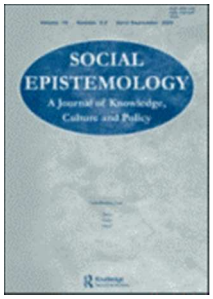

Proceduralism and the Epistemic Dilemma of Supreme Courts

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Abstract: Proceduralists hold that democracy has a non-instrumental value consisting in the ideal of equality incorporated by fair procedures. Yet, proceduralism does not imply that every outcome of a democratic procedure is fair per se. In the non-ideal setting of constitutional democracies, government and legislative decisions may result from factional conflicts, or depend on majoritarian dictatorships. In these circumstances, Supreme Courts provide a guardianship against contested outcomes by enacting mechanisms of checks and balances, constitutional interpretation, and judicial review. Yet, in virtue of this role, Supreme Courts exercise a form of epistocratic power, which rests at odds with the ideal of political equality. We analyse this dilemma and propose a solution, arguing that Supreme Courts do not run unrestrained decisions; rather their decisional power is bound to the protective function of fundamental rights, in which their constitutional mandate ultimately consists.

Keywords: proceduralism; epistemic peerhood; epistocracy, Supreme Courts; judicial review

1. *Introduction*

One of the crucial issues in democratic theory is whether the legitimacy of democracy rests ultimately on the fairness of its procedures, or it is rather instrumental to the attainment of more fundamental goods. In this work we explore the procedural account of democratic authority. Proceduralist views hold that democracy should be justified by appealing to the quality of its procedures, not the quality of outcomes. The scope of fair procedures does not only encompass the way institutions treat citizens' claims before the law. Fair procedures should also contribute to realise an essential dimension of the ideal of political equality, the value of equal respect, that is people's prospects and capacities for pursuing a meaningful life-plan. More precisely, a proceduralist account claims that democratic deliberation is legitimate in virtue of the equal consideration of the interests and preferences of all those involved by means of suitable decision procedures.

More recently, some theorists have focused on the alleged epistemic qualities of democratic procedures for decision-making, arguing that the epistemic performances of agents should matter in establishing the validity of collective choices (Anderson 2006; Estlund 2008; Landemore 2013, 2017 [this issue]; Martì 2006). These authors, generally labelled epistemic democrats, insist that an exhaustive justification of democratic authority should balance

proceduralism against the epistemic quality of procedures.[1] In section 2 we analyse this debate, and argue in favour of a specific version of epistemic proceduralism, which we call normative proceduralism. This is the view that the procedural justification of democratic decisions is partly grounded in the mutual recognition of citizens as epistemic peers (Peter 2008, 2013b). Thus, epistemic peerhood is a realisation of mutual respect and as such it contributes to political equality. In sections 3 and 4 we assess whether our proceduralist account is consistent with the fundamental protective role played by Supreme Courts in real world democracies (see also Follesdal 2017 [this issue]). In the non-ideal setting of actual constitutional democracies, Supreme Courts provide a guardianship of fundamental rights and liberties against contested majoritarian outcomes by enacting mechanisms of checks and balances, constitutional interpretation, and judicial review. Yet, in performing such a role, Supreme Courts exercise a form of epistocratic power, which is at odds with the principle of peerhood that we defend. Following this line of argument, we contend that this is a genuine normative dilemma for proceduralists: either they align with the strictly procedural aspects of equality, and deny that any constitutional body may be conferred with special epistocratic privileges, or they defend the epistocratic role of Courts, giving up on the idea that expertise and epistemic considerations may override democratic outcomes. We propose a solution to this dilemma, arguing that Supreme Courts do not run unrestrained decisions, but rather their decisional power is bound by the protective function of fundamental rights, in which their constitutional mandate ultimately consists.

2. *Proceduralism: normative and epistemic*

A proceduralist view holds that democratic legitimacy does not depend on external criteria of assessment of the quality of decision outcomes, but rather on the principles that govern procedures of collective decision making. Which are these principles? According to classical proceduralists (Dahl 1959; Riker 1982), the legitimacy of democracy is grounded in the very existence of a scheme of rules and procedures of consent formation under conditions of fairness, where no reference is made to the values promoted by those procedures. Such account is thus quite thin: democracy is a selective procedure established by an agreement over rules alone, without referring to any substantive value where agreement would be difficult to reach.

[1] For instance, Estlund (2008: 89) claims that democratic procedures have a better-than-chance probability of identifying right policies, and are better at doing so than other forms of governments.

Other and more recent advocates of proceduralism look for a different strategy. Call it normative proceduralism. Democracy — according to this view — incorporates substantive political values that democratic procedures should contribute to realise. For instance, for Saffon and Urbinati (2013: 2), the significance of democracy in its historical unfolding is to protect and enact the principle of equal liberty. The historical purpose of democracy is also its normative goal: it is an intrinsic feature of democratic processes to be conducive to freedom and therefore no external criterion is required to assess the quality of such achievement. This is the first feature of normative proceduralism, 'procedural correctness', which refers to the intrinsic fairness granted by pure proceduralism (Rawls 1971, 73-78).

A second aspect of normative proceduralism stems from the description of citizens as agents actively engaged in decision-making processes. A well-suited democratic decision-making procedure should respect the agency of every member of the constituency and ensure everybody the possibility of impacting public choices. The criterion of equal consideration at work here is responsiveness: outcomes of democratic decision-making process should address the demands of participants involved in decision-making either by meeting their valid claims, or by offering a justification for rejecting them.[2] In either case, procedures are responsive when they treat participants as agents, not patients of political decisions. Along with procedural fairness, responsiveness is the other feature justifying the majority rule as a democratic criterion of decision-making in conditions of stable disagreement, since procedures ensuring a degree of respect to each opinion allow citizens to feel respected even they happen to be in the minority.[3]

However, it may be objected that since responsiveness requires democratic decision-making to be sensitive to the particular aims, preferences, and claims of the participants, is it an extra-procedural criterion.[4] So, does normative proceduralism partly hinge on epistemic criteria? In order to address these difficulties, some theorists have sought to establish a non-monistic account of legitimation for democratic authority, looking at both the procedural and epistemic virtues of deliberative systems. Call this view epistemic proceduralism (see also Ebeling 2017 [this issue]). The argument — epitomised by Estlund (2008, 98-116) — holds that democratic

[2] Saffon and Urbinati (2013: 20-22) include responsiveness among the main features of their account of procedural democracy along with uncertainty; openness and contestation; participation, emendation, and non-triviality.

[3] Jeremy Waldron (1999) has shown that as long as neutrality among citizens is concerned, tossing a coin and majority-rule solution would both be procedurally valid; therefore neutrality per se does not grant fairness. The responsiveness criterion provides an answer to the tossing the coin objection, because the majority rule incorporates the commitment of giving equal weight to every member's claim and preference, a feature that lacks in random selection.

[4] On this debate, see Estlund's (2008) critique of the presumed strictly procedural value of responsiveness, which he refers to as 'aggregativity', and Mackie's (2011) incisive reply to it.

procedures are authoritative because they tend to produce correct decisions. Since for epistemic proceduralists the aim of democracy is to track the truth,[5] democracy is preferable among alternative forms of decision-making because it best approximates such a goal. This position has some advantages. For instance, when competing demands are at stake, it seems reasonable to claim that outcomes of deliberation should be sensitive to expert knowledge, which can more reliably foresee the consequences of deliberation. Truth may not be the ultimate goal of deliberation, but it is a side-constraint for good deliberation. Yet, epistemic proceduralists admit that the epistemic value of democratic procedures is modest: for one thing, democracy is not infallible; besides, deep disagreement is a fact of public reasoning, no matter how good deliberative procedures are laid out. Estlund argues that the crucial point is not to defend democracy as the best form of government, but that it is 'the best epistemic strategy from among those that are defensible in terms that are generally acceptable. If there are epistemically better methods, they are too controversial —among qualified points of view, not just any points of view— to ground legitimately imposed law.' (2008, 42). Against normative proceduralism, which judges the merit of a procedure by means of equal status and responsiveness, epistemic proceduralism maintains that such criterion overlooks the epistemic performances of those involved in collective decision making: not every outcome is correct just in virtue of being the result of a suitably constructed procedure. Truth — or rather, the best choice among 'those that are better than random' — constraints procedures when outcomes are epistemically poor or ill-informed, and a place should be made for qualified opinions within the procedure itself. Political decisions are legitimate when they are the outcome of a democratic procedure, and a democratic procedure is legitimate because it is conducive to decisions that would not be rejected by those equipped with adequate knowledge and expertise.[6]

We agree with Estlund that such considerations matter in democracy, and yet we believe that epistemic proceduralism is at odds with the circumstances of deep disagreement that characterise contemporary democracies. For instance, Fabienne Peter (2008, 2013a, 2013b) has convincingly argued that outcome-oriented versions of democratic authority dismiss disagreement as an unfortunate fact of our public life imputable to agents' reasoning fallacies

[5] See List and Goodin (2001, 177) for a formulation of this view: 'The hallmark of the epistemic approach, in all its forms, is its fundamental premise that there exists some procedure-independent fact of the matter as to what the best or right outcome is. A pure epistemic approach tells us that our social decision rules ought be chosen so as to track that truth'.

[6] Estlund (2008, 48) takes the acceptability requirement necessary for political legitimacy, but not sufficient for it. See also Enoch (2009, 38) for an interpretation along these lines.

and cognitive flaws. Epistemic accounts like Estlund's that overlook the fact of disagreement in the name of the epistemic quality of democracy miss this crucial aspect: that disagreement is not simply a fact that prevents participants from agreeing; rather, it is what justifies democracy as a legitimate selective procedure.[7] Even more, they miss the value of dissent rooted in the definition of democracy as a political system under circumstances of stable disagreement.[8]

Our intention is thus to explore a different strategy, which recognises an epistemic status to participants in deliberation and yet refutes any epistemic conception of democratic authority. We move from two premises: first, that a well-functioning democracy must allow citizens to fight for the recognition of their own interests and rights; second, that the epistemic circumstances of a real-world democracy are such that claims of knowledge, interests and rights are essentially contested.[9] Moving from these two premises, we hold that in a democracy shaped by the ideal of political equality, both institutions and citizens among them must recognise each other as epistemic peers. This normative requirement is the third grounding feature of normative proceduralism, that is the possibility for fellow citizens to acknowledge each other the status of epistemic peers.

This requirement — we said — refers to two fundamental aspects of equality: one is the proceduralist tenet that equality has a non-instrumental value expressed by the idea that any voice in the political arena should be given equal weight. The second hinges on the epistemic intuition that, within a collective decision framework, everybody has an equal likelihood of being mistaken (Elga 2007; Peter 2008 and 2013a). This second feature has a clear fallibilist appeal. Yet, the idea of an equal likelihood of being fallible is not uncontested. After all – one may argue – from the claim that everybody could be mistaken, it does not follow that everybody is in the average equally likely to be mistaken. Experts may be mistaken, but are less likely to be so *vis-à-vis* the laymen. In plain words, they are more competent.[10] Therefore, the equal likelihood principle does not seem to lead to the equal weight of consideration in collective decision-making. However, the criticism fails to realise that it suffices to grant the fallibilist clause to conclude that everybody in a political constituency – the expert and the

[7] For two other views that look at disagreement as a valuable aspect of contemporary democracies, see Anderson 2006 and Bohman 1996 and 2006.

[8] The normative value of dissent is central to agonistic versions of democracy (Mouffe 2000; Tully 2004) and dialogical forms of deliberation and negotiation (Bellamy 1999; Bohman 1996).

[9] Peter (2013a) argues that, in conditions of pervasive disagreement, the appraisal of evidence is always mediated. On the same point, Sosa (2010) claims that the full-disclosure-assumption of first-order evidence is too strong since evidence is often 'too complex' to be fully grasped by a single agent.

[10] Competence is also Mill's chief argument in favour of plural voting. See Mill (CW, v. 19, 324-325).

layman alike – are mutually accountable in justifying their claims. No matter whether an expert is actually less likely to be mistaken, the possibility of being so is sufficient to commit the expert to a request of justification. The same goes with alternative definitions of epistemic peerhood that refer to the degree of equality with regard to epistemic virtues such as intelligence, coherence, attentiveness, intellectual honesty, etc. They all involve a more or less thick notion of what counts as sharing an equal status as knowers.[11]

The advantage of a fallibilist characterization of peerhood is to grant the equal status of participants as knowers in virtue of the actual conditions of deliberation in which they operate, without appealing to potentially contestable standard of assessment of epistemic virtues. Two agents that disagree in a context of deliberation must at least admit that they are on a par as disagreers. Assuming good will in seeking a solution to potential conflicts, those subjects would both acknowledge that is extremely difficult to establish who has the epistemic authority to make claims that count as conclusive reasons. This consideration is crucial for a conception of democracy, because it provides agents with epistemic reasons to recognize other participants as epistemic authorities. Indeed, once disagreement is reckoned not to be solvable once and for all, as epistemic peers we are justified in holding our beliefs, but not entitled to dismiss other participants' positions as epistemically inferior. Even in case of widely different epistemic performances, the lack of a publicly justifiable argument for referring to a third-personal authority provides us with a reason for attributing at least a minimal level of epistemic credibility to people we disagree with.[12] That is, the interpersonal exchange among participants has an epistemic value, regardless of whether such deliberation will reach or not correct decisions, and therefore the epistemic aspects of the reasons-giving process still pertain to a procedural account of democratic authority.

We argued so far that when citizens are willing to deliberate together about political matters, they enter into a normative symmetric relationship as epistemic peers. If we accept the image of democracy as a collective work-in-progress of correction and emendation from its previous mistakes, we should then say that each citizen will be part of the crew that keeps repairing the boat.[13] Now, within the architecture of actual constitutional democracies, Supreme

[11] For more standard definitions of epistemic peerhood, see Gutting 1982 and Kelly 2010.

[12] Such account of epistemic peerhood is consistent with the description of political equality as a range property (Carter 2011; Rawls 1971). In fact, the normative request of recognizing my fellow citizens as epistemic peers appeals to the democratic ideal of granting to everybody the default position of equal respect, rather than assessing the actual cognitive, moral, practical (etc.) abilities of each citizen.

[13] See Bohman (2006, 183) referring to Neurath's boat metaphor.

Courts play a unique function in the work of self-correction, as they provide a guardianship of individual rights against the attempts of the other branches of legal power to pass legislation or executive orders that hinge on those rights. However, the epistemic function fulfilled by the Courts might appear to run afoul with the normative requirement of ascribing the status of epistemic peer to any member of a political society. In the next section, we address this problem, wondering whether the appeal to the expertise of constitutional judges is at odds with the procedural ideal of the equal epistemic status shared by participants to the democratic process.

3. *The epistemic dilemma of Supreme Courts*

In the previous section we defended a normative view of proceduralism that incorporates epistemic peerhood as a requirement of democratic deliberation. Looking at the actual circumstances of deliberation, we claimed that the possibility of overcoming dissent and reaching a full agreement is incompatible with the very definition of democracy. Democratic procedures should respect the agency of citizens and for doing so they must grant citizens the ability to fight for their interest and values, politicising their demands in the public arena. Democratic deliberation is not merely focused on political agreement. A large portion of the democratic ideal is fulfilled by the adversarial process (Leydet 2015; Manin 2011) that ensures the critical assessment of political proposals as well as the constant attempt by minorities to be equally treated publicly and before the law.

The epistemic entitlements of participants to democratic decisions have a crucial role in defending claims of justice and rights when government and legislative decisions result from factional conflicts, or depend on majoritarian dictatorships. In the non-ideal setting of actual constitutional democracies, Supreme Courts usually provide a guardianship against contested outcomes of this sort by enacting mechanisms of checks and balances. The reason why we identify Supreme Courts as having a special function is twofold: first, because they are the only unelected body within the system of check-and-balances of constitutional democracies with the power to strike down majoritarian decisions by means of judicial review. Admittedly, other unelected bodies have constitutional powers in contemporary democracies, such as upper chambers (for instance, the British Chamber of Lords) and head of states (such as in any modern constitutional monarchy). Yet, upper chambers' legislative functions are exclusively exercised in conjunction with other elected assemblies, while unelected heads of states have usually only a limited veto power. In neither case, can these bodies autonomously strike down

the law. On the contrary, Constitutional Courts are the paradigmatic case of an unelected body provided with an autonomous constitutional power of such sort. Landmark cases representative of this judicial function can be found in many constitutional democracies, even beyond the state level.[14]

The great question — to label Dworkin (2011, 395-399) — is whether unelected judges should have the power to deny the decisions of a majority. Alexander Bickel, who originally addressed this question, called it the 'counter-majoritarian difficulty' (1986, 16-18). This is a genuine problem for proceduralists: either they align with epistemic peerhood, and deny that any constitutional body may be conferred with special epistocratic privileges, or they defend the epistocratic role of Courts, giving up on peerhood. But is it really so? Let's have a closer look at which features of Courts give rise to the main concerns.

The first contending feature of what we may call the epistemic privilege accorded to supreme judges is judicial review. In its most general formulation (which encompasses both civil and common law systems), judicial review is the power Supreme Courts have to invalidate legislative and executive acts that are incompatible with the Constitution. Although the specific powers vary among jurisdictions,[15] the general doctrine of judicial review consists in the principle of the separation of power, and the supervising function of the judiciary over the other branches of constitutional powers.

Many democratic theorists have been sceptical towards judicial review, both on historical and conceptual grounds.[16] Judges have in fact a discretionary power entrenched by the provision of immunities in adjudication and sentencing, and yet they are not usually elected, but rather inducted into office without popular designation. The most straightforward case against

[14] See, for instance, *Brown v. Board of Education*, 347 U.S. 483 (1954), the US Supreme Court landmark decision during the Civil Rights movement, and more recently, *Obergefell v. Hodges*, 576 U.S. (2015), where the Court established the right to marry to same-sex couples. Both cases invoked equal protection under the Fourteenth Amendment. In the Europe Union, a homologous function is exercised to some extent, by the European Court of Justice (ECJ). A recent landmark decision by ECJ on the right to privacy over data published on the internet (the so-called 'right to be forgotten'), is *Google Spain v AEPD and Mario Costeja González* (C-131/12 2014), in which the Court held that an internet search engine operator is responsible for the processing that it carries out of personal information which appears on web pages published by third parties.

[15] Judicial review includes also the power to overthrow decisions made by lower Courts. As Dworkin puts it, judicial review is 'the power of judges not simply to ensure that citizens have the information they need to properly assess their own convictions, preferences, and policies, or to protect citizens from an incumbent government anxious unfairly to perpetuate its mandate, but actually to strike down legislation whose majoritarian pedigree is undeniable', (2011, 396).

[16] Some scholars have challenged the progressive function of the Supreme Courts in the USA history. See for instance Christiano (2008, 281), who share the same scepticism expressed by Dahl (1955) and Tushnet (1999). For the opposite view, see Bickel (1986), who stresses the constitutional uniqueness of judicial review in US constitutional history. Pacelle (2002) argues that the appropriate role for the Supreme Court in the USA should be based on the doctrine of judicial restraint.

judicial review is Waldron's (2006). Waldron criticises this exclusive power on two fronts. First - he claims, judicial review 'does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights…'; second, it is politically illegitimate, so far as democratic values are concerned: 'by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality'. (Waldron, 2006, 1353). Thus, while there is no conclusive reason to argue that the judicial power is better situated than legislatures on identifying and protecting rights, there is an overwhelming superiority of legislatures over courts in terms of legitimacy, equality and participation, that courts cannot emulate. In conclusion, for Waldron the problem with judicial review is both a matter of legitimacy, and of substantive justice.

Against this argument, many have claimed that judicial review is indeed compatible with democratic ruling because we cannot even conceive of contemporary modern democracies without a Supreme Court enabled with the power to interpret the Constitution and enforce its rules against the misuse of public and private powers. This view, which we may label strong constitutionalism (Ackerman 2014; Bellamy 2007; Dworkin 2011; Eisgruber 2001; Ferrajoli 2011), holds that judicial review secures the power of judges to protect fundamental rights, and a Supreme Court may act democratically even by overriding the decision of a majority when the protection of these rights is at stake (Lever 2009). By fundamental rights we refer here to the cluster of civil, political, and social rights that figure in contemporary liberal democratic constitutional charts. Among them figure the core rights of classic liberal tradition, such as the rights to life, liberty and property that we may find in a system of natural liberties, along with the civil liberties concerning the freedom of religion and expression, the writ of habeas corpus and due process, the equal protection of the law and fair trial, which all safeguard the legal status of citizens against unduly government interference; but also more substantive participatory rights, including the right to vote and to be elected, freedom of press and association. The historical development of these rights is instructive in explaining the democratic procedures of the constituent processes that led to their constitutional entrenchment.[17] However, along with the historical dimension, fundamental rights and democracy show also a conceptual dependence: the legitimate authority of democracy cannot

[17] Habermas (1996) claims that liberal rights and democracy are co-original and provides a reconstruction of this historical process to show how such interdependence is mediated by the progressive constitutionalisation of these rights.

rest exclusively on the decision made by majorities, for also other forms of democracy — popular or plebiscitary — would satisfy such requirement, but in its power to grant the expression of dissent and safeguard minorities from populist drifts. When the exercise of judicial review appeals to fundamental rights so conceived, Supreme Courts realise a genuine democratic power.

Another form of epistemic privilege of supreme judges is their exclusive role as interpreters of the Constitution. Issues concerning discretion by expertise are even more critical when judges are invested with the power to decide over hard-cases concerning issues of public and private morality. Normative proceduralists have reason to be concerned with this form of privilege, for it violates the requirement of epistemic peerhood. One might say: if a judge has the power to overthrow a democratic decision that is the outcome of a sound deliberative procedure, then constitutional democracy would be similar to that farm where all were equals, but some were more equal than others. Yet, this is an uncharitable characterisation of a good-will proceduralist. As we remarked, proceduralism is not a form of fetishism in the sacred value of procedures. Procedures are valuable insofar as they embody the non-instrumental value of equal consideration and respect. Therefore, not all outcomes of correct procedures are to be accepted without criticism or appeal. This is the case of majoritarian dictatorships, a threat that has long been feared by republican thinkers who saw in unrestrained majorities the risk of a mob rule.[18] For instance, in the aftermath of the 9/11, an unprecedented restriction of fundamental rights, the increase in surveillance and the new profiling techniques led to an unfair distribution of the burdens of enhanced security, which fell heavily on targeted minorities (especially Muslims) in the name of the general interest. These are outcomes the wise proceduralist would not deem fair, even if procedurally correct. What a proceduralist rather rejects is that procedures may be overrun by judgment without appeal. Therefore, if there is a tension between the proceduralist paradigm and the role of Supreme Courts, this must lie in exclusive nature of this power.

We can reconstruct what we said so far as an argument leading to a dilemma.

1. Proceduralists hold that one of the function of democratic procedures is to grant the equal value of each participant's claims, both as moral and epistemic subjects. As epistemic subjects,

[18] James Madison urged that the instability of government due to factional conflicts is actually linked to the tyranny of the majority, for measures to solve these conflicts are often not decided according 'rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority' (*The Federalist papers*, No. 10, 49-54).

participants in the democratic decision-making process are on a par because they are equally likely to be mistaken (peerhood), and they are equally entitled to demands of justification for outcomes taken in their names (responsiveness).

2. It follows from (1) that epistemic peerhood justifies the proceduralist understanding of democracy against epistemic conceptions of democracy. A function of democratic procedures is not to be truth-tracking, but to deliver outcomes that are responsive to the preferences and claims of the members of a given constituency. Thus, any decision-making procedure that denies the equal likelihood of being fallible and the equal entitlement of responsiveness, frustrates people's fundamental equality.

3. Yet, (2) requires an amendment. Proceduralism does not license every possible outcome of a democratic procedure decision. This is specifically the case of those outcomes of procedurally sound decisions, which may yet frustrate participants' demands to count in the decision-making process. When cases of majoritarian dictatorship, or distributive concerns in the allocations of social burdens are at stake, the procedural correctness of outcomes is to be justified *vis-à-vis* epistemic demands of equal consideration.

4. How to ensure and specify these amendments? When procedural outcomes conflict with the equal value of rights and the epistemic status of the participants, the authority of Supreme Courts grants a form of guardianship against these outputs by means of judicial review and constitutional interpretation. A conception of proceduralism that is sensitive to the non-ideal circumstances in which constitutional democracy operates, should explain and justify the role of Supreme Courts within its paradigm.

5. However, in performing their role, Supreme Courts exercised an epistemic privilege that conflicts with epistemic peerhood even in its amended version, granting judges immunity in virtue of their exclusive role and expertise.

6. Therefore, either we align with the proceduralist paradigm (3), accepting peerhood and rejecting the epistemic of Courts, or we recognize the epistemic authority of Courts (5), and deny that peerhood should apply in those cases protected by constitutional privileges.

The dilemma appears to be genuine, or at least it helps to locate where the tension between epistemic and procedural aims rest.[19] Yet, the argument overlooks an important aspect of constitutionalism which — far from conflicting with proceduralism — reflects instead some of its desiderata. We shall develop this argument in the last section of this work.

4. *The Epistemic Authority of the Courts*

The crucial function of Supreme Courts is to rule over cases and laws in the light of the Constitution. In the exercise of this function Supreme Courts do not run unrestrained decisions, nor is their function confined to ascertaining the mere consistency of an existing law with the letter of the Constitution. Constitutional Courts — in both civil and common law systems — often rule over hard-cases by offering interpretations that preserve the integrity of the Chart. The function of the Courts is still discretionary, but bound to task of ensuring the realization of constitutional principles. More precisely, their decisional power is bound to the protective function of fundamental rights, in which their constitutional mandate ultimately consists.

Once we have gained this vantage point, what we called the epistemic power of Constitutional judges appears under a different light. It is not a 'privilege', but a prerogative Courts have to interpret the Constitution and rule within the Constitution over the safeguard and advancement of fundamental rights of equal liberty. The epistemic prerogative of Supreme Courts is then substantive, and not merely procedural: it is an interpretation of the integrity of the legislation with the principles of the Constitution, not merely of their consistency.[20] And since the goal of safeguard and promotion of equal liberty and fundamental rights is what proceduralists embody within their conception of democratic legitimacy, the original dilemma loses strength.[21] Indeed, the envisaged conflict may turn into an alliance. Several reasons run in favour of a possible reconciliation, which avoids the charges of epistocracy. The main reason stems from the consideration that Supreme Courts are not regular courts. In exercising their

[19] Pacelle (2002) also claims that U.S. Supreme Court poses a dilemma for democratic theory, but of different nature: the dilemma does not concern the very existence of a court, but its role as historically accorded to by judicial activists, namely those who defend the *de facto* legislative initiatives of the Court.

[20] Ferrajoli (2011) is a strong advocate of this view of constitutionalism. Yet, it should be noted that not every form of Constitutional interpretation is meant to be critical of the status quo, or push progressive measures of reform. US Constitutional history is a paradigmatic case of the difficult struggle for the advancement of rights (see Ackerman 2014). But, whether one favours a progressive or conservative interpretation of Constitutional Courts, the choice should not affect the fundamental argument that constitutional interpretation does not run unrestrained.

[21] This is not to say that the dilemma vanishes, but that we can dispel it on an appropriate refinement of the proceduralist view.

prerogative, they are bound by an interpretation of the Constitution whose authority rests in the shared agreement of being a common frame of reference, in much the same way proceduralists address the issue of disagreement by appealing to the shared understanding of fair procedures. Of course, more should be said on this point, but it suffices for the scope of this paper to contrast this view with a straightforward epistemic interpretation. Alex Stein (2008), who has defended this view, maintains that the epistemic authority of courts (not just Supreme Courts) consists in operating in an 'interest-free' zone, where the ascertainment of disputed facts' probabilities is made on epistemic grounds alone. He contrasts the 'interest-free' with an 'interest-laden' domain, where 'courts allocate risks of error under conditions of uncertainty' and evidentiary rules such as 'burdens of proof, corroboration, hearsay, opinion, character, and others'. Since these rules are driven by moral and political, rather than epistemic considerations,

> these reasons are situated in the domain of anti-knowledge [….] because they are not facts that can be discovered or established by some uncontroversial or accepted method. Rather, they are preferences that reflect their holders' ideologies, which are always contestable. The prevalent societal attitude towards these ideologies is moral skepticism and distrust. None of these ideologies, therefore, is given a privileged status. Disagreements over them are settled in a formal way by democratic procedures that transform people's collective preferences into laws. (Stein 2008, 408).

Clearly this cannot be a sufficient explanation of the function of courts. While it is true that when courts operate within the sphere of fact-checking, they are not (supposed to be) driven by interests, it does not follow that adjudicating over demands of justice are mere ideological preferences. Indeed, the role of Constitutional Courts is exactly to adjudicate among competing demands by looking at those common principles that deflect, not reflect, factional interests. If the epistemic authority of Courts consists in this division of labour, then the prerogative of Supreme Courts is not epistemic in Stein's sense.

In a recent debate, Thomas Christiano and Corey Brettschneider (2009; 2011) discuss the legitimacy of judicial review within a substantive view of the public values underpinning democracy.[22] While they agree on such value-laden perspective, their exchange revolves around the question whether the power of Courts is reconcilable with those ideals. Are these values

[22] We want to thank one of the anonymous reviewer to urge us to clarify our position on such matters on this important exchange.

embedded within democratic procedures, or they rest outside the procedures and provide an external standpoint to judge the legitimacy of the procedures?

Christiano's core claim is that the value of judicial review is instrumental, for while it does undercut democratic procedures, it does so legitimately when the Court upholds the value of public equality. By contrast, Brettschneider (2007) argues that the ideal of self-government justifies constraints on the democratic process, yet without betraying democracy. What he calls the 'value theory of democracy' is the attempt to solve the counter-majoritarian dilemma by setting procedures based on a cluster of three values — political autonomy, equality of interests, and reciprocity — that can adjudicate in cases of such tensions that standard democratic decisions cannot accommodate. The case in point is when bad decisions are taken by majority rule. For Brettschneider such outcomes have a *prima facie* authority in virtue of the cluster of values underpinning the self-regulating mechanisms — including judicial review — of the legal system taken as a whole. For Christiano instead, public equality provides a criterion of legitimacy that rests outside procedures. As a consequence, judicial review is *pro tanto* justified as an extra-democratic measure of last resort when it the strikes down decision outcomes that violate public equality.[23] There is no *prima facie* justification here that judicial review inherits from its procedural pedigree. In conclusion, while for Brettschneider the judicial power of Courts can yet be justified within the 'value theory of democracy', for Christiano the judicial power is based on the substantive merit of those decisions.

Our point is quite different: the justification of the procedural role of Supreme Courts (and therefore, of the power of review) is epistemic, but not value-laden. In other words, the legitimacy of Courts does not depend exclusively on its procedural pedigree, neither on the power of Courts to uphold a set of substantive values. The role of the Court is instead constrained by the epistemic function of upholding constitutional rights within the framework of procedures. Thus, we agree with Christiano that the core of a democracy consists in the fundamental liberal rights entrenched within a democratic constitution. However, *contra* Christiano, we maintain that the power of Courts in upholding those rights does not lie outside democracy, but it is internal to the procedure of self-emendation of a constitutional democracy.

[23] This is the bulk of Christiano's argument about judicial review. However, it must be noticed that Christiano does not undermine the role of democracy as such, but only of the idea that majoritarian procedures are sufficient to legitimize democracy. Democracy is valuable because it contributes to realizing public equality, and the core content of public equality is expressed by that set of classical liberal rights. In a nuanced argument against Waldron, he also argues that democratic and liberal rights are indeed equivalent. Thus, the constitution of equality is tantamount a democratic constitution for there cannot be democratic rights without liberal rights. The converse does not hold however: liberal rights trump democratic rights when the former can be protected only at the expense of rule of the majority. See Christiano 2008, 284-285.

Likewise, we agree with Brettschneider that the power of Courts is internal to the mechanism of constitutional self-emendation that is a mark of democracy; but, *contra* Brettschneider, we argue that these procedures have an epistemic function, which do not incorporate the values of his cluster conception.[24] Besides, without a proper assessment of the epistemic prerogative of Courts, we would not be able to understand their peculiar role. To appreciate this point, consider that other mechanisms of checks and balances can be enacted within a system of law to the effect of striking down a piece of legislation. This is the case of the veto power sometimes conferred to high authorities such as heads of States in democratic regimes or even constitutional monarchies, and of other unelected supranational bodies — such as the European Commission — which may halt the outcomes of democratic decisions of Member States by enacting measures or provisos contained in ratified treaties. Whatever kind of power these bodies may have, it does not consist in power of judgment over the constitutionality of democratic decisions. It is precisely in such power of judgment that lies the epistemic prerogatives of Supreme Courts; and — to stress again — such power is not extra-procedural, but conferred within the scope and the constitutional aims defined by the constitutional procedures.

Another neglected aspect our analysis contributes to highlight concerns the status of Constitutional judges. Given the value-laden conception of democracy both authors share, we should conclude that justices should have special moral powers in order to exercise their function in the light of the public values underpinning democracy. We reject this idea. We argued that justices have a prerogative to exercise the power of review, but that such power is restrained in many ways: first, by their role of interpreters of the Constitution; second, by the constraints of accountability that come with responsiveness, and third by the very procedures

[24] To elaborate more on this point, Brettschneider (2011, 3) argues that, in order "[t]o determine when judicial review is justifiable... we must balance two duties: first, the duty to uphold the substantive values which underlie democratic procedures and, second, the duty that comes from the fact that a law was passed by a democratic procedure". There is nothing wrong in this argument, and we agree with Brettschneider that the authority of democratic decisions is not completely undercut (*pace* Christiano) by the fact that they might run afoul with the cluster of values that grants the legitimacy of democracy. However, what lacks in Brettschneider's argument is exactly an account of the criterion needed for adjudicating among the values in balance. We argue that such criterion is epistemic, because striking the best balance requires both detailed and legal knowledge of the cases in point, as well as the political wisdom of foreseeing and pondering the long-term consequences of upholding one value over the other. Therefore, if we agree that judicial review is justifiable, at least in some cases, it is a matter of which legal facts and consequences of the matter are at stake in the decision. Moreover, striking a balance in the sense suggested by Brettschneider cannot but ultimately rest within the power of the Courts: the reasoning for this claim is that the balance that justifies an act of judicial review must fall within the scope of the Constitution, and only Constitutional Courts can ensure that this constraint is fulfilled. Our argument here is that a precautionary attitude should prevail: since we cannot know if a law in the future may be passed that undermines a substantive democratic value, judicial review is prima facie justified as a safeguard measure in circumstances when procedures fail.

governing their deliberations (internal majority rule, unanimity, publicity, right to dissent, etc.). Admittedly, justices must be qualified for their role, and to this effect they must exhibit competence, moral integrity, and perhaps other public virtues. However, it is not their pedigree that justifies their status. We have addressed this issue in previous section, showing that the riddle about the counter-majoritarian dilemma stems from the presumption that the power of Courts lies on a privilege. We argued that their role is a prerogative, not a privilege. More precisely, their status is a legal prerogative that serves a functional role — contributing to the functioning of the system of check and balances and division of powers of a proper constitutional democracy — for which their expertise is designed. Within the context of such a form of government, Justices must fit the status, not the other way around.[25]

There is a third point in the Brettschneider-Christiano debate where we contribute in a novel way. Neither Christiano nor Brettschneider address what we claim to be an essential aspect of equality, that is, the epistemic status of reflexive participants in democratic deliberation. Brettschneider (2007, 18-19; 146-17) briefly discusses Estlund's proposal on the matter, but mainly for the purpose of rejecting epistemic democracy. Proceduralism, as we defend it in this paper, shares the same concerns with the role of expertise in democracy. Yet, we argued that there is a difference between attributing a special status to experts, and

[25] An objection against this argument is that Justices should actually have special moral powers in order to fulfil their higher responsibilities, and thus be chosen according to their moral qualities, not only their legal expertise. The view underlying this objection seems to be that higher moral powers enhance persons' capacity for good judgment, which is essential for being a good judge. Like professional airline pilots must pass physical and psycho-attitudinal tests that are not required for the average car driver, likewise judges must be able to stand to higher standards of moral reasoning and personal integrity. In response to this objection, we should notice two things: first, there is no agreement on the whether there are objective standards of moral excellence, and which they are supposed to be. Disagreement over moral standards is too wide to request tests of moral integrity more stringent than those which apply to ordinary people. Second, the very idea of a special moral power seems to be inspired by perfectionist conceptions of morality as a pursuit of personal excellence. Although this view is attractive in many ways, it is not concerned with the standards of accountability for public officials in the exercise of their duty of office. Admittedly, we want judges to be citizens in good standing, but not more than for any other citizen appointed to a public office. A good judge does not to be a moral Hercules. How good a judge is will rather depend on other essentially epistemic qualities, including the capacity for coherence in reasoning and proper justification. We may add: if there we are to identify a form of integrity that is specific of constitutional judges, that should be constitutional integrity, or better said a practice of ruling inspired by a unifying conception of the Constitution. The idea that a constitutional judge does not need to be a Herculean hero can also help to better clarify the distinction we draw between privileges and prerogatives. An analogy with law enforcement officials can help: the power of cops to use coercion, and even physical violence in some cases, is a prerogative of the authority conferred upon them by a State, not a privilege they have in virtue of any special moral quality. Their power of coercion comes with constitutional restrictions protecting the freedom of individuals, and requires accurate knowledge of the statutes and regulations that specify when force can be used legitimately, along with the know-how acquired by experience and the discernment of what is appropriate to do in critical situations. If the power of law enforcements officials were a privilege associated their personal qualities, even the nicest of cops would exercise her power arbitrarily.

recognizing an epistemic status to participants in deliberation. Our point was that epistemic peerhood is part of what constitutes equality in general, and is thus a pre-condition for more substantive values of a democratic polity (whether public equality in Christiano's sense, or equality of interests as for Brettschneider). The idea is that we cannot genuinely recognize the status of moral peers to fellow citizens when we do not recognize them as our epistemic peers, that is as subjects whose claim of knowledge we accept to evaluate on the assumption that we are constrained — for normative and epistemic reasons — to attribute a minimal level of epistemic credibility to people we deliberate with. Thus, part of treating others as having equal consideration and respect with regard to political institutions is treating them as bearers of defeasible truth claims, where defeasibility concerns the content of truth claims upon due inquiry, not the status of the bearer of those claims.

So far, in reviewing the Brettschneider-Christiano debate, we have insisted on the epistemic prerogative of Supreme Courts. But, how can we reconcile such prerogative with the defence of proceduralism? Our answer lies in the understanding of the three features of proceduralism that we have defended above. To recall, these are 'epistemic peerhood', 'responsiveness', and 'procedural correctness'. First, epistemic peerhood is granted by Supreme Courts by allowing citizens and participants at large to the democratic process to appeal to the Constitution as subjects of rights, especially when the entitlements of right-holders are violated by government interference in absence of due information. The recent NSA scandal revealed by Edward Snowden testifies to the extent to which rights can be violated by withholding the information required in order to properly enjoy them. In this sense, appealing to the prerogative of Supreme Courts, realises —rather than frustrating— the epistemic entitlement of citizens. It allows them to exact their liberties by vetoing decisions which violate the principle of epistemic peerhood. The entitlement of right-holders to constitutional protection captures also Estlund's tenet that, in order to oppose majoritarian outcomes, subjects should be epistemically qualified. Here the idea is that right-holders have a qualified claim insofar as their claims depend on information they have or they have right to obtain in virtue of having rights (Fricker 2007).

Consider now the second desideratum of proceduralists: responsiveness. We argued that epistemic peerhood implies a duty of responsiveness. Responsiveness, as we defended it here, is the epistemic (or argumentative) analog of the moral principle of reciprocity as Brettschneider reads it. Most importantly, epistemic peerhood explains both the horizontal and vertical dimension of reciprocity. By being involved in democratic deliberations, procedures should require truth-claims to be subjected to scrutiny. This is the game of giving and asking

for reasons that a democratic society should expect to take place among peers in the public. Along with the horizontal dimension given by equal recognition of a duty of responsiveness, there is a vertical dimension where the duty of responsiveness impinges on arguments and decisions taken by political representatives and public officials, among which the courts' justices. Accountability is the institutional principle which reflects such duty in the relationship between citizens and public officials. The vertical dimension is given by the prerogative of public officials to exercise the power of decision; yet, the duty of responsiveness implies that those decisions do not run unrestrained. Within the vertical dimension of accountability lies an important distinction between political representative and judges. Elected representatives are accountable to citizens for their political acts performed. Judges instead — and especially Constitutional judges — are accountable in a different manner. First they are accountable for decisions they make in the light of the Constitution they interpret. Opinions of the justices are open to public scrutiny for consistency, and for the substantive views they hold in reading the Constitution. Second, they are accountable to private citizens because they respond to cases — whether filed individually or collectively — brought by citizens. Therefore, their prerogative is doubly constrained by the epistemic standards of interpretation and legal argumentation and the procedures of due process.

The third desideratum of proceduralism is procedural correctness. We said in this regard that the power of constitutional interpretation and review does not run unrestrained. One way Supreme Courts are restrained is by internal procedures: consistency tests and negotiations leading to majority voting within the Courts may serve this goal in the making of decisions. But, in a more fundamental way constitutional interpretation is constrained is by reference to their function of protecting fundamental rights. Since rights have an unconditional value, their protection requires correcting democratic procedures when they risk eliciting unwelcome outcomes.[26] When Supreme Courts perform this role properly, they ensure the fallible and self-correcting power of democratic procedures, which proceduralists take as a necessary feature of procedural correctness.

Of course, these considerations are open to discussion. It might be argued that there is no sensible distinction between prerogatives and privileges: if a body is granted the epistemic power of exclusive interpretation and judicial review, having the last word is still a privilege,

[26] Or, at least, some of them. Paradigmatic cases of unconditional rights include those listed in the First Amendment to the US Constitution, that is the freedom of religion, speech, and the press from government interference; the right of the people to peaceful assembly, and to appeal the government for redress of grievances. We can also add the right to privacy, and the legal guarantees of habeas corpus, and due process.

whether we would agree with it or not. But proceduralism is not at odds with constitutionalism under the interpretation we have defended in this paper. Our interpretation of proceduralism as a normative view holds that democratic procedures incorporate the moral value of respect due to citizens as epistemic peers. We have stressed that one of the features of such peerhood is the tenet that respect consists in granting citizens an equal power of influence over collective-decisions, and provides justification for decisions affecting minorities according to the just procedures. When procedures are formally correct but frustrate such a value, they can be legitimately amended, or their outcomes curbed by mechanisms of checks and balances. Insofar as these mechanisms are designed and enacted according proper ruling, they are democratic even if they overturn the decision of a majority, because their amending function is bound by the purpose of interpreting the constitutional principles constitutive of a democratic regime. Supreme Courts enact the limitations incorporated in the Constitutions and exercise their epistemic prerogatives to serve this purpose. In doing so, they rather reaffirm the idea that democracy is a permanent process of majority formation under constraints that prevents the exercise of the majority rule from the consequences of abusing the power conferred on a majority.[27]

5. *Conclusion*

In this paper, we defended the view that proceduralism can make justice of the epistemic value of deliberation. While advocates of epistemic democracy and proceduralists seem to be at odds, we maintained that a proper role for epistemic standards should be found in the idea of peerhood, responsiveness and procedural correctness. When participants to deliberation exchange reasons and in doing so are able to recognize themselves as epistemic peers, then the deliberation can be described as appropriately conducted and thus procedurally and epistemically valid.

We proved this point against the claim that proceduralism is incompatible with the role of Supreme Courts in actual constitutional democracies, and leads to a dilemma for proceduralists. We argued that our view of epistemic normative proceduralism explains away the dilemma by placing the epistemic prerogative to Courts within its proper function. This

[27] Saffon and Urbinati nicely phrases this view by saying that constitutionalism prevents democracy from incorrect outcomes, where the notion of correctness does not exclusively depend on the formation of democratic majority, but on the constitutional checks imposed on the validity of its decisions (2013, 8-9).

function —we said— is to grant the safeguard of fundamental rights and the constitutional principles in which democratic authority ultimately consists.

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