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# ESTLUND'S FLIGHT FROM FAIRNESS

**Ben Saunders**

*In Democratic Authority, Estlund claims not only that procedural fairness is insufficient to justify a democratic procedure but that it is not even necessary. This article reconstructs his argument, but argues that he is wrong to reject the importance of fairness altogether. While our reason for preferring democratic procedures to coin-tossing for making decisions may indeed be because of the epistemic properties of the former, it is also important—at least in conditions of pluralism, where there is reasonable disagreement over substantive questions of justice and the common good—that the democratic procedures be fair to all participants.*

Estlund's *Democratic Authority* represents the culmination of over two decades of work in democratic theory, though its relationship to his previous work is complicated (2008: ix) since some of his ideas have changed over time. This commentary focuses on one particular change in the theory, what we may call—mirroring the title of his fifth chapter—Estlund's 'flight from fairness'. In an earlier article, that first outlined epistemic proceduralism, Estlund held that 'Democratic legitimacy requires that *the procedure is procedurally fair* and can be held, in terms acceptable to all reasonable citizens, to be epistemically the best among those that are better than random' (1997: 174, emphasis added). Chapter 6 of *Democratic Authority* sets out a similar theory, again contrasting epistemic proceduralism with both impartial proceduralisms (which emphasise fairness to the exclusion of epistemic value) and 'too epistemic' correctness theories (2008: 102). Estlund's project is to find a middle ground position, according to which democratic procedures require epistemic value, rather than mere procedural fairness, but can be legitimate without having to be substantively correct, because of their tendency to get right answers. As he now formulates his theory, 'Democratic legitimacy requires that the procedure can be held, in terms acceptable to all qualified points of view, to be epistemically the best (or close to it) among those that are better than random' (2008: 98).<sup>1</sup>

Although the changes may, at first, seem trivial, there are several significant points, any of which could merit longer comment. One is why democratic procedures are required to be *better* than random—why isn't it enough to be epistemically best (or close to it)? Moreover, one shift in Estlund's position, which I cannot discuss here, is the switch from 'all reasonable citizens' to 'all qualified points of view' (on this, see the other two contributions to this symposium: Lister 2010, Quong 2010). Perhaps most significant, however, is the abandonment of the fairness requirement, which shall be the focus of this discussion. Estlund (1997) required democratic procedures to be both procedurally fair and epistemically valuable. In his most recent, and definitive, statement, however, epistemic proceduralism 'gives little or no role to procedural fairness' (Estlund 2008: 66); qualified acceptability of its epistemic merit is assumed to suffice for legitimacy. This raises a number of questions, including what it means to abandon procedural fairness, why Estlund does so and whether he is right to do so.

The following paper reconstructs and criticises Estlund's argument. I argue that he fails to show that fairness is unimportant and suggest it may be necessary where there is a conflict

of interests and indeterminacy about what is impersonally best. In these instances, I think it is permissible for people to use their political power to advance their interests, compatible with justice and the common good, and that an acceptable political system should give all a fair chance of satisfaction. Estlund may be right that fairness is insufficient to justify democratic procedures, but does not succeed in showing that it is not necessary.

### What Does Procedural Fairness Require?

Although fairness is a central notion to much moral and political theorising, there is little agreement as to what it requires. Various accounts of fairness abound in the literature, either general theories (e.g. Broome 1990–91; Hooker 2005) or in political applications (e.g. Beitz 1989; Christiano 2009), and it is possible that the term does not pick out any unified value. Since Estlund offers his own distinctive account of fairness, however, the first thing to do is to examine what he means by the procedural fairness that epistemic proceduralism gives little or no role to. At first, the rejection of (intrinsic procedural) fairness may seem radical, but it is important to pay close attention to what is meant by this. For example, Estlund does not reject the importance of what he calls *non-cheating fairness*, which corresponds to Hooker's formal fairness (2005: 329–30). Once rules are defined, it is important that people stick to them. Nor does he reject *prospective* fairness, which describes the procedure's tendency to produce substantively just outcomes. As Estlund notes, a wise and benevolent dictatorship or an epistocracy of the educated could serve prospective fairness. In fact, since the point of *epistemic* proceduralism is to realise better outcomes (understood either in terms of justice or the common good), from the point of view of prospective fairness whatever procedure is adopted could be better than giving everyone a single vote and accepting whatever outcome emerges, as pure proceduralists would recommend. Estlund's claim that we need to appeal to non-procedural values is, I think, well-taken but actually very modest. Assessing procedures by their likely outcomes is still assessing them procedurally (hence epistemic *proceduralism*), rather than simply focusing on the correctness of outcomes, but it incorporates substantive concerns, rather than wholly procedural or intrinsic fairness.

The intrinsic fairness that Estlund rejects as unimportant is the non-retrospective, non-prospective fairness of a procedure, whether or not it is properly run (2008: 70). Retrospective fairness is simply the result of arising out of such a fair procedure; a substantively unjust law may nevertheless be retrospectively fair if it came about as the result of a fair procedure. It seems that Estlund would prefer a substantively just law that came about through some inegalitarian procedure, such as Supreme Court review, to a substantively unjust law that came about through an intrinsically fair procedure, such as simple majority rule. Thus, it seems that his view is what Dworkin (2000: 185–90) would call a 'dependent conception' of democracy; that is, it regards the best form of democracy as that which realises substantively just or equal outcomes (for clarification of this notion, see Saunders 2010, forthcoming). This reflects the priority that Estlund assigns to substance over procedure; 'the idea of a fair procedure would not even arise if it were common knowledge that everyone agreed what the correct decision is' (2008: 71). Despite the endnote clarifying this sentence, I am unsure exactly what Estlund has in mind here. Perhaps he means if citizens were of a common mind they wouldn't need a decision procedure. It is not obvious to me that substance lexically dominates procedure in the way that this suggests. Even if all happened to agree on substantive policy, I think it would be problematic if, say, only whites or one particular dictator had an effective vote on the issue. I am not suggesting that Estlund's epistemic proceduralism would endorse such

arrangements, since it seems obvious that there could be qualified objections. Perhaps Estlund's Qualified Acceptability Requirement effectively replaces fairness here, by ensuring that equal respect is shown to all parties (c.f. Quong 2010), but all that has to be so acceptable is the procedure's epistemic value. It is not clear that the only objections to such procedures depend on their possible results, rather than (for example) the fact that they fail in themselves to publicly recognise the equality of all citizens.

This returns us to another sense of fairness, which is not Estlund's concern. Beitz (1989: 84–91) adopted a broader, contractualist notion of fairness, in which equality enters only at the level of justification. This mirrors Barry's distinction between first-order and second-order impartiality (1995: 11). Estlund's rejection of fairness is not a rejection of fairness at this justificatory level—hence the need for the qualified acceptance of everyone—but merely a rejection of the need to act fairly in every particular context. One example he gives is that it is permissible to save one's child rather than a stranger. It seems likely that such partiality could be impartially justified by a higher order moral theory, so some would call it fair in a broader sense. According to Estlund's interpretation of fairness, however, it is not fair but does not exhibit the vice of unfairness either; it is merely a case where (first-order) fairness is not required. I shall have more to say about the claim that fairness is only an occasional value below. To me, it seems natural to use 'fair' in a broader sense that covers what is impartially justified (see Saunders 2009: 280–1), but the fairness that Estlund rejects is a much narrower ideal, closely tied to first-order impartiality.

It seems, then, that Estlund's rejection of the need for fairness is simply a rejection of political egalitarianism—expressed by the slogan 'one person, one vote; one vote, one value'. In other words, he rejects the sufficiency of what is, in Dworkin's terms, a 'detached' conception of democracy (2000: 185–90)—one that defines democracy simply by the equal impact of all citizens. This would fit with his discussion of plural voting in an epistocracy (Estlund 2008: 206–22), especially his lack of concern about the greater voting power enjoyed by those in smaller districts or who hold elected office (2008: 221–2). Estlund holds that any particular proposal for weighted voting would most likely be open to qualified objections, and therefore ruled out by epistemic proceduralism, yet he does not attempt to provide a positive case for equal voting—in fact, he concludes 'equal voting is a questionable ideal, and defending it is no part of my aim' (2008: 222). The 'qualified acceptability' condition may, therefore, block certain 'invidious comparisons' yet be consistent with various cases for plural voting, particularly those that do not perpetually privilege the same group of people but give people differential votes over different issues (e.g. Brighthouse and Fleurbaey 2010, forthcoming; Heyd and Segall 2006).

### The Rejection of Fair Proceduralism

If political equality is all that Estlund means by fairness, then it seems less radical to reject it as necessary for democratic authority. There may be reasons, perfectly consistent with democracy, to give some more votes than others, for instance because they have more at stake in a given decision (Brighthouse and Fleurbaey 2010, forthcoming). Nonetheless, we must still examine Estlund's argument—both for its own sake and to see whether it confirms our interpretation of the procedural fairness that he rejects. It is this task that occupies the present section.

The first thing that immediately strikes one about the argument is that it seems back to front. Estlund's position differs from his earlier treatment in holding that fairness is not

*necessary* for democratic authority. His argument, however, focuses on criticising those pure proceduralists who hold that fairness is *sufficient* for democratic authority. The gist of the argument is that fairness, as it has been understood here, is a very thin value and would be equally satisfied by tossing a coin to decide between potential courses of action (Estlund 2008: e.g., 6, 66, 93; the point has been made before, e.g., Beitz 1989: 76). If our only concern was to be fair to people, then this would not require a democratic procedure, so assuming that we favour democratic procedures we must have some other reason to do so. Vernon (2001: 42–9) suggests that one reason to prefer democratic procedures to a simple lottery over all possibilities is that they give all parties a chance to influence results in their favour. As Estlund points out, however, this would also be true if we put all possible alternatives on a dartboard and had ‘voters’ throw darts at it—with the option with most darts in it winning (2008: 95–6). This proposal would also allow citizens to use their ability at darts to influence outcomes in their favour. Though Vernon thinks it counts in favour of voting that it encourages the development of public reasoning (2001: 42–9, 67–71), Estlund questions the value of this if it does not improve outcomes, asking why we should not prefer the most humorous procedure instead (2008: 101). (In fact, Vernon does value the improvement of public reason, even though he denies that the majority vote after public deliberation necessarily leads to better outcomes (2001: 48–9, 64–9), but I cannot explore this matter here.)

Estlund argues that fairness alone requires full anonymity, which pays no attention to any aspect of individuals, including their preferences, and so is satisfied by tossing a coin (2008: 78–80). I must admit that I am slightly confused by the argument here. I grant that tossing a coin is fully fair, however I think it would also be fair to adopt a procedure that did count all preferences equally. Indeed, Estlund admits that ‘Majority rule is a fair procedure in an important respect: it pays no attention to who casts which vote’ (2008: 82).<sup>2</sup> It seems to me that fairness requires not only *proportional* satisfaction of claims but their *maximal* proportional satisfaction (contrast Hooker 2005: 340–1 and Broome 1990–91: 95–6). If one owes £100 to one person and £200 to another, then to pay them £50 and £100 respectively would be to satisfy their claims in proportion, but this would be unfair if one could pay them all that one owed. Similarly, a coin toss could be said to achieve equality only by levelling down; it treats all citizens equally because it does not count preferences at all. Whether I am right about this or not, though, there still seems to be something wrong with complete anonymity. Even if mere proportionality satisfied the demands of fairness, it would surely be unfair to pay people an equal sum regardless of whether or not one owed them anything. It seems, then, that fairness must involve responding to the claims that people have. Thus, assuming that people have some claim to self-rule, we might think that there is a reason, grounded only in fairness, to give positive weight to people’s votes, rather than simply to toss a coin. This, however, leads us into a discussion of possible decision procedures.

Estlund says little about the difficult issue of defining democracy, beyond characterising it as ‘the actual collective authorization of laws and policies by the people subject to them’ (2008: 38). As we have seen, though, he contrasts the alleged fairness of majority rule to tossing a coin. The coin would be fair but undemocratic. In seeking an account of democratic authority, there are at least two things that matter in judging a decision-making procedure: i) is it democratic? and ii) is it legitimate? It seems that, in situations where people’s preferences are essentially no more than arbitrary tastes, and there is no issue of the correctness of outcomes, simply the need for co-ordination, then a lottery or coin-flip could be legitimate. This would not be *democratic*, because it does not give the people any influence in decision-making, but there may be no basis for qualified rejection of such a proposal.

A dictatorship could also be legitimate (but non-democratic), if for instance all agreed that one person was supremely wise and virtuous.

I should say here that I do not find it obvious that flipping a coin is the fairest procedure to decide between the claims of two rival groups (Saunders 2008, 2009). The demands of fairness may be sensitive to the context and what is being distributed. We do not like the idea of a sports contest being decided by a lottery, for example, because we think there are relevant criteria that ought to determine the victor(s). It appears that, while lotteries may be the fairest recourse in many cases, such as breaking a tie, they are not always fair, at least if resorted to too early (Broome 1990–91: 89). The problem with trying to give an abstract account of fairness, therefore, is that its requirements are actually sensitive to context. We need to consider what is being distributed. Making decisions by lottery would indeed give all individuals an equal expectation of getting their preferred choice, whatever it was. However, this is to treat citizens as patients rather than agents. Democracy is about rule by the people, not merely in their interests. Democratic fairness, therefore, requires not that each person has an equal expectation of getting his or her way, but that each has equal (and positive) influence over the decision. If each individual has equal influence, we should expect larger groups to get more of what they want. Tossing a coin would thus be an inappropriate form of fairness, because it bypasses the people's preferences altogether.

Estlund would presumably respond, rightly, that this argument begs the question, for we have not yet been given any reason to accept democracy or the idea that outcomes ought to be responsive to people's preferences (aggregativity). Thus, this argument simply proves his point that defences of democracy must appeal to more than the very thin notion of fairness to get off the ground. I shall say more about this later. For now, it is enough to note that there does not appear to be anything particularly democratic about Estlund's general standard for legitimacy (though see Quong 2010). A collective decision procedure, democratic or not (e.g. random, dictatorial), is legitimate if all qualified points of view accept it as amongst the epistemically best.<sup>3</sup> Democracy is legitimate only when it meets this standard, but a regime need not be democratic in order to meet it. That lotteries satisfy this condition in some circumstances is no problem; rather the problem is for those who want to defend democratic procedures on the basis of no more than their thin procedural fairness—these people cannot give us reason to prefer a democratic procedure to a lottery. It should be noted, however, that Estlund somewhat misleadingly focuses on majority rule here. Majority rule should not be assumed the only intrinsically fair or democratic procedure. Estlund also suggests the possibility of following the preferences of a single randomly selected voter (2008: 80, 82) and I think such a procedure would be democratic, since citizens' preferences would be efficacious and equal (I have explored such a proposal in Saunders 2008). If majority rule and such 'random dictatorship' are both democratic, then the choice between them must be made by appealing to something other than their intrinsic fairness—and, again, it seems that Estlund is right to say that must be something to do with their likely outcomes. Thus, procedural fairness alone is insufficient to explain our preference for democratic procedures over coin-flipping or for majority rule over random dictatorship.

This completes Estlund's account of the failings of fair proceduralism. Intrinsic fairness alone cannot give us reasons to favour democratic procedures, so those who claim to abstain from appeal to substantive outcomes—including normative social choice theorists and deep deliberative democrats—actually smuggle in substantive values when they assume aggregativity (that the procedure must be somehow responsive to facts about people's preferences). There is no reason, Estlund suggests, for such responsiveness unless it leads to

better outcomes. This shows that intrinsic fairness is not enough for legitimacy, but it is still unclear why Estlund thinks that it plays little, if any, role—rather than being necessary but not sufficient. To explain this, we need to examine what he calls the *non/un issue* (2008: 67).

### Why Fairness Does Not Always Matter

Estlund must show not only that fairness is not sufficient to legitimate democratic procedures, because a coin toss would be equally fair, but that fairness is not even necessary. I find this argument unconvincing. Estlund claims that fairness is only an occasional value—a lack of fairness is not always unfair (a fault), sometimes it is merely non-fair. He calls this the *non/un issue*, demonstrating the distinction with the example of giving change to beggars (2008: 67–8). Since this is an act of charity, which is an imperfect duty, we are not required to give to every beggar, but entitled to discretion. To give to one beggar, and not another equally deserving one, though, violates the generic principle of justice, which requires that like cases be treated alike. This differential treatment is not fair, yet seems intuitively acceptable.<sup>4</sup> Estlund describes this case as neither fair nor unfair, merely a case of non-fairness, because it is a circumstance where fairness is not required. Where fairness is not required, there is nothing unfair about not being fair. (If the distinction is unclear, it may be helpful to consider the parallel contrast between non-voluntary and involuntary.)

Let me begin with Estlund's charity example. Giving more to one beggar and less to another, no less needy or deserving, indeed violates the generic principle of justice. Estlund's view that this is not cause for concern is, however, widely shared. Not only is it intuitively acceptable for us to practice charity as and when it suits us, but it is also consistent with Rawls' influential justice as fairness (1999a). One might think that justice as fairness would find any lack of fairness problematic; Rawls, however, rejects the monistic view that the same moral principles are appropriate for governing all things. Utilitarian principles may be appropriate for individual decisions, while Rawls' international principles (1999b) famously differ markedly from justice as fairness (Pogge 2001, 2004). On Rawls' view, justice as fairness only applies to the basic structure of society and not to individual decisions within it (Rawls 1996: 257–88). This means that social justice is realised when important social institutions, most notably the state's redistributive taxation and welfare policies, are geared to the greatest advantage of the worst off. Provided that this condition is met, individuals may freely act as market maximisers, confident that the requirements of justice will be met because the necessary adjustments are made elsewhere in the system. Individuals are not required to show constant concern for the worst off in their personal decisions, like choosing their occupation or how much to work, since this would be too demanding on them when they have their own lives to lead.

These points should be familiar, but they explain why a lack of fairness is not problematic when it comes to charity. Acts of charity are not part of the basic structure but matters for personal decision. Giving more to one beggar than another is like spending more on one friend's birthday present than another's or tipping one waitress more than another without relevant reason. When it comes to the basic structure of society, inequality can only be justified to the worst off group if they are as well off as the worst off group can be, so we could only improve their position by making others even worse off. When it comes to personal behaviour within the basic structure, justification may still be necessary, but its demands are less stringent. We may assume that parties to Rawls's original position, concerned only with the basic structure, would permit first-order inequalities or unfairness in other domains.

Thus, these cases satisfy demand for the higher-order impartiality of justification (Barry 1995: 11), so they are permissible cases of non-fairness.

Estlund succeeds in showing that first-order fairness is not always required. Nonetheless, there is a weakness in his argument, because both his examples—giving charity to the beggars and rescuing his child—are cases of personal conduct and not cases of permissible non-fairness in the basic structure. It may be that fairness is not always required in our personal lives, but that it is always required of the basic structure of society or at least in our democratic decision-making mechanisms (which I take to be part of that structure). Estlund's argument fails to show that fairness is not required in this context.

### The Importance of Fairness

The argument, so far, has attempted to explain what Estlund means by intrinsic fairness and why he rejects it as a necessary property of democratic processes. The previous section argued that, even if fairness is only an occasional value, this does not show that it is not always required of basic political institutions. I have not, yet, offered a positive argument to show that fairness is required. The present section considers, but ultimately rejects, certain reasons why fairness might be thought important to decision-making procedures.

Perhaps the most obvious reason to favour fair procedures is to ensure that all interests are fairly considered in final outcomes. It has long been recognised that excluded groups are likely to have their interests unduly discounted or neglected; either because decision-makers consciously consider these groups of lesser worth or simply because their interests are less visible or not properly understood. These facts provide compelling reasons to ensure that all groups have the vote and perhaps even justify 'special representation' rights for minorities. This argument applies not only to ascriptive groups, but also to those defined by social roles or position. In his discussion of epistocracy, for example, Estlund argues that proposals to give extra votes to the educated or to urban-dwellers would fail his qualified acceptance test, since it is possible that these groups have their own distinctive interests and so would neglect those of other groups (namely, the uneducated or rural-dwellers) (2008: 215–22). This argument, however, concerns the fairness of outcomes and thus what Estlund calls prospective fairness. This is not something that Estlund rejects—epistemic proceduralism requires that all qualified points of view can accept the procedure's epistemic value. Since there could obviously be qualified objections to proposals giving certain groups greater voting power than others, it seems that a separate concern for fairness is unnecessary.

Another possible suggestion is that a fair voting procedure may be a requirement, not of bringing about fair outcomes, but of public assurance that justice is done. Christiano (2008: 46–74) argues that justice must not only be done but be seen to be done and giving everyone an equal vote is a requirement of realising this public equality. On this view, even if a group of enlightened Platonic guardians could adequately protect the interests of all other groups in society, that would not be enough, for those other groups would not have public assurance that their interests would be served (even if they would, *ex hypothesi*, be so). I think it is hard to separate this concern, at least in practice, from a concern as to whether justice would in fact be done at all. (I am not denying the conceptual distinction, merely noting that our intuitions are liable to being infected by considerations that ought to be kept distinct.) Moreover, I suspect that Estlund's qualified acceptance condition will also be able to accommodate this concern. If people do indeed have an important interest in being able



to see that they are treated as equals, independently of actually being treated as equals, then presumably they can qualifiedly reject political arrangements that do not enable them to see this. It may be argued that it is easier for people to see that the system grants them political equality than that it realises just distributive shares, but this is not obvious. It is true that there is considerable disagreement over substantive justice, but there is also considerable disagreement over the requirements of political equality—for instance, whether majority rule treats minorities fairly, how districts should be drawn, and whether money permits some undue influence in elections.

Christiano's proposal does, however, point us to a promising line of attack. He argues that there are higher order fundamental interests in correcting the cognitive biases of others, being at home in the world, and being recognised as an equal by others (Christiano 2008: 60–6, 88–96). Beitz (1989: 105–17) made similar claims about our regulative interests in recognition, equitable treatment and deliberative responsibility. These arguments question the priority that Estlund assigns to substance over procedure (2008: 70–2), suggesting that it is independently important that decision-making procedures treat each person fairly. If we have important interests in recognition, then it may be better all things considered that we are allowed to choose for ourselves, even if the outcome is worse than it otherwise would be. I may prefer to make my own mistakes than have someone else run my life. There is, however, an important difference between cases of individual choice and collective decision-making. Individual autonomy in self-regarding matters is often protected by appeal to something like Mill's 'harm principle', which rules out paternalism or morality-based interference. Only action that harms others is potentially liable to interference, whereas purely self-regarding acts are sacrosanct. This reasoning, however, would not defend one's right to a vote—regardless of what one was likely to vote for—since those who, either maliciously or mistakenly, vote for injustice can be seen as harming other members of the polity (Brennan 2009). It seems unlikely, therefore, that we can use this reasoning to justify giving all citizens an equal say in deciding policy, even when that leads to worse results.

To deny some people votes may be a setback to their recognitional interests. I am not sure how far this line can be pressed though or how troubling it really is for Estlund's case. I agree with Christiano and Beitz that there are recognitional interests attached to being granted a vote, but I am unsure how weighty they are—after all, many people do not bother to exercise their votes. Of course, there is a distinction between having or not having a vote and exercising or not exercising it. One may think that there is a powerful case for everyone having a vote, but also that not everyone should actually cast their vote (Brennan 2009). Perhaps Estlund could accept a universal, equal franchise but hold that, ideally, only those well-placed or equipped to judge should exercise their vote, while the less informed should abstain, if this best served the epistemic value of democracy. This would seemingly achieve the results he wants, without offending anyone's recognitional interests, but it is unclear how stable such a proposal really is. It would work only if citizens themselves made judgements about their own competence to vote, which not only requires the incompetent to recognise their own incompetence but also forces them to endorse this potentially demeaning judgement of themselves.

It is possible, however, to imagine a scenario in which no one's recognitional interests are offended though not all have equal votes. Estlund compares the authority of his epistemic proceduralism to that of a jury (2008: 7–12, 156–8). We could, perhaps, extend the considerable work on citizens' juries (e.g. Fishkin 1991, 1996) to more radical sortition

proposals (e.g. Callenbach and Phillips 2008; Sutherland 2008). Suppose that, rather than giving all citizens a vote, only a sufficiently large random sample of citizens have a vote. Such arrangements might be adopted because political participation is seen as a burden or because of the infeasibility of meaningful deliberation amongst large groups. This arrangement is not fair, in the way Estlund describes, since some have votes and others do not. Nonetheless, no one's recognitional interest is offended—exclusion was determined by a lottery, suggesting that all were assumed competent. Moreover, if the resulting group represents a random cross-section of the population then there is no need to fear demographic bias of the sort that might lead to qualified rejection of such a proposal (Estlund 2008: 215–22), provided of course that the group of decision-makers do not somehow become a separate faction in society, as might happen were they able to vote special privileges for themselves *qua* decision-makers. Finally, this arrangement might be deemed to have epistemic value, since not only would all significant interest groups be represented, but the smaller size of the decision-making body would permit debate and deliberation. Whatever we may think, all things considered, about such an arrangement it seems possible that it would satisfy the requirements of epistemic proceduralism, and that it does so even though it is not intrinsically fair (in the sense Estlund defines and rejects) and without offending anyone's recognitional interests.

### Fairness and Outcomes

Once one is clear exactly what Estlund means by fairness, it seems less important than many have supposed. It is important, however, to distinguish the intrinsic fairness of the procedure from what Estlund calls its prospective fairness, that is, its tendency to produce substantively fair outcomes. We, of course, want substantively fair outcomes and Estlund agrees with this—indeed, the priority he assigns to substance over procedure means that, unlike some others, he is unwilling to sacrifice this substantive fairness for the sake of procedural fairness. If all could accept, without qualified objection, some particular group of epistocrats, then such an arrangement would be authoritative in virtue of its greater likelihood of realising substantively just outcomes. This seems to assume, however, that there is some uniquely best outcome and this is what will be challenged by the present section, in which I shall argue that procedural fairness may after all be a necessary condition of legitimate decision procedures.

I do not question that political matters are truth-apt in the minimal sense Estlund requires (2008: 25). One does not, however, have to be a cultural relativist or sceptic about objective values to question the idea that there is a single right answer to any political question. This may be because of value pluralism or indeterminacy about the requirements of some particular principle. Even if one's ideal is specified quite precisely—for example, maximising the average hedonistic utility of members of your society, or maximising the primary social goods of the worst-off subject to maintaining the most extensive set of equal basic rights and liberties and fair equality of opportunity—there is still likely to be room for different distributions. Suppose, for example, that in the best political arrangement some must be better off than others, but it is an open question who occupies which position. Here, we have a coordination problem—specifically, a conflict of interests, with people competing for the more favoured positions. Perhaps all would agree to the distribution (3,2) or (2,3) over any other possible distribution—including the more unequal (4,1) and levelling down to (2,2)—but we would not expect there to be agreement between the two groups over which

of them should be better off; members of the first group will permissibly prefer (3,2), while members of the latter will permissibly prefer (2,3).

I think that such cases of indeterminacy will be rather pervasive; this is not to deny that there are right and wrong answers, merely to deny that there is a single optimal outcome. There may be a range of wrong answers, which can be ruled out because, for example, they violate someone's rights, but if there is indeterminacy between a range of equally justified permissible outcomes then this seems to threaten the epistemic project. Everyone may agree that any member of this set of most justifiable options should be preferred to any other outcome outside of this set, but they may reasonably disagree over choices within that set—which may be a matter of brute, unreasoned preferences or permissible self-interest. I am not, like the radical deliberative democrats, claiming that democracy is a wholly pure procedure, the outcomes of which cannot be assessed by any independent standard. What I am claiming is that there is a point where we simply face coordination problems, conflicts of interest or clashes of incommensurable values, so there may be no reason for all to prefer one outcome to another—it may be that radical choice is required. If it is not the case that outcome A is better than outcome B, or that outcome B is better than outcome A, then the matter cannot be settled on epistemic grounds. Nonetheless, it may still be that some individuals would prefer outcome A, while others would prefer outcome B. In such circumstances, I think it is appropriate to regard democratic procedures as a competition between these groups to realise their most-favoured outcomes (consistent with the generally accepted requirements of justice). That is, *within this set of permissible options*, we can regard democratic contests as a pure procedure—so the whole may be regarded as 'quasi-pure' (McGann 2006: 60–85; Rawls 1999a: 176). Democracy thus involves the contestation of legitimate opponents (Mouffe 2000: 80–107), rather than search for a single, universal truth.

I have said little about how far political decisions are likely to be constrained by considerations of justice and the common good and how far they are likely to be such unreasoned choices. No doubt this will be a matter of controversy, for it seems that it will depend upon one's general theory of justice. If justice required only that all have an adequate minimum level of resources (Frankfurt 1987; Waldron 1986), for example, then there would obviously be considerable scope for discretion once everyone had met that level. Conversely, if one believed in a perfect duty to maximise average utility then there may be very little room for choice (although there would still be, as suggested earlier, need to decide between equally maximal distributions, such as (3,2) and (2,3)). Rawls's justice as fairness is intermediate between these two extremes for, while the difference principle may seem quite demanding in isolation, there may be different ways of ranking bundles of primary social goods and, in any case, it is subject to equal basic rights and liberties and applies only to the basic structure of society. Rawls is explicit that, subject to the general requirements of justice being met in the basic structure, citizens have a certain freedom to use their vote to promote their personal ends or comprehensive views (1996: 235–6). It seems that any plausible theory will have to recognise some cases of indeterminacy and, provided that we take the separateness of persons seriously, we cannot simply be indifferent between these outcomes. It may be that no general reason can be given why (3,2) should be preferred to (2,3), or vice versa, but we must accept that the choice may make a significant difference to the individuals concerned, and thus I think the choice should be fair to both sides. Indeed, it may be that only a fair procedure would be acceptable to all parties—though note that this is not secured by Estlund's Qualified Acceptability

Requirement, since it is only the epistemic value that must be acceptable to all qualified points of view, not the procedure as a whole.

Because these are cases of (quasi-)pure procedural justice, it seems that they are cases where what is needed is an intrinsically fair procedure, democratic or otherwise, rather than prospective fairness. The epistemic aspect of Estlund's conception of democracy may exclude the unjust inequality (4,1), but I see no epistemic basis on which to prefer either (3,2) or (2,3)—there simply is no truth of the matter as to which of these is better and so nothing for an epistemic procedure to track. One way Estlund could respond would be to say that, in these cases, it simply does not matter which option is chosen.<sup>5</sup> This is suggested by his remark that, if everyone agreed there were no independent standards, it might simply be a matter of an arbitrary decision (2008: 71). This seems to be a case where a coin flip might be a legitimate procedure. However, if fairness is unimportant, then Estlund has no basis for saying that a coin flip (or some other fair procedure) is required—it seems that the procedure no longer matters, provided one of the eligible options is imposed. If we take seriously the fact that which option is chosen will make some individuals better or worse off, even if neither option is generally better, then I think it is hard to avoid the conclusion that we ought to be fair to each of these individuals concerned.

Perhaps Estlund may argue that the problem here is the narrow focus on individual decisions. Suppose, however, that society faced a series of choices like this—each of which could be modelled as dividing odd units of good between two factions in society. In this case, it may be that there is no rational basis for deciding which group should be favoured by the first decision but, after that decision has been made—let us say it is (3,2)—the next time we face a similar conflict we all have reason to favour those who lost out last time; so if the next conflict is between (5,4) and (4,5) then we ought to choose the latter and this is something that all can recognise. This would prevent one faction getting all their way at the expense of the other and go some way to reducing cases of pure procedural justice to imperfect justice in a larger sphere, thus reducing the need for intrinsic (as opposed to prospective) fairness of the procedure. I do not, however, think that this will totally eradicate the need for intrinsic fairness—for one thing, it still needs to be settled which group get their way on the first issue, even if this effectively also decides the second issue the other way.

I have not offered a complete defence of value pluralism (although my argument here only requires pluralism in a very minimal sense: it is enough to recognise different individuals' well-being as numerically distinct values), fully developed theories of justice, fairness and the common good, and the implications of these for democracy. Nonetheless, I hope to have demonstrated that, if there are not uniquely correct answers to all political questions, then we have reason to be fair to all parties. This may be achieved non-democratically, as by a randomising device, but we may value procedures that give citizens some influence and thereby perhaps produce other benefits (e.g. educative effects or stimulating deliberation). Thus, there may be some scope within which democratic decision-making can legitimately be seen as a pure procedure, in which individuals can contest for their favoured outcome, rather than striving to realise an independent ideal. Like Lister (2010), I think Estlund too narrowly confines the legitimate scope of democracy. It is true that he has shown intrinsic fairness is much less central than often supposed to democratic procedures. I accept that legitimate democratic procedures need not be equal ones, but I think it is a mistake to completely denigrate the importance of intrinsic fairness. Its place may be much smaller than some suggest, but it is still significant.

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### NOTES

1. Estlund actually tries to justify both the legitimacy and authority of democracy, two notions he explicitly distinguishes (2008: 2). This distinction is unimportant to me here and I shall generally speak only of legitimacy.
2. This is one aspect of Estlund's argument that I find particularly confusing. Sometimes it seems that he merely wishes to say that any procedure that smuggles in such responsiveness or aggregativity is not really grounded *solely* in fairness, thus cannot boast of being without any appeal to substance ('fully virginal'). On this reading, a procedure such as majority rule could be defended on grounds of fairness *and* other values, without being any the less fair (it is simply that they are not sensitive only to fairness). However, Estlund also says that 'Sensitivity to personal features is a departure from fairness' (2008: 81) and often speaks of other procedures as retaining only 'elements of fairness' or being 'fair in a way'. This suggests majority rule is less fair than a coin flip—though, of course, that need not be a problem if it is only a case of non-fairness (rather than unfairness) and it has other things to recommend it. I am unsure what Estlund thinks about the fairness of majority rule (though it is clear that it cannot be justified solely by appeal to fairness).
3. Estlund actually excludes the legitimacy of random procedures by fiat; requiring that the procedure be not only epistemically close to best but also better than random. I do not see why, but cannot explore this here.
4. At least, I believe the arbitrary inequality would usually be regarded as unfair. Broome (1990–91) offers a narrower account of fairness, as the proportionate satisfaction of claims (duties owed to people). Since neither beggar has a claim, this inequality seems not to be unfair on his view. In this narrower sense, fairness might always be valuable.
5. I thank Roger Crisp and Jonathan Quong for pressing me on this point.

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