better and more just decisions. The second, which I have not yet mentioned and will not pursue here, would be to argue that certain democratic arrangement that satisfy the relevant kind of equality have sufficient epistemic value of their own that the epistemic advantages of epistocracy are, to some extent, blunted. My own approach has been to doubt that without an epistemic case for democracy itself, the appeal to the relevant kind of equality will not be enough. That would be compatible with thinking that a strong case for the intrinsic value of the form of equality might also be a necessary part of any answer.

iii.

A final instance of this same pattern, which may have occurred to the reader by how, is the supposed lexical priority of the equal basic liberties in Rawls. No inequality in people's basic liberty is permitted, not even for the sake of benefits in the form of primary goods for every person. Now, Rawls in particular argued that equality of at least the political liberties, and, indeed, also their fair

substantive value for individuals was essential for guarding against what would eventually be a profoundly unjust society. As he says, "unless the fair value of these liberties is approximately preserved, just background institutions are unlikely to be either established or maintained." (PL 327-28)

The so-called "fair value of the political liberties" might be thought of as an implication of the idea of the procedural fairness of the political system. It depends, though, on what is meant by procedural fairness. If that means to refer to a value that does not derive in any way from the quality (say, justice or injustice) of the procedure's outcomes—call it outcome-independent procedural fairness—then, while that is a common way of thinking about the importance of political equality, it does not seem to me to fully describe Rawls's way.[18]

But the language of "procedural fairness" is a little more slippery than it might seem. Scanlon, in his recent discussion of Rawls's idea of the "fair value of the political liberties," says that it is an appeal to procedural fairness. But his use of that term seems to sit precariously between the outcome-independent sense and a more instrumental sense of procedural fairness. For example, he speaks of the power some would have, when political power is too unequal, to influence the results of the procedure in their own favor. Surely, that does sound unfair. There is the impression that there is meant to be something unfair about this even if, somehow, the results and decisions turned out to be substantively just (however, unlikely this may seem). Alternatively, however, what is wrong with some being able to influence the procedure in their own direction may instead (or in addition) be that this will tend to result in substantively unjust laws—laws skewed unjustly toward the interests of the more powerful.[19] Scanlon's language seems almost studiously to avoid suggesting that the argument is outcome based in any way, though I am not prepared to say for sure which he has in mind. As for Rawls, it is fairly clear that his own emphasis is outcome based. This doesn't rule out that unequal value of political liberties might also be unfair in an outcome-independent sense, but I see no appeal to that idea in Rawls's account.

On the Rawlsian view, at least read in this way, we see how another gambit in defense of political equality is to deny that the inegalitarian alternative is really likely to be epistemically better. However, Rawls does not consider the case of epistocracy. He mainly considers the prospect of some having more political power owing to their greater wealth. It is easier to cast that as a threat to just

[18] There is some sign that Rawls has both reasons for "fair value." "The guarantee of fair value for the political liberties is included in the first principle of justice because it is essential in order to establish just legislation and also to make sure that the fair political process specified. by the constitution is open to everyone on a basis of rough equality." (PL 330)

[19] The objection can be framed as procedural in a way, if, as Scanlon says, "the objections are procedural in the robust sense I defined earlier. The charge is that …officials made decisions that were not responsive to the relevant reasons." ("Why Does Inequality Matter?" *** p. 84) But to say they are the relevant reasons for making certain decisions seems also to suggest procedure-independent values pertaining to outcomes, that the participants ought to be attending to. So is this objection really about an outcome independent procedural criterion, or not?

decisions than it would be if the greater power were not apportioned to wealth but to some plausible marker of competence at making just decisions.

So, while Rawls's account of fair value points to the epistemic benefits of that kind of political equality, the strong priority of the equal basic liberties must confront the recurring pattern of challenge, and now this kind of question for Rawls will be quite familiar: Why think that the equal basic liberties are so important that they may not be outweighed by the prospect, should there be one, of political arrangements that would produce significantly more just decisions over time? I close with just the thought that, there are elements in Rawls in which the only justification for one injustice is to prevent even worse injustice, and that might be something to consider here. But, if so, that would be to hold that, in principle, epistocracy could turn out to be morally preferable to democracy. But this would all require a lot more thought.