

13 DEMOCRACY, REVISITED

We have discussed two of the secondary tempering factors: Impersonal Justification and Least Discretion. Now we turn to a third: Equal Influence. It is the core of the justification of democracy.

13.1 Equal Influence

Equal Influence requires that any individual who is subject to superior untempered power and authority has as much opportunity as any other individual for informed, autonomous influence over decisions about how that power and authority are to be exercised.

The rationale is straightforward. If I have as much opportunity for informed, autonomous influence over the exercise of the power and authority as anyone else has, then there's no one to whom I can point and say, because *he* had greater influence, I, in being subjected to that power and authority, am subordinated to *his superior* power and authority. Granted, I have far lesser influence than the collective or artificial will, if any, that wields the superior power and authority. But that collective or artificial will is not another natural person, with whom a question of equality arises.

What is "equal opportunity to influence" a decision? Note, first, that it is matter of *influence*, not of *correspondence*. So long as one enjoys equal influence, whether or not one enjoys correspondence does not, in itself, bear on whether one stands in relations of inferiority to others.

Second, what matters is one's equal *relative* influence with others, not the *absolute* extent of one's influence. The fact that one does not have influence over the decision does not put one under the power and authority of another, if no one else has influence over it either.

Third, the interest is in the standing opportunity for influence, not its exercise. The reason is not, as with the interest in political activity, that the exercise of the opportunity has value only if it is *my* exercise, guided by my convictions. Indeed, the present view is silent on whether *my exercise* has any value at all. Nor is it that asking me to pitch in is a reasonable way to divvy up the labor of servicing my needs. It's instead that if you and I have, and will continue to have, the same opportunity to influence the decisions to which we are subject, then the fact that I refrain from exercising it on occasion does not somehow subordinate me to you. It is important, however, that I *continue* to have the opportunity. That is, my opportunity for influence must be "standing," not one-off. It isn't enough that, once upon a time, you happened to win a lottery. This explains why a denial of suffrage by lottery

would still be problematic, even though it would not express that anyone was an inferior decision-maker, or that anyone's substantive interests were less worthy of concern.

Fourth, what matters is, specifically, equality of opportunity for *informed* influence. Suppose an asymmetry in influence over a decision would threaten a relation of inferiority between us. It scarcely defuses the threat that while both of us can, in a suitably objective sense, influence the decision, I know how to influence it in accord with my judgments, but you do not: your attempts at influence are, from your perspective, more or less random. To take an extreme case, a disparity of knowledge of this kind could be what makes you my slave; I know the code that unlocks your chains, whereas you can only enter numbers at random. The point is not that giving you as much information as I have will lead us to make a better decision—although it may well do that too. The point is instead that, whether or not it leads to a better decision, it helps to remedy the imbalance in power between us.

Fifth, what matters is equal opportunity not only for informed influence, but also for *autonomous* influence: influence knowingly in accord with judgments that are themselves reached by free reflection on what one takes to be relevant reasons. It scarcely defuses the threat inferiority if I can manipulate the judgments that underlie your vote.

Finally, when people enjoy equal opportunity for influence, this will often be because some people, who in some sense have greater “natural” power, cede equal opportunity for influence to others. Perhaps the military could ignore the elected civilian leadership, but does not. This is not, in itself, incompatible with equal opportunity for influence. However, it is important what form the ceding of equal opportunity takes: that it not be presented as a condescending gift or a matter of personal discretion. We will return to this in Equal Influence, not Nondomination.

13.2 *Equal, not Positive, Opportunity*

How might we ensure equal opportunity for informed, autonomous influence over political decisions? One possibility, already broached in passing, is to ensure that no individual has any opportunity for influence over those decisions.

In principle, political decisions might be made by *someone*, but not by someone with whom any of us, who are subject to the decision, has ongoing social relations. In that case, that person's greater opportunity to influence decisions would not threaten relations of inferiority.

At first glance, though, it may be obscure how this could occur. Rule by a colonial power will not fit the bill, since only the narrowest conception of "social relations" would deny that there are social relations between colony and metropole.

However, if one looks across time, rather than space, then the phenomenon comes to seem pervasive. To a great extent, the accumulated body of law to which we are subject was made by those no longer living. In this way, we are subject to political decisions of the dead. Now, perhaps we have the sort of ongoing social relations with the dead that make avoiding relations of inferiority with them an object of concern. But perhaps not. On this view, Thomas Jefferson's suggestion, in his letter to James Madison of September 6, 1789, that every generation should draw up its own constitution, on the grounds that "'the Earth belongs in usufruct to the living'; that the dead have neither powers nor rights over it" would be not simply unworkable in practice (as the more reliably earthbound Madison tactfully observed in his reply of February 4, 1790) but also wrongheaded even as a matter of theory. The basic point is this. If our concern were for correspondence, or some kind of absolute influence, then Jefferson's proposal would be the obvious ideal. By contrast, as far as claims against inferiority are concerned, then perhaps there is no objection to rule by the "dead hand of the past": where all are committed to following whatever law may have been bequeathed to us, just as we might all be committed to following whatever law a majority of us chose. At least it is an open question. And if there is no such objection, then this may be one respect in which human mortality is not entirely to be regretted. It gives us intelligent decision-making without the threat of social hierarchy.

The difficulty, of course, is that this inheritance, as rich as it may be, is neither perfectly prescient nor perfectly self-interpreting. Decisions may be substantively unreliable, and conflicting interpretations may lead to coordination failures, with ensuing substantive losses. New decisions will need to be made, and old decisions will have to be disambiguated. This can be done without giving any of us any opportunity for influence, such as by lottery, or it can be done by giving each of us some positive, but equal, opportunity for influence, such as by voting. This gives a simple answer to at least the Question of Institutions: namely, that democratic institutions realize Equal Influence.

Needless to say, this does not rule out other arguments, which appeal to something other than Equal Influence, for *positive* procedures over *merely equal* procedures, such as lotteries. One argument is simply instrumental: that, as things actually are, or could reasonably be expected to be, some positive equal procedures are more substantively reliable than any non-positive procedures that satisfy give equal opportunity for influence.

One might suggest that there are noninstrumental reasons for positive democracy. But, for the reasons given in XXXX, I am pessimistic that we can identify interests of the right kind.

Moreover, the instrumental case for positive democracy better coheres with certain intuitions than a noninstrumental case, which argues for positive procedures even when merely equal procedures are substantively more reliable. For instance, there is the intuition that, when it comes to deciding who is to be drafted, a fair lottery is better than a vote. A lottery fully satisfies the substantive claims of each—namely, that he should have an equal chance of avoiding the draft—whereas a vote only introduces the possibility of substantive unfairness (for example, that voters gang up on a salient or disliked candidate). If we accept that the argument for positive procedures in general is purely instrumental, then we can explain why, in this case, in which positive procedures are less substantively reliable, merely equal procedures are intuitively preferable. By contrast, if we insist that there is a noninstrumental argument for positive procedures, that some important value of “self-governance” always argues in favor of a vote, then we need to explain why, in this and all similar cases, that value is overridden in favor of a lottery.

13.3 Explaining Authority

Moving beyond the Question of Institutions, how do we answer the Question of Authority? Why does the fact that a political decision was made democratically give others an objection, or even a complaint, if I fail to implement or comply with it?

The answer is that if I were to disregard the democratic decision, then I would be depriving others of equal opportunity to influence this very decision. For influence over the decision, in the sense relevant in this context, is not simply influence over what gets engraved on tablets or printed in registers; it is influence over what is actually done. I would be *depriving others of equal influence*. This is so even if I myself don't *relate to* them as inferiors in that instance.

Consider, now, two objections. Some may object that others are not deprived of equal influence when I refuse to implement a decision that others are implementing, provided that I believe that anyone else may refuse as I do. If I have greater influence than others, this is only due to their own voluntary choice. But this objection requires that anyone's refusal would have influence comparable to my refusal. This is unlikely where there is any significant division of labor in the implementation of the decision.

The second objection is as follows. What if, as is generally the case, there is more than one formal procedure that gives equal opportunity for influence? Suppose (as I will argue in XXXX) that plurality rule and majority rule for changes to the status quo each give equal opportunity for influence. Suppose that changes *A*, *B*, *C*, and the status quo have been voted on, on the assumption, perhaps based on long custom, that a change will be made only if there is a majority for that change. A plurality, but not a majority, is in favor of change *A*. Suppose that person *X* can implement change *A*, respecting plurality rule, or can implement the status quo, respecting majority rule. Why would *X* be depriving people of equal opportunity for influence if *X* were to implement change *A*?

One answer is that people debated and voted with the reasonable expectation that majority rule would decide the matter. If instead, known only to people like *X*, plurality rule would instead decide the matter, then people like *X* actually had greater opportunity for *informed* influence than others had. In other words, a certain degree of *prior*

coordination about which procedure will be followed is typically necessary for equal opportunity for *informed* influence. We return to this point in Partisan Gerrymandering and Equal Influence.

13.4 Explaining Legitimacy

How, finally, do we answer the Question of Legitimacy? Recall that there are two ways of understanding the Question of Legitimacy. The first asks: Why does the fact that a political decision was made democratically *remove my pro tanto objection against* its implementation, even though that implementation may involve “relations of rule”? In other words, why might democracy be what we earlier called a “legitimizing condition,” as consent or public justification are so often said to be? On this first interpretation of the Question of Legitimacy, the problem to be solved is not that there is a *deficit of positive reasons* to implement the decision, but instead that I have a *objection against* some relation of rule that that implementation would involve, which is more or less insensitive to those positive reasons.

I have argued that the complaint against the state is a complaint against the relations of inferiority involved in subjection to political decisions. And if *that* is the complaint, then Equal Influence is one of the things that answer it, for the reasons already explained. In other words, it makes perfect sense that Equal Influence should be seen as a legitimating condition, if the very thing that raises the problem of legitimation is the asymmetry of power and authority that the state involves. The answer to the Question of Legitimacy, so interpreted, is straightforward.

There was, however, another interpretation of the Question of Legitimacy. Even if the fact that the decision was politically made does not remove my objection against its implementation, why might it constitute a *positive reason that weighs against* that objection?

The answer to the Question of Legitimacy, so understood, is just the flip side of the answer to the Question of Authority. If I, as agent, have positive reason to implement democratic decisions, then so do others. And their reasons weigh against my objections as patient. Note that this reason might obtain even if other positive reasons to implement it are lacking, because of, say, the Duty/Directive Gap.

13.5 Proper Representation

A question remains: How is Equal Influence compatible with “representative” government? Must not at least some special decision-making powers, not possessed by every citizen, be placed in the hands of at least some officials?

The answer that I will explore later is that when these officials satisfy certain further selection and conduct conditions, they satisfy a further, secondary tempering factor of “Proper Representation.” As our definition of democratic decision-making allowed, democratic decision-making can be “indirect,” so long as it satisfies whatever further selection and conduct conditions are supported by the values that underlie direct democratic decision-making.

14 CONSIDERATION

So far, I have been focused on asymmetries of power and authority over, and factors meant to temper them: Impersonal Justification, Least Discretion, Equal Influence, and Proper Representation. However, relations of inferiority are also partly constituted by disparities in consideration. I now turn to those.

14.1 *Consideration as Treatment*

The responses that count as “consideration” consist in forms of *treatment* and in forms of *expression*. We begin with treatment, and then turn to expression.

The relevant forms of treatment—that is, those that count as consideration—are those forms of treatment that superiors in a social hierarchy, as such, characteristically attract. Or, viewed from another direction, the relevant forms of treatment are those that, in a society uneasy with hierarchy, it is felt that either every person is owed equally simply in virtue of being a person, or are problematic for anyone to give anyone else. Examples are responses such as respect and intimidation. In our society, everyone, we feel, should be given equal respect, and no one should feel intimidated.

Looking to paradigm cases of social hierarchy to determine what forms of treatment this includes, we find examples such as: acting to advance, or to be perceived as acting to advance, someone’s interests, aims, preferences, or enjoyments; making efforts to ingratiate oneself, or curry favor, with them; showing them deference, courtesy, and respect; noticing and attending to them; listening to them and taking them at their word; trusting them by default as decent, peaceable people; “treating them as individuals”; and recognizing their contributions.

For simplicity, the form of consideration that I will mainly consider is acting to advance, or to be perceived as acting to advance, someone’s interests. However, there is much to say about other forms of consideration, much of which has already been helpfully illuminated by others. Some brief comments will have to suffice.

On “listening to people and taking them at their word”: Fricker’s (2007) path-breaking work on “epistemic injustice” is, I would say, an exploration of disparities of consideration, often along lines of gender, constituted by disparities in listening to people and taking them at their word.

On “noticing and attending to people”: Consider Moreau’s (forthcoming) insightful discussion of “structural accommodation,” architecture, literal and social, that presupposes that the needs, interests, abilities, etc. of a privileged group are normal: such as the ability to climb stairs to access spaces otherwise open to the public. To be sure, those unable to climb stairs presumably have an

improvement complaint about this. Their situation could be improved, without unfairness to others. However, they have a further complaint about the fact that this simply fails to see them or to take their needs into account, while seeing and taking into account the needs of the privileged group. This is a disparity of consideration, where the consideration takes the form of seeing someone and taking their needs into account. Something similar might be said of Moreau's example of how representations of, as it were, "the man in the street" overlook people from certain groups—such as, to wit, people who aren't men.

On "trusting them by default as decent, peaceable people": This seems to me the negative image of what Moreau (forthcoming) calls "censure." Her example of censure is assuming that any Muslim must sympathize with terrorism or extremism. That is, I would say, to withhold from them a form of consideration: namely, the default trust extended to others. Although not all unmerited responses to a person wrong them, it seems plausible that unmerited censure does, and quite independently of disparities of consideration. However, when the unmerited censure is unequal, then there is, in addition, is a disparity of consideration, which wrongs them in a further way.

On "treating people as individuals," rather than as instances of stereotypes, even if the stereotypes are otherwise favorable: See Eidelson 2013 and Beeghly 2018. Eidelson's example is assuming that a female Asian-American musician who has a technically imperfect audition must just be having a bad day.

For his part, Eidelson suggests that the intuitive objection so naturally described in terms of "failing to treat as an individual" is a general objection to failing to respect someone's autonomy, by neglecting evidence of past choices, or assuming an incapacity for future choices. Now, perhaps there is such a general objection, which would apply when someone assumes that someone who is unusually tall, presumably not by choice, plays basketball (Eidelson 2013 208). At very least, your taking offense when someone "makes assumptions" about you is intelligible in a way in which your taking offense when, say, someone, knowing of your good deeds, admires them is less intelligible. But, as Eidelson acknowledges (2013 208), the objection seems significantly clearer and more forceful when the assumption is based on a view about a minority or disfavored protected class, such as being an Asian-American female. But why should this be, if, as Eidelson proposes, the objection is a

general objection to someone making assumptions about you? Moreover, there seem to be similar objections to your “failing to treat someone as an individual” even if you draw inferences from that person’s acknowledged choices: for example, that a man who has chosen to wear a yarmulke will be combative, or that a woman who has chosen to wear a headscarf will be retiring. Conversely, it seems that you can fail to treat someone as an individual by neglecting evidence of some unchosen trait that they have, such as refusing to believe the mounting evidence that someone of African descent is congenitally beat deaf, and so will never “have rhythm.”

This suggests to me that “failing to treat someone as an individual” matters, when it does, because it contributes to a disparity of consideration, where the relevant form of consideration is attending to people’s particular qualities, whether chosen or unchosen. The disparity of consideration, in other words, consists in one’s attending to the individual traits of some people, but not of others. Why should this matter, especially if the individual traits to which one attends in others are defects? Well, among other things, people whose particular traits are not attended to are thereby disbarred from forms of association, such as love and friendship, that require attention to particular traits. In other words, to view people as merely instances of a stereotype, even a favorable stereotype, is to keep them always at a distance. Thus, it is a disparity of consideration when members of the majority or favored protected class treat one another as individuals, attending to their particular qualities, while treating members of the minority or disfavored protected class as merely instances of a stereotype, even if it is the stereotype of a “model minority.”

From this list, we can identify some marks of the sort of treatment that counts as consideration. First, although the “basing trait,” if there is one, may be some specific attribute, the treatment is focused on the person as a whole. Thus, because Herr Geldsack *has high net worth*, one is particularly courteous to *him*. By contrast, we can rate a sprinter highly along the dimension of speed, say, without this bleeding into our responses toward him or his claims as a whole.

Second, the treatment is not simply a detached appraisal, of the sort that an uninvolved spectator might make, such as that Genghis Khan was an able archer.

These first two remarks show that it isn't sufficient for a disparity of consideration that one simply appreciates that one person has, whereas another lacks, attributes that are desirable or sources of pride.⁷⁷ Buyers in a slave market can discern skills or beauty in their prospective "purchases." And while politeness might require paying some minimum of attention and regard to each fellow guest at a dinner party whoever he or she may be, it does not require that one find them all equally lively or skilled at conversation.

Of course, traits such as beauty or skill might *become* basing traits for a disparity of consideration that consists in responses other than mere appreciation of those traits. In that case, the resulting "meritocratic" disparity in consideration may become objectionable in the way that disparities of consideration based on race or lineage are.

Third, it isn't necessary for treating someone in the relevant way that one's treatment of them has any particular effects, such as that their interests are in fact advanced. Accidents happen.

Fourth, it is necessary, however, that one *intends* to treat them in that way: for instance, that one intends to advance their interests or at least to be perceived as doing so. One doesn't just foresee that it will advance, as a by-product or background condition, someone's interests. We do that much when we make arm's length exchanges with someone, or brake to avoid a collision with them.⁷⁸

Fifth, it isn't necessary that one treats the person that way because one believes that one has noninstrumental reason (or any other reason in particular) to treat the person that way. For example, you might be conspicuously solicitous of your patron's interests simply to curry favor.

Accordingly, it is not necessary for a disparity of consideration that it be believed that the social inferiors are *unworthy* of the greater consideration that the social superiors receive. So, in particular, it is not necessary that it

⁷⁷ And even if such appreciation of special attributes were a disparity of consideration, it might still be unobjectionable insofar as it was merited. See Merited Disparities, below.

⁷⁸ This does *not* mean that "implicit bias" cannot contribute to a disparity of consideration. See Discrimination, Revisited.

be believed that because the social inferiors lack some relevant basing trait, they are not fully human, and so lack full moral status (compare Manne 2018, Ch. 5; contrast Hellman 2008 38).⁷⁹

People can show greater consideration for some over others from motivations that do not depend on any such belief. People may be responding from unthinking habit or merely copying what others do. People may be temporizing or responding strategically, whether out of self-interest or for more altruistic reasons. For example, they may just be catering to the interests of those with greater purchasing power. Or, finally, people can take pleasure in belonging to the in-group, without any illusion that their belonging to it has some deeper justification. To overlook this is to underestimate the human genius for social distinctions.

Sixth, however, it is necessary that one does *not* treat people in that way simply because one believes that some special relationship to that person gives one agent-relative reason to do so. In social hierarchies, people treat members of the higher stratum more favorably than members of the lower stratum, regardless of their relationship to them.

Accordingly, it is not sufficient for a disparity of consideration that people act from what they believe is justified agent-relative partiality. Merely to treat one person and not another as a friend is not to treat the latter as a member of a lower stratum. He's just not a friend, and he has other people, but not you, as friends.

Seventh, is it not necessary that basing traits be traits for which their bearers are not responsible: traits that they cannot choose, or traits that they are born with. It does not make discrimination against race and gender acceptable that people can, in some cases, successfully "pass" or change their birth-gender. (Nor, as we will see, is it obvious that it would be acceptable to graft the pattern of consideration characteristic of an aristocratic order onto meritocratic competitions, simply replacing lineages with test scores as the basing trait, even if people are responsible for success in those competitions.)

⁷⁹ My own view is closer to a revision of Hellman's view, proposed, for criticism, by Arneson 2013b 93.

Finally, a disparity of consideration from a superior has special significance. To be the favorite of a superior is itself a kind of superiority.

14.2 Consideration as Expression

Disparities of consideration, as I noted earlier, consist not only in disparities in certain forms of treatment, which we have just described. Disparities of consideration also consist in forms of *expression*.

The central question is what the content is that's expressed. We've already ruled out the answer that what, in general, is expressed is that some people are less worthy of something, let alone that they are less worthy because they are less than fully human. The answer, I think, is instead that what is expressed (possibly insincerely or as mere lip-service) is an *endorsement of independent relations of inferiority*. Those independent relations of inferiority might be constituted by a disparity of consideration of *another* kind or by an asymmetry of power and authority. Whether or not it is expressed that anyone is less *worthy*, in other words, the *social fact* of the inferiority of some to others is embraced or ratified.

I take it that an act, *A*, expresses a content, *E*, only insofar as *some* people in the relevant culture either *intend* to communicate *E* by *A* or *interpret* others as doing so (Ekins 2012). If *A* does not bespeak or invite such intentions or interpretations, then it simply does not express *E*. Whether *A* expresses *E* will of course depend on convention, context, history, and more general cognitive limits of intention and interpretation.

These expressions depend "recursively," in two ways, on independently existing relations of inferiority. First, to repeat, the *content* expressed is an *endorsement of some independent relation of inferiority* of Xs to Ys. Again, it is endorsement of that *social fact*, whether or not that endorsement is grounded in some further judgment that, e.g., the Xs lack moral status.

Second, the *vehicle* of expression may be some difference in response to Xs and Ys that, *apart from independently existing relations of inferiority, would not express an endorsement of relations of inferiority*. Whether it counts as lesser consideration to be required to sit in the back, as opposed to the front, of the bus is impossible to say without knowing whether it is the superiors or inferiors (as determined by *other* contexts) who are required to sit in the back (Hellman 2008 27). Holding other things fixed, if African Americans had been told to stop at the front of the bus and only white

passengers been allowed to sit at the back of the bus, “going to the back of the bus” would have had the opposite valence.

14.3 Merited Disparities

Some disparities of consideration may be “merited,” or “made fitting,” by a relevant difference in attributes. That is, it may be constitutive of, or internal to, recognizing values of certain kinds that, when one judges certain differences in people’s attributes, one treats those people differently in one of the ways that we have listed as forms of consideration. For example, it may no longer be fitting to hear someone out, because he has shown himself to be untrustworthy, or it may be fitting to withdraw goodwill from someone, because he has seriously wronged others. I assume that disparities of consideration that are responsive to merit are less objectionable, if objectionable at all (even if they are not tempered). Why this is so is a further question, and I’m not sure what its answer is.

Whatever its answer, however, one might worry that if we say that disparities of consideration are not objectionable where they are merited, then we are just implicitly conceding that what we are calling an “objection to disparities of consideration” is really just an objection to something that has nothing to do with relations of inferiority. Instead, the objection is either (i) that we are responding to some people in ways that they have not merited, or (ii) that we are withholding from some people responses that they have merited.

However, there is no complaint, in general, about *giving* someone a favorable response when they have no trait that merits it. No one has a complaint against you for simply hearing a stranger out because, as far as you know, they have done nothing that would give you grounds to mistrust them. And yet it’s not clear how your willingness is a response to the stranger’s *merit*. You don’t know them from Adam.

And while it might be more objectionable to *withhold* from people responses that they have merited, it isn’t true, in all of the relevant cases, that the withheld consideration is merited by the people from whom it’s withheld.

The Half-Warm Society illustrates both points. The objection to the Half-Warm Society can be neither to giving the right handed something that they have not merited—since the right-handed are given the same responses in the unobjectionable Warm Society too—nor to withholding something from the left-handed that they have merited—

since that is also withheld from them in the unobjectionable Cold Society.

To grant that disparities in consideration are not objectionable when they are merited is also not to endorse, say, grafting the pattern of consideration characteristic of an aristocratic order onto “meritocratic” competitions: that is, simply replacing lineage with qualifications or career as the basing trait. This is because there is no reason to think that qualifications or career merit such responses. Qualifications, to the extent that they are admirable, merit admiration. But admiration is not, for example, acting to advance someone’s interests. And one’s being better qualified, as we saw in XXXX, means that beneficiaries have weaker objection to one’s getting a job. But this is not a response to merit; it’s purely instrumental.

Of course, some might say, not without justice, that we *do* currently view qualifications and careers in the way in which aristocratic orders viewed lineage (Arneson 1999 93–94).⁸⁰ But it isn’t clear to me as a conceptual matter that qualifications and careers, however scarce and desirable, *must* be freighted with such further significance. The fact that someone spends his days doing something that I would prefer to spend my days doing needn’t mean that he has a higher rank, any more than that he enjoys, in the privacy of his own home, some labor-saving convenience that I don’t.⁸¹ This is not to deny, of course, that the distribution of such goods—desirable work or conveniences—is of concern. It is just to observe that the concern is not rooted in a claim against inferiority.

⁸⁰ If so, then it suggests another explanation of why we view White’s advantage as different from Hauser’s in Substantive Equality of Opportunity: namely, that careers attract consideration in a way in which owning, rather than renting, a domicile does not.

⁸¹ I worry that these are run together in the opening lines of Arneson’s 2015 encyclopedia entry on “equality of opportunity”: “Equality of opportunity is a political ideal that is opposed to caste hierarchy but not to hierarchy *per se*. The background assumption is that a society contains a hierarchy of more and less desirable, superior and inferior positions.”

14.4 Discrimination, Revisited

This suggests what the discrimination complaint in the Half-Warm Society might be: a complaint about a disparity of consideration, which is neither merited, nor tempered, since it is ongoing, inescapable, pervasive, and not cabined to any one time, place, or context.

More generally, I suggest that discrimination complaints are against:

- (i) a disparity of consideration,
- (ii) not tempered by the primary factors,
- (iii) which is not merited, and
- (iv) which tracks a basing trait (e.g., handedness).

Condition (iv), that the disparity tracks a basing trait, matters morally only insofar as it explains *why* condition (ii) is satisfied: why the primary tempering factors go missing. The basing trait matters morally only as a coordination point, targeted by many different people and institutions across society, for a system of differential treatment and expression that is untempered: ongoing, inescapable, etc.

Earlier we asked what counts as a “protected class,” such that treating people differently based on their membership in that class gives rise to a discrimination complaint. How should we generalize from the cases of race and gender? We proposed only a vague, necessary condition: that differential treatment on the basis of membership of the class in question be “widespread in society.” What this necessary condition was gesturing at was, we can now say, a certain way in which the primary tempering factors can go missing, and so a disparity of consideration can become objectionable. Namely, the disparity of consideration can track a basing trait across a variety of contexts, in an ongoing way, etc.

I now suggest that there is nothing more to a protected class than this. A “protected class,” then, is simply any group defined by a basing trait around which an unmerited disparity of consideration, untempered by the primary factors, has gathered (or threatens to gather).⁸²

The relevant basing trait needn’t, in principle, be one that the bearer is not responsible for. However, the difficulty of escaping a disparity of consideration may be correlated with

⁸² Compare Lippert-Rasmussen 2014 on “social salience.”

the disparity of consideration tracking a basing trait that the bearer is not responsible for.

The relevant basing trait needn't, in principle, be visible or salient. However, basing traits that are less visible or salient may be less likely, in practice, to attract a widespread disparity of consideration.

As we noted earlier, "protected classes" are sometimes defined as classes that have been subject to discrimination in the not-too-distant past. We worried that this risked a regress. In order to be discriminated against now, the class would have to have been discriminated against in the past, and in order to have been discriminated against then, the class would have to have been discriminated against in the further past, and so on. How could discrimination ever start? The present suggestion avoids this regress, since it does not define protected classes as those that have been subject to discrimination in the past.

However, there is something right in the suggestion that protected classes are classes that have been subject to discrimination in the not-too-distant past. This is because of the second sort of "recursion" that we discussed in Consideration as Expression: namely, that a response that would not express an endorsement of a relation of inferiority may express such an endorsement because of a history of relations of inferiority. Thus, a response to a basing trait that would not otherwise count as lesser consideration can come to have that meaning within a not-too-distant past of lesser consideration for people with that trait. In this way, what would not otherwise be discrimination may become discrimination because of existing discrimination. Consider an example that Hellman 2008 discusses, of a principal segregating black and white students for a school photo, which might have been an innocuous aesthetic choice, like clustering taller people in the center, if not for the history of segregation by race.

We can now explain our misgivings about Alexander's suggestion that the distinctive wrong of discrimination is rooted in judging a person to be of lesser moral worth.

We observed, first, that as Alexander's own formulation reveals, the discrimination complaint seems to be a *comparative* objection to a judgment of *lesser* moral worth *than others have*. It's not the objection that one might have to a consistent amoralist, who underestimated everyone's

moral worth. We have now explained why this is. In the case of the consistent amoralist, there is no disparity of consideration.

Second, we worried that there seems a further objection when the underestimation of moral worth is *based on one's being a member of a "protected class,"* such as race or gender, as opposed, say, to being a judgment motivated by some personal jealousy, enmity, or dislike. In the former cases, but not the latter, the primary tempering factors are absent.

Finally, we worried there can be a discrimination complaint about differential treatment that *does not involve any underestimation of moral worth,* as in the Half-Warm Society. This is because there can be a disparity of consideration without any underestimation of moral worth.

This account of discrimination might explain why people have complaints about discriminatory *patterns* of responses in society. But, one might ask, does it explain why the victim of some *specific* discriminatory response has a special complaint about that specific response, and not just a complaint about the broader pattern, or others' support of it?

It does. Their complaint is that, on this occasion, a specific person "related to" them as an inferior, in the sense explained in *The Structure of Claims Against Inferiority*. Granted, in the absence of the broader social pattern, the same treatment would not have counted as responding to them as an inferior, and so they would not have that complaint about it. But this is compatible with their complaint still being about that *specific response toward them*, not only about the social pattern.

The word "tracks" in (iv) may cover some cases of "indirect" discrimination. What matters is that those with the relevant basing trait systematically receive lesser consideration. Barring freak accidents, this must be because consideration is *somehow* sensitive to that basing trait. But this sensitivity to that basing trait might be unintended, or unconscious, or by proxy. In principle, to return to a possibility raised earlier, there might be a disparity of consideration of which no one was aware. We might discover that we live in the Half-Warm Society, when we thought we lived in the Warm Society.

We rediscover this with each round of studies showing that women are paid less than men for the same work. These

studies make it regrettably easy to imagine a scenario in which no one intends, or is even aware, that women, as such, are paid less than men for the same work. For example, salary negotiations may be influenced by factors whose influence and correlation with gender go unnoticed.

Now, this must be *intentional*, in *certain* ways, in order to count as lesser consideration *as treatment* at all. At very least, the employers must *intend* to pay such and such an employee such and such an amount, *as compensation for work*, in order for the transfer of funds to count *as valuing the employee's contributions at a certain rate*. As we noted in Consideration as Treatment, merely foreseeably benefitting someone is not in itself consideration. Braking on the highway, solely in order to avoid damage to one's own vehicle, is not a form of consideration for the driver one would otherwise rear-end, although of course one foresees that it will benefit them.

Thus, if somehow employers were to scrupulously design and approve payrolls with perfectly equal pay, but by some concatenation of freak accidents, which due precaution could not have prevented, a group of employees, all of them, as it happens, women, receive smaller bank transfers, this would not be a disparity of consideration *as treatment*. (However, it might still be a disparity of consideration *as expression*, if, otherwise innocent though it is, it occurs against a background in which the freak accident may naturally be *interpreted*, albeit incorrectly, as expressing lesser consideration.)

While this account covers many forms of indirect or implicit discrimination, it admittedly does not cover what might be called "egalitarian discrimination." Suppose that a culture believes in a gendered division of labor, although (somehow) this is in no way linked to asymmetries in power or authority, or disparities of consideration (Lippert-Rasmussen 2014 41). Or suppose that two equal groups just do supererogatory things for their own members, without any suggestion of a hierarchy, just as members of different families do.

If there really is no connection whatsoever to hierarchy, then, I submit, the problem, if there is one, is different. In the gendered labor case, for example, the problem is just that everyone is pointlessly limited by their gender in the opportunities that they can pursue.

As we will see in the next chapter, there are cases in which (i)–(iii), but not (iv), obtain: where there is a disparity of consideration, which is not tempered by the primary factors, and which is not merited, but which does not track a basing trait. These cases are of *non*-discriminatory disparities of consideration *by the state*. While they are not cases of discrimination, they are objectionable in a similar way.

15 EQUALITY AS A CITIZEN

We return now to claims against inferiority addressed to the *state*.

Earlier, we discussed claims raised by those subject to the state's decisions against their standing in relations of inferiority to the *agents* of the state: those who decide what the state does. They are concerns, to borrow an expression from Pettit 2012, about "vertical" relations to the state. These relations to the state are tempered, or so I have suggested, by the secondary factors of Impersonal Justification, Least Discretion, Equal Influence, and Proper Representation.

Now we discuss concerns that some of those subject to the state's decisions stand in relations of inferiority to *other patients* of the state: others who are likewise subject to the state's decisions. They are concerns about the state's role in "horizontal" relations, between one patient of the state and another.

15.1 Equal Consideration

As we saw in the last section, discrimination represents one way in which a disparity of consideration can be untempered. Some basing trait, such as handedness, serves as a coordination point for lesser consideration from many different persons and institutions, across society. The disparity of consideration is thus made ongoing, inescapable, pervasive, etc. It is unlike a fleeting episode of lesser consideration from a lone individual, such as a driver who performs a “random act of kindness” by picking up another hitchhiker, but, deciding that is enough for the day, not you. Discrimination, as we have described it, is an untempered disparity of consideration constituted by the responses of many different actors, state and non-state, which is made possible by coordination on a basing trait.

Our question now is what we should say about disparities of consideration that are constituted *by the responses of the state itself*, when they are *not* connected to any pattern of discrimination, so understood. If it is objectionable for *the rest of society*, coordinating on a basing trait, to, say, count your interests for less in the provision of public services, might it also be objectionable, for a similar reason, for *the state*, without the cooperation of the rest of society and independent of any basing trait, to count your interests for less in the provision of public services?

One might answer no. “After all, it isn’t objectionable for the isolated, randomly kind driver to show you lesser consideration, again so long as they treat you adequately and so long as this isn’t connected to any independently existing pattern of discrimination, so long as there isn’t any coordination on a basing trait. So, likewise, it isn’t objectionable for the *state* to show you lesser consideration, so long as it treats you adequately and so long as this isn’t connected to any independently existing pattern of discrimination.”

However, the reason why the isolated individual’s lesser consideration of you was unobjectionable, we said, was that tempering factors were present. The lesser consideration was not ongoing, or inescapable, or pervasive. It was both regulated by higher-order structures with a different character and occurred against the background of other structures within which you enjoyed equal standing with the person who enjoyed greater consideration from that isolated individual. By contrast, relations to the state are ongoing,

inescapable, pervasive, and not regulated by higher-order structures. And if, in one's relations with the state, one does not enjoy equal standing with other individuals, there may be no *other* structures in which one does enjoy equal standing with them. In other words, because the primary tempering factors are absent, the state seems to play something more like the role of "the rest of society" in a case of discrimination and less like the isolated stranger in a random act of kindness. (Granted, the state might do more for others without judging (whatever that would come to) that you are unworthy of more. But, as we saw, the same can be true of discrimination. Other individuals in your society might do more for others without judging that you are unworthy of more.)

The state's consideration is special in a further way: it is the consideration of a *superior* power and authority. A disparity in the state's consideration, therefore, does more to constitute those it favors as superior than would a disparity in any individual's consideration.

This suggests that the state is under a more stringent requirement, *Equal Consideration*, to show equal consideration for its residents than private persons, such as the randomly kind driver, are under to display equal consideration for one another. Private persons are required, perhaps, only to refrain from contributing to patterns of discrimination (unless they stand in special, e.g. parental, relationships). The state, by contrast, is required to show equal consideration even absent any pattern of discrimination, any coordination on basing traits.

This may be why when theorists offer examples of "wrongful discrimination" against members of a group that are isolated from any broader pattern of discrimination against that group, they tend to offer examples in which the *state* directly distributes some benefit or privilege unequally, when there is no justifying difference. Witness Hellman's example of a "state law forbidding people with freckles from voting" (2008 41), or Moreau's example of denying heterosexual couples civil partnerships. If it were a private actor, rather than the state, distributing a benefit unequally, then given that it was isolated from a broader pattern of discrimination, or coordination on a disfavored basing trait (freckles and heterosexuality not being *disfavored* traits), then it would be less clear that it was wrongful.

This view assumes that the state, understood as the agency that wields final power and authority, has a certain unity, even over time, even when distributed into a multitude of offices. And insofar as the state's consideration takes an expressive form, it also assumes that what the state does can have expressive significance. Both assumptions are open to question, granted. But they seem to me plausible.

There may also be traits such that if one lacks them, one is, as a contingent matter, less likely to be accorded Equal Consideration by the state. If one has no mailing address, then one may not receive certain forms of government aid. This might be so even if there is no pattern of discrimination against people lacking a mailing address. This can be practically significant, as we return to in *Poverty, Relative and Absolute*. For it suggests another strategy for addressing violations of Equal Consideration: to work not on the sensitivity of state action to those traits, but instead on the traits, such as homelessness, themselves.⁸³

⁸³ See Moreau forthcoming on "basic goods."

15.2 *Equal Citizenship*

Suppose the state satisfies Equal Influence and Equal Consideration. And suppose that the state moreover shows its citizens not only *equal* consideration, but also sufficient *positive* consideration. It follows that those subject to the state enjoy a kind of socially recognized equal status with one another in virtue of the relations of each of them to the state. In virtue of Equal Influence, one is an equal “active” citizen. One has the same say as any other citizen has in what the state does. In virtue of Equal Consideration, one is an equal “passive” citizen. One enjoys the same consideration from the state as any other citizen does.

This means that, as a kind of happy by-product, the state satisfies the last of the primary tempering factors that we listed. Whatever other asymmetries or disparities there may be between members of society, they stand as equals to one another in at least one other recognized relationship: namely, the relationship of Equal Citizenship, that is constituted by their relations with the state. Moreover, because the state wields final power and authority, which regulates all other relations, citizenship is, in one sense of “fundamental,” one’s most fundamental standing with respect to others in society (Miller 1997 234).

Equal Citizenship, note, requires not only equal consideration by the state, but also sufficiently positive consideration. If the state plays little role in people’s lives, it might trivially satisfy Equal Consideration. However, it would not go very far in satisfying Equal Citizenship, since the relationship of equal citizenship that it established would be relatively thin; it would not amount to much.

This might remind the reader of one of Rawls’s arguments for the priority of the equal basic liberties. The argument’s main premise is that it is important to secure for everyone a kind of equal status: that, whatever other hierarchies there may be in society, there be at least one socially recognized relationship in which members of society stand as equals to one another. The difference lies in what this socially recognized relationship might be. Rawls’s answer is that it is the socially recognized relationship that is realized by a basic structure that secures the *equal basic liberties* and that gives that equality in the basic liberties priority over the distribution of other goods. My proposed answer is more general: that the socially recognized relationship of equality is the relationship realized by Equal Influence and, more

important for present purposes, Equal Consideration by the state.

15.3 *Equal Treatment by the State, Revisited*

If we accept Equal Consideration, then Equal Treatment by the State follows as a special case. In general, to give a benefit *B* to *X* but not to *Y*, absent a justifying difference between them, is to show greater consideration for *X* than for *Y*. So for the state to show equal consideration for its citizens, it must treat them equally.

If Equal Treatment by the State is a special case of Equal Consideration, then this explains why it applies to what the state *directly* provides. An agent's providing something directly is *that agent's* treatment and expression in a way in which an agent's merely countenancing, via the intervention of other agencies, something to be provided is not. What one says oneself is a more significant expression of one's state of mind, for example, than what one suffers others to say. Thus, when the state unequally provides something that it directly provides, this is a more significant expression of the state's unequal consideration than when something, via the actions of the state and of intervening agencies, is unequally provided.

This in turn assumes a distinction between what the state directly does and what it indirectly allows to happen. In the latter case, what happens is more the result of independent initiative by other agents, who, even if regulated by the state in what they do, are not implementing its directives or carrying out its express charges. This means that, for present purposes, the state may be something less than the "basic structure," insofar as the "basic structure" includes some of those regulated, but not directed or charged, agents, such as participants in a market economy.

One might worry that this makes it too easy for the state to slip the fetters of Equal Treatment. All it needs to do is "privatize" (Patten 2014 4.4). However, first, much that goes by the name of "privatization" would not be "indirect" in the relevant sense. The state's contracting with non-state employees to do what state employees would be in their place directed to do, for example, makes little difference. Those "private contractors" are still carrying out the state's express charges.

Second, there are reasons against replacing direct provision with (genuinely) indirect provision. One is simply that people might be worse served by indirect provision. Another reason against indirect provision is that it would

undermine Equal Citizenship. Granted, the state might fully satisfy Equal Treatment by providing equally *little* to everyone. After all, the Aztec Empire trivially satisfied Equal Treatment with respect to you and me by giving neither of us anything. But if the state provides equally *sufficiently much* to everyone, then it provides them with Equal Citizenship. That is something that the Aztec Empire, despite its flawlessly equal treatment, does not provide us with.

This view explains why *Y* has no equal treatment complaint when *Y* is a non-resident alien of the state in question. In that case, *Y*'s relations to that state are not ongoing, inescapable, pervasive, etc., and that state does not play the same final, regulating role over *Y*'s society.

This view also explains why *Y* can have an equal treatment complaint even if the unequal treatment does not stem from *X*'s and *Y*'s belonging to different "protected classes." The root objection is to an *untempered* disparity of consideration. Again, the disparity in this case is untempered not, as in the case of discrimination, because of *coordination* across many agents *on some disfavored basing trait*, but instead because it is the *state* whose consideration is at issue.

This view also explains why equal treatment complaints typically apply to *specific* benefits. Giving people the same benefits is typically, given the cognitive limits of interpretation, a less ambiguous expression of equal consideration than compensating lesser provision of a certain good with greater provision of another.

Finally, this view suggests that what counts as a "justifying difference" will similarly depend, in part, on the contingencies of what expresses what. Perhaps the fact that the state cannot give *B* to *Y* (because, say, the rule was already applied in *Y*'s case) but can now give *B* to *X* might be enough for the unequal provision *not* to express *unequal* consideration. But, then again, it might be less ambiguous, and more of a *positive* statement of *equal* consideration, simply not to give *B* to *X* under the circumstances.

One might object: "You grant that what counts as equal consideration depends, in part, on 'what expresses what.' What if prevailing interpretations were such that the state *cannot* express *unequal* consideration by how it *henceforth* acts *so long as* it henceforth acts in whatever way brings it about, directly or indirectly, that interests in improvement

are best satisfied overall, treating any mistakes that it might have made in the past as water under the bridge? In that case, once the state determined how best to satisfy improvement claims going forward, Equal Consideration would impose no further constraint on its deliberations.”

First, it’s not clear that, given the general cognitive limits of interpretation, what expresses what is so malleable. Second, I have supposed that consideration consists not only in expression, but also in treatment. It is not clear that what counts as equal treatment is so malleable. In any event, even if we grant that Equal Consideration imposed no independent constraint, it would still be a further reason *to* satisfy improvement claims (at least within a given society).

15.4 *Equal Basic Liberty, Revisited*

As we noted, the argument for Equal Citizenship just given more or less follows the structure of Rawls's second argument for the priority of the equal basic liberties. The shared main premise is that it is important to secure for everyone a kind of equal status: that, whatever other hierarchies there may be in society, there be at least one socially recognized relationship in which members of society stand as equals to one another.⁸⁴

Where the argument departs from Rawls is in what the socially recognized relationship is. Rawls suggests that it is realized by a basic structure that secures the equal basic liberties, and, moreover, gives that equality priority over the distribution of other goods.

As it stands, however, the argument invites the first two puzzles about the doctrine of the basic liberties discussed in Equal Basic Liberty. First, how does liberty even differ from money—let alone differ in such a way as to make different principles of justice appropriate to each? Second, why are some inequalities in liberty, such as those that result from home security systems purchased on the open market, unobjectionable?

And further questions arise. Even if we grant that equal status requires equality in the holdings of goods of some kind, why should the goods be all and only the liberties? Why not money, or less than all the liberties, or some of the liberties and some money?

A natural reply is that it is easier to tell whether there is equality of liberty than whether there is equality of other goods. But this isn't obvious, as Shiffrin 2004 observes. On the one hand, with appropriate reporting requirements, we could monitor equality in income and wealth. On the other hand, monitoring equality in some of the basic liberties can be quite difficult.

By contrast, I have been suggesting that the relevant equal status, of Equal Citizenship, is constituted by Equal

⁸⁴ For Rawls, this equal status matters, in turn, because it supports the social bases of self-respect, which matters, in turn, because the social bases of self-respect are important means to pursuing one's life plan. I discuss more in *Psychic Cost*.

Influence and Equal Consideration (where there is sufficiently positive influence or consideration). It is equality in the relations, active and passive, that each of us bears to the state.

Furthermore, I propose that the truth in Rawls's doctrine of the equality of the basic liberties is simply Equal Treatment by the State as applied to the special cases of (i) the state's *directly* issuing and enforcing prohibitions on what its citizens do and (ii) the state's *directly* protecting citizens from interference by others.

Again, what is the difference between freedom of movement and bus fare even supposed to be—setting aside the question of why the difference should matter? When the state denies freedom of movement, it directly issues and enforces a prohibition. There is little or no intervention by other independent agencies. By contrast, when the state allows or facilitates an economic structure that ends up leaving one unable to find a private transportation service willing to transport one for what one is able to pay, the state's role is less direct. One's inability to travel is due to a greater extent to the intervention of independent agencies.

To be sure, this may be more a difference in degree than in kind. Insofar as it is in the state's power to regulate those other agencies, the difference is in *how directly* one is treated by the state: *how far* one's treatment is mediated by the decisions of other agencies. And degree of directness may be hard to measure; in some cases, there may be no answer as to whether one sort of provision is more or less direct than another. But it is still a difference.

This difference matters if, as we have suggested, Equal Treatment by the State applies more stringently to what the state more directly provides. This may mean that one has an equal treatment complaint about inequality in freedom of movement that one lacks about inequality in bus fare.

This view, of course, differs in several ways from Rawls's doctrine of equal basic liberty. First, the focus is not on individuals *having* equal amounts of some privileged good. The focus is rather on the state's *providing* equal amounts. If some threshold of basic security has been *provided* equally, there is no violation if some *have* additional security because they have purchased it on the open market.

Second, the comparative complaint doesn't attach to some *privileged kind* of good, such as *liberty*. It is rather that there is special pressure on the state to provide *whichever goods it directly provides* equally. It isn't violated when the state simply upholds an otherwise justified economic system with the predictable but indirect result that some, but not others, can induce a private provider of transportation services to provide them. If, by contrast, in a command economy, the state distributed bus vouchers only to party members and not to others, then that would be like the state's granting "freedom of movement" only to party members. In that case, there wouldn't be a significant moral difference between a bus voucher and an internal passport, as seems intuitive.

If we understand the equality of the basic liberties to be a special case of Equal Treatment by the State—namely, where as the state *directly* provides protection from interference—then we can explain why it isn't violated when the state, while providing equal police protection to all, in addition upholds an otherwise justified economic system with the predictable but indirect result that some, but not others, have home security systems.

This proposal is thus relieved of the need to draw a clear, general distinction between liberty and money. And this proposal does not imply that protection from sentience is somehow more important than protection from disease. The state's directly providing sewers to only some would be objectionable in the same way as its providing police protection to only some.

Finally, there is no insistence on the *priority* of distributing one kind of good over any other. Again, the idea is simply that the unequal provision of goods directly provided by the state, but not the mere unequal holding of goods that are not directly provided by the state, gives rise to a comparative equal treatment complaint.

One might worry that this gives the state *carte blanche* to stand aside as some are assaulted, defrauded, etc. by others. After all, the state plays only an "indirect" role in those violations of liberty!

First, people would have an improvement complaint if the state did not give them *sufficient* protection from assault, fraud, etc.: that is, if the could have given them greater protection without unfairness to others. Second, people

would have an equal treatment complaint if the state were to provide better protection to some people than to others.⁸⁵ All this view is committed to is that if, both having received that equal protection, Y were to be victimized but X were not to be victimized (no protection being perfect), Y would have no equal treatment complaint against the state.

⁸⁵ Cohen (2011) suggests two other possible differences between “state” and “business” provision of freedom. One is that the businesses, but not the state, are distributing scarce goods (188–9) [Tony made this point]. But police protection is also in limited supply. Indeed, so too are many legal permissions: only so many can do the permitted act before the cost becomes prohibitive. The other possible difference is that the “prohibition” of an act can be an “insult to” or “diminution of” “status” in a way in which the refusal to give a gift or accept an exchange on certain terms is not (191–2). I explore something like this in Self-sovereignty.