

# Disagreement and Democracy: From Vote to Deliberation and Back Again?

## The Move toward Deliberative "Voting Ethics"

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*We should think of deliberation with a view to voting, and voting in a way that looks back to what took place in deliberation, as a unified exercise of political virtue, rather than an unsatisfactory compromise between disparate models of democracy.*<sup>2</sup>

### Introduction

The idea that democracy revolves around the transformation of preferences through deliberation or discourse,<sup>3</sup> rather than simply the aggregation of preferences through voting,<sup>4</sup> has become during the past ten years one of the major positions in democratic theory.<sup>5</sup> Hardly anybody nowadays finds deliberation intuitively repulsive. Nor does anyone not take for granted

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<sup>2</sup> Waldron 1999b, 223.

<sup>3</sup> Note that, in this essay, I will not distinguish between 'deliberation' and 'discourse', which are nowadays used interchangeably. It is true that there are important differences between Habermas's theory of discourse and theories of deliberative democracy, but for reasons of simplicity I will assume they both refer to (i) an intersubjective process of communication (by contrast to individual deliberation) that is (ii) expansive (unlike private conversations) and (iii) non-coercive.

<sup>4</sup> The aggregative model of democracy was initiated by Schumpeter 1947 and further developed by Downs 1957.

<sup>5</sup> The main contributors to this new deliberative turn are Habermas 1998; Bessette 1994; Mansbridge 1980; Barber 1984; Cohen 1989; Dryzek 1990, 2000; Elster 1986; Manin 1987; Fishkin 1991; Bohman 1996; Gutmann/Thompson 1996; Nino 1996. Of course, the emphasis on deliberation is not entirely new and it is the re-

that, in a democracy, political disagreements over issues of justice and the right<sup>6</sup> are to be resolved by argument and deliberation on the part of all those affected by the future decision.

Given the existence of pervasive reasonable disagreement in matters of justice, however, it also seems quite natural to expect a complete theory of democratic deliberation to include an account of the *institutional forms* that deliberative processes might take; there must indeed be processes of reaching legitimate and binding collective decisions in multi-member bodies like legislative assemblies,<sup>7</sup> when an agreement<sup>8</sup> or the mutual accommodation of our differences is not possible.

Most advocates of deliberative democracy do not provide such an account, however. Some of them reject standard practices of liberal democracy as impossible locations for public reasoning. Others, who acknowledge that non-deliberative procedures constitute an unavoidable component of any democratic institutional arrangement, simply assume the moral superiority of deliberation over voting or other elements of the aggregative model of democracy from which they want to distance themselves.<sup>9</sup> In doing so, defences of deliberative democracy neglect issues that are crucial to the task of formulating a persuasive defence of democratic deliberation; to borrow James Johnson's terms, they "do not treat deliberation primarily as a mode of political decision making".<sup>10</sup>

vival of an old theme that can be found in the writings of Aristotle, Burke, Mill and, more recently, Dewey or Arendt.

<sup>6</sup> Note that I am concentrating in this essay on people's disagreements over their *impartial opinions of justice and the right* rather than on their conflicting *interests and partial preferences*. When they resort to taking a vote, therefore, I will assume, unlike most deliberative theorists and critiques of aggregative procedures, that they vote on the basis of those judgements rather than preferences. See on this distinction, Coleman/Ferejohn 1986 and Brennan/Pettit 1990.

<sup>7</sup> Note that in this essay I am concentrating on such multi-member political bodies, and in particular legislative assemblies, since they are the instances of decision-making institutions where disagreement is most legitimate and deliberation most required. One should note, however, that the majority rule applies even in so-called 'non-majoritarian' institutions such as courts which have to make a decision by some procedure.

<sup>8</sup> Note that, in this essay, I will use 'agreement' and 'consensus' interchangeably to designate a consensus of conviction and will oppose them to the mere 'convergence' of different reasons.

<sup>9</sup> Note that I will not expand in this essay on deliberative democrats' misgivings about the aggregative model of democracy and especially the social choice theorists' critique of voting, such as the critique of the ambiguity and instability that follow from voting patterns. This critique applies indeed to the deliberative model too. Moreover, there are easy means to avoid some of the vicious regresses and paradoxes that this critique denounces. See Waldron 1999a; Farber/Frickey 1991 and Johnson 1998.

Apparently confirming this critique, a section of one of the latest books on deliberative democracy, John Dryzek's *Deliberative Democracy and Beyond*, is entitled *From Voting to Communication*.<sup>11</sup> In that section, Dryzek argues that only such a shift in deliberative democrats' basic conceptualization of democracy would enable a compelling and critical defence of deliberative democracy. Whereas others, like James Bohman, have identified and celebrated a progressive move back from deliberation to vote as a characteristic feature of the "coming of age of deliberative democracy",<sup>12</sup> Dryzek criticizes it as a conservative retreat to liberal democratic institutions. In lieu of votes and elections, he offers an account of reasoned agreement as the result of deliberation, as well as an argument for rhetoric means of communication between public spheres of deliberation and the political process of decision-making. According to him, such a theory is the only "defensible theory of democracy ... in the wake of the deliberative turn".<sup>13</sup>

In the present paper, I aim at reversing this new critical trend in the deliberative-democracy movement. I argue that after having criticized and moved away from voting and other democratic institutions, deliberative-democracy theorists have begun to – and if they have not, should – realize that it is best to move back to those institutions, thus combining deliberation with collective decision-making institutions; that deliberation is more accurately understood as the give-and-take of public argument with the aim of making an action-guiding and conflict-resolving decision that can be justified to the people bound by it. A better conception of deliberative democracy should place disagreement and the need to vote at the core, and not at the periphery.

Furthermore, in circumstances of reasonable disagreement, the deliberative movement should face not only the inescapable culmination of deliberation in a voting process, but also the need for a good theory of deliberative democracy to do more than simply accommodate the act of voting. The time has come for deliberative-democratic theories to develop true deliberative 'voting ethics'<sup>14</sup> rather than concentrate on their limited discourse ethics. Instead of merely accommodating reasonable disagreement and existing voting institutions *realistically* and *pragmatically*,<sup>15</sup> they should at-

<sup>10</sup> Johnson 1998, 162.

<sup>11</sup> Dryzek 2000, 47.

<sup>12</sup> Bohman 1998, 400.

<sup>13</sup> Dryzek 2000, 2.

<sup>14</sup> Note that the term 'voting ethics' is meant to echo Habermas's 'discourse ethics'. I am not using the term in its Kantian meaning.

<sup>15</sup> On the contrast between seeing reasonable pluralism as a mere *fact* and seeing it as a *conceptual and normative issue*, see Mouffe 2000, 18 ff.

tempt to offer a long-awaited *normative theory* or *justification* of the need to vote in the light of deliberation.<sup>16</sup>

It is therefore still an important normative task to determine better and worse modes of combining deliberation with existing democratic institutions. In doing so, deliberative democrats face the delicate dilemma of either too much realism or too much idealism: theories of deliberative democracy should not, on the one hand, surrender to existing forms of democratic institutions too prematurely nor, on the other, cultivate too critical an attitude towards the necessary components of any viable democracy.<sup>17</sup> As Bohman puts it, by theorizing over such issues, deliberative democracy should not abandon its initial promise, but it must become a *complete theory of democracy* rather than a simple ideal of legitimacy.<sup>18</sup>

My aim in the present essay is not therefore to undermine the moral desirability of the deliberative ideal of democracy. In fact, I will take it for granted without arguing more for one account of democratic legitimacy than for the other.<sup>19</sup> All I am aiming at is to undermine the excessive idealism that befalls those who abstract from the empirical consequences of norms in a particular setting. Without arguing against the need for public discussion, one has to argue for the need to take the question of institutional and constitutional design more seriously.<sup>20</sup>

Although current legal debates are mostly preoccupied with the question of the extent to which our nation-states must be willing to surrender their power to supranational institutions, concern for *infra-state level pluralism* is not obsolete. It will be no less difficult in the future to reconcile indivisible popular sovereignty with the proliferation of a multitude of incompatible sources of legality and dispute, than to reconcile the same sovereignty with the new post-national institutions and their own sources of legality.<sup>21</sup> Both phenomena are now irremediably linked and enhance each other: on the one hand, infra-national moral and social pluralisms have increased thanks to the globalization of our perspectives and, on the other, relations of interdependency driven by global markets and the plurality of moral sources overwhelm the nation-state as a location for democratic regulation, thus calling for more global forms of governance and adjudication. Hence the need for *deliberative democracy* to acknowledge our differences and solve

<sup>16</sup> See Koh/Slye 1999, 15 on the need for additional work on justificatory theories of democratic institutions.

<sup>17</sup> Bohman 1998, 401.

<sup>18</sup> Bohman 1998, 401.

<sup>19</sup> It follows that I will not take sides on issues such as the epistemic nature of democratic deliberation, etc.

<sup>20</sup> See Elster 1986, 117.

<sup>21</sup> See for the same approach, Ricoeur 1994, 272.

them by argument, but hence also the *need to vote* and the need for institutions of collective decision-making.<sup>22</sup> Instead of looking at the implications of globalization for supranational democracy, citizenship and the creation of new opportunities for the development of international civil society,<sup>23</sup> what I would like to emphasize here are the consequences of globalization for infra-national democracy as well as national citizens' institutional rights. The argument for 'voting ethics' also applies, however, *mutatis mutandis* to supranational institutions.

This paper spans some of the Anglo-American and German literature which converges on the subject of deliberative democracy. The many different versions of deliberative democracy can roughly be classified under two main schools, the first broadly influenced by John Rawls and his follower Joshua Cohen, the second by Jürgen Habermas and his follower Seyla Benhabib. The two traditions, despite their differences, face, I argue, similar practical obstacles to realization and a propensity to understate the importance of reasonable deliberative disagreement as well as the need for a democratic justification of voting procedures. There will be no specific emphasis on any author in particular, but I will discuss in turn different features of some of the main theories of deliberative democracy in both traditions.

The present essay is structured in such a way as to reveal the gradual acknowledgement and justification that there should be among deliberative democrats of the inescapable fact of voting. Some authors have not made any of the steps I suggest; others have, but are still half-way through. In the first section, I argue that deliberative disagreement about justice is persistent and hence that reasonable consensus is an unattainable regulative ideal for a democratic theory (1). In the second section, I claim that the need for closure should be acknowledged by deliberative democrats. There, I also assess the different institutional and non-institutional modes of closure that have been proposed in lieu of voting in recent deliberative theories (2). I claim that, despite the advantages of the proliferation of institutional and discursive designs as well as the benefits of mutual accommodation, voting remains the inescapable culmination of a *crescendo* of modes of closure. In the third section, I argue that deliberative democrats should do more than accommodate voting that comes *after* deliberation, as many do now; they should provide a true deliberative justification of voting (3). Finally, in the last section, I outline basic deliberative voting ethics; this entails two stages: first, an ethics of voting and, second, an ethics of the majority rule (4).

<sup>22</sup> Bohman 1995, 253.

<sup>23</sup> See, for instance, Dryzek 2000, ch. 5.

## 1. Deliberation and Disagreement

In this section, I argue that actual reasonable agreement cannot constitute the regulative ideal which deliberative democrats want it to be (1.1.). A realistic theory of democracy should much more hold on to a sense that, even after deliberation, people often continue to disagree in good faith about justice (1.2.). The pursuit of a potential reasonable agreement amounts therefore, at the most, to an element of the internal logic of deliberation (1.3.).

### 1.1. *Actual Reasonable Agreement qua Regulative Ideal of Deliberation*

The idea that democracy revolves around the transformation of preferences through deliberation rather than the mere aggregation of preferences through voting has now become one of the major positions in democratic theory. Deliberative democracy remains, however, a complex ideal with a variety of forms. What I reconstruct here as the standard case for deliberative democracy is based on the convergence in the writings of a wide range of theorists, not all of whom may subscribe to every aspect of the definition.

Deliberation democracy, broadly defined, is thus any one of a family of views according to which public deliberation among free and equal citizens is the core of legitimate political decision-making and self-government. One may summarize the core phenomena that count as deliberative democracy as (i) a process of collective decision-making with the participation of all those affected by the decision or their representatives;<sup>24</sup> (democracy) and (ii) a means of reasoned argument offered by and to participants who are committed to values of rationality and impartiality<sup>25</sup> (deliberation).

Whatever form it takes, a conception of deliberative democracy "is organized around an ideal of political justification"<sup>26</sup> (public justification) requiring free public reasoning of equal citizens (reasoned argument). Claims on behalf of or against such decisions must be justified to these people in terms that, on reflection and using their common reasons, they are capable of accepting.<sup>27</sup> According to Cohen, "deliberation aims to arrive at a rationally motivated consensus – to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals".<sup>28</sup>

<sup>24</sup> Benhabib 1996, 68.

<sup>25</sup> Elster 1998, 8. See also Cohen 1989, 22.

<sup>26</sup> Cohen 1996.

<sup>27</sup> See Dryzek 2000, v.

Of course, deliberative democrats are well aware that complete actual consensus is not a realistic aim in complex societies. As Cohen claims, "even under ideal conditions, there is no promise that consensual reasons will be forthcoming".<sup>29</sup> The reasonable-consensus standard is therefore usually considered a counterfactual and regulative ideal. According to Cohen, "outcomes are democratically legitimate if and only if they *could* be the object of a free and reasoned agreement among equals".<sup>30</sup>

However, although the *regulative goal* or *ideal* is not complete consensus here and now, it is more than the claim that ideally all rational people could agree. For deliberative democrats, *achieving actual* common conviction is the *ideal* that should regulate political institutions and processes. In Gerald Gaus's terms, this regulative ideal can be depicted as the 'Regulative Ideal of Real Political Consensus'.<sup>31</sup> As Gerald Postema stresses, "it is intended as a model for real moral discourse in concrete, historical, social conditions. It is an idealization, to be sure, but it is an ideal which we can demand real social and political institutions to approximate".<sup>32</sup> Deliberative politics, we are told, "seek an answer to which we all can agree, since it is reached from a debate in which each is able, freely and fully, to offer his reasoned judgement under rules that treat no person as privileged ... A reasoned interchange in which all seek an answer to which all must agree, results in unanimity. The procedure of deliberative politics is thus informed by the standards that its outcome must satisfy".<sup>33</sup>

### 1.2. *Deliberative Disagreement*

Diversity of impartial and reasonable opinions about justice is likely to be persistent in pluralistic and globalized societies.<sup>34</sup> Although it may occur, reasonable consensus is not therefore ordinarily to be expected on the subject matter of politics, even after thorough deliberation. Hence the term 'deliberative disagreement'.<sup>35</sup>

<sup>28</sup> Cohen 1989, 23.

<sup>29</sup> Cohen 1989, 23.

<sup>30</sup> Cohen 1996, 99–100.

<sup>31</sup> Gaus 1997, 206.

<sup>32</sup> Postema 1995, 360.

<sup>33</sup> Gauthier 1995, 320.

<sup>34</sup> Note that emphasizing the pervasiveness of reasonable disagreement does not amount to holding a sceptical moral stance. Although the idea of objective values is the idea of one view being right and the others wrong in a dispute about justice, it is an idea which has little utility in politics. As long as those values fail to disclose themselves to us, all we have are opinions about objective values.

<sup>35</sup> See on this term, Guttman/Thompson 1996.

Reasonable disagreement, that is, the disagreement of reasonable<sup>36</sup> people arguing in good faith about justice, can have two main origins:<sup>37</sup> value pluralism<sup>38</sup> and/or social/epistemological pluralism.<sup>39</sup> The idea of reasonable pluralism and disagreement has recently been elaborated by Rawls in his account of why the diversity of philosophical views must be regarded as a permanent feature of modern society. The reason is that there are 'hurdens of judgement', i.e. 'the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life'.<sup>40</sup> Rawls concludes by saying that "many of our most important judgements are made under conditions where it is not to be expected that conscientious persons with full powers of reason, *even after free discussion*, will arrive at the same conclusion".<sup>41</sup> Although Rawls uses the burdens of judgement to characterize the origins of disagreement about the good, the idea can be used to characterize political disagreement about justice as well, as in Jeremy Waldron's elaborate account of political disagreement.<sup>42</sup>

Of course, deliberative democrats will reply that they do not deny the existence of reasonable pluralism and disagreement about justice and the right. For instance, Habermas acknowledges that "experience teaches us that some very well defined issues of justice are often controversial even in homogeneous societies".<sup>43</sup> Despite this acknowledgement of the persistence of reasonable disagreement about legal-political issues, however, Habermas retains a conception of legitimacy that allows no alternative to violence and coercion, but a consensus arrived at in moral or ethical discourses or, at least, in procedurally regulated negotiations.<sup>44</sup> Thus, although they acknowledge the existence of reasonable pluralism and disagreement, deliberative democrats object that this same disagreement is precisely why deliberation is so important in that it will transform disagreement into a reasonable consensus.<sup>45</sup>

<sup>36</sup> I will not expand here on the notion of reasonableness, but let me briefly summarize my position: the kind of reasonableness that matters in this argument is the reasonableness of a *person*, who in good will and given her entire personal circumstances, applies her reasoning capacities to a question, even if her position is something we regard as morally wrong, provided it is plausible given the circumstances.

<sup>37</sup> See Larmore 1996, 12 ff., 154 ff.

<sup>38</sup> See Berlin 1990, 2 ff.; Gray 1996, 35. See also Kutz 1994.

<sup>39</sup> On this distinction, see Raz 1995, 316–317. See also Gaus 1996, 155; Postema 1996, 90–91.

<sup>40</sup> Rawls 1993, 54–56.

<sup>41</sup> Rawls 1993, 58.

<sup>42</sup> See Waldron 1999a, ch. 7.

<sup>43</sup> See Habermas 1996, 1574. See also Mason 1993, 64.

<sup>44</sup> See Habermas 1995, 558–559.

This approach is flawed. Deliberation may not lead to a greater consensus on what constitutes the right and may actually only crystallize bases for disagreement. Of course, I am not arguing that deliberation will have no impact on people's opinions. On the contrary, and although few deliberative democrats offer explicit arguments on this point,<sup>46</sup> deliberation may be expected to enrich people's conceptions<sup>47</sup> and increase information, coherence and reflexivity.<sup>48</sup> In fact, I will assume in this essay that it does. Despite all its benefits, however, deliberation can also heighten and exacerbate disagreement.

This might occur in at least two ways. First, disagreement is not only at the origin of deliberation, but it is a primary *creative resource* of deliberation. Deliberation is indeed a creative process that may multiply rather than reduce the different understandings of what is at stake.<sup>49</sup> Second, even if deliberation induces a better understanding of the dimensions of conflict, it may simply *make the bases for disagreement clearer*.<sup>50</sup> Even assuming unlimited time for deliberation, unanimous and rational agreement might not necessarily ensue.<sup>51</sup>

Some deliberative democrats who acknowledge the persistence of reasonable disagreement reply by reducing the scope of the *reasonableness* of the opinions the deliberative process is considering and reconciling.<sup>52</sup> Such redefinitions of the notion of public reason, however, are irreconcilable with the ideal of inclusive deliberative democracy these same authors argue for.

First of all, once the *scope of public reason* has been restricted to some areas of politics, such as 'constitutional essentials' and questions of basic justice in Rawls, and once some controversial moral issues have been taken off the agenda, reasonable views will tend to be more consensual.<sup>53</sup> In such

<sup>45</sup> See Barber 1984, 135, 151; Sunstein 1988, 1555; Cohen 1989, 23; Mansbridge 1980, 31–33.

<sup>46</sup> On the embarrassing ambiguity of deliberative democratic theory on the issue of the moral legitimacy of its outcome and its normative standards, see Estlund 2000a.

<sup>47</sup> See Miller 1993.

<sup>48</sup> See Manin 1987, 349–350.

<sup>49</sup> See Sunstein 1988, 1562, 1575; Barber 1984, 119, 128–129, 135.

<sup>50</sup> See Knight/Johnson 1994, 286; Riker 1982, 128; Elster 1986, 115; Larmore 1990, 119 ff.

<sup>51</sup> Elster 1986, 115. See also Knight/Johnson 1994; Walzer 1990. See for the same critique, Lukes 1991, 228 ff. and Klosko 2000, 240 ff.

<sup>52</sup> See Estlund 2000b, 116, 124 who argues for such a substantive account of reasonableness in order to save the plausibility of a standard of mutual justification and liberal legitimacy.

<sup>53</sup> See, for instance, Gauthier 1995, 322; Rawls 1993, 223 ff. On constitutional precommitments: Ackerman 1988; Holmes 1988.

frameworks, reasonable people are of course unlikely to disagree, but this is at the price of not deliberating over what matters most to them.

Second, by restricting the *content of the notion of reasonableness*, deliberative democrats can confine the deliberative ideal to those who share common understandings or principles and who regard politics as a way of ascertaining what those shared understandings are.<sup>54</sup> Constraints of 'the reasonable' amount to a way of smuggling in some *ex ante* substantive limitations on the process of public deliberation.<sup>55</sup>

Finally, not only do those accounts of unitary public reason and of exclusive reasonableness create the agreement they need, but they *silence justified dissent*.<sup>56</sup> Democratic procedures cannot ignore reasons without threatening cooperation in deliberation itself. If equal standing contributes to the value of a procedure and the willingness to accept its outcome, then deliberators should not be too quick to exclude a reason as non-public.

Despite all this and their acknowledgement that reasonable agreement is more often than not impossible in politics,<sup>57</sup> some deliberative democrats refuse to be sceptics about the *aim* of justifiable agreement.<sup>58</sup>

It is true that we cannot infer from the fact that there has only rarely been complete reasonable agreement on issues of justice in the past that such reasonable consensus is logically or even empirically impossible. Accordingly, then, we cannot reject reasonable agreement as an entirely unattainable end for deliberative democracy: after all, indeed, it is only meant to be a regulative ideal that one ought to try to reach.<sup>59</sup> However, although a good theory may make *idealistic* assumptions about people's motivations, a *realistic* conception of democratic deliberation should hold on much more to a sense that, even after deliberation, people often continue to disagree in good faith about issues of justice which we expect the legislature to delib-

<sup>54</sup> See, for instance, Walzer 1983; Cohen 1996, 101.

<sup>55</sup> Knight/Johnson 1997, 285. See, for instance, Gutmann/Thompson 1996, 52. *Contra*, paradoxically: Gutmann/Thompson 1990 who used to argue against this kind of manoeuvre. Gutmann/Thompson 2002 now argue that these substantive restrictions on the result of deliberation are purely provisional and can be entirely revised; this argument does not hold, however, since the principles will always start by constraining some deliberation and can never be entirely revised in the sense that the concepts, whose conceptions may change, are there to stay.

<sup>56</sup> Young 1996, 126.

<sup>57</sup> Gutmann 1999, 230.

<sup>58</sup> See, for instance, Estlund 2000b, 124.

<sup>59</sup> See Weber 1949, 90–93 on the distinction between, on the one hand, the *ideal type* that is the construction of certain elements of reality into a logically precise conception and, on the other, *evaluative ideals*, like the regulative ideal at stake here, that are not pure conceptions, but exemplary models.

erate upon and then to settle.<sup>60</sup> We may well need, for rational debate to seem worthwhile, a regulative *ideal* or *hope* of achieving rational consensus, but what we really do not need is an unrealistic *expectation* that it will necessarily be achieved.

Thus, without strictly denying the possibility of reasonable consensus, a better and more realistic approach would lead us to realize the very little plausibility there is in that ideal and hence its very little pertinence *qua regulative ideal* for our deliberations as well as for the legitimacy of our democratic decisions. It follows, then, that deliberative theorists should not too readily assume that disagreement, the absence of consensus and hence the need for a *vote* by the end of deliberation, are signs of failure. They should give up the dream of rational consensus and follow Ludwig Wittgenstein's advice: in our desire for a total grasp, "we have got on to the slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk: so we need *friction*. Back to the rough ground".<sup>61</sup>

### 1.3. Potential Reasonable Agreement *qua Internal Logic of Deliberation*

The lack of realism and hence normative pertinence of the regulative ideal of real consensus does not mean that reasonable consensus does not matter in terms of the *internal logic of deliberation*;<sup>62</sup> to argue in good faith is indeed to present reasons that one thinks others should accept, and two or more people will only persist in argument if they think that in the end the same considerations could convince them all.<sup>63</sup>

According to Habermas, however, if participants in the discourse assume that reaching agreement solely on the basis of an exchange of reasons is not guaranteed, their behaviour cannot be described as rational argumentation and discussion.<sup>64</sup>

Such a conclusion is too hasty, however. What can be realized as *observers* of the persistence of political disagreement should be part of our perspective as *reflective participants* in rational discourse,<sup>65</sup> without undermin-

<sup>60</sup> See Waldron 1999a, 93.

<sup>61</sup> Wittgenstein 1991, 46e. Note that this reference to Wittgenstein does not imply further adhesion to his theory.

<sup>62</sup> See Bohman 1998, 422.

<sup>63</sup> Waldron 1999a, 91.

<sup>64</sup> Habermas 1996, 1574.

<sup>65</sup> See Waldron 1994, 533; Waldron 1999a, 159 ff. on Rawls. See also McCarthy 1994, 58.

ing the participants' view that deliberation is worthwhile. The only supposition one needs for the genuine give and take of rational discourse is that the force of the better argument can contribute to the final shape of *whatever* type of agreement or arrangement is reached, even if it does not sanction my view of what it is correct to do in a particular case. For instance, when competing conceptions of justice are at issue, arguments may serve to get others to see the authenticity or the lack of authenticity of a proposed conception and hence give it the appropriate weight. Thus, the constitutive presuppositions of discussions of justice may resemble those with which participants engage in what Habermas calls critique and criticism in ethical deliberation, *without* necessarily assuming that one will necessarily reach the one correct view.<sup>66</sup> Debate can still be rational without assuming that the application of reason can resolve any or all conflicts; it may be possible to reason out the limitations of reason without resort to non-rational means of persuasion.<sup>67</sup> Even if reasonable agreement is out of reach in practice, there may be non-ultimate questions that are worth discussing. Moreover, it may even be worth discussing matters of ultimate principle too, for who is to say when the limits of reasoned agreement have been reached?<sup>68</sup>

There is a difference, therefore, between such an *underlying logic in reasoned argument* and the *regulative ideal or aim at actual reasonable agreement*. Accepting the possibility of a rational consensus as a discipline and a presupposition internal to the logic of deliberation is not the same as stipulating it as the appropriate political outcome of successful deliberation, even at an abstract or ideal constitutional level.<sup>69</sup>

## 2. The Need for Closure and the Inescapability of Voting

In this section, I would like to argue for the need for political closure, given the persistence of deep political disagreements even after thorough deliberation. The very best theories of deliberative democracy are now characterized by the acknowledgement of pervasive deliberative disagreement and the need for closure in their account of deliberation (2.1).<sup>70</sup>

There remains, however, a temptation for many theorists of deliberative democracy to try and marginalize voting in their accounts of the formation of public opinion. I will therefore assess some of the proposals of modes of

<sup>66</sup> See McCarthy 1995, 478. See also Waldron 1994, 534.

<sup>67</sup> Veitch 1999, 124–125.

<sup>68</sup> Brennan/Pettit 1990, 318.

<sup>69</sup> See, for instance, Gauthier 1995, 320.

<sup>70</sup> See the subtitle of Gutmann/Thompson 1996: 'Why moral conflict cannot be avoided in politics and what should be done about it'.

collective choice which have been made in the recent literature on deliberative democracy (2.2.), both at the non-institutional and institutional levels of discourse. I will then argue that the proliferation of institutional designs at all levels is crucial, but that it cannot avoid the culmination of deliberation in voting by the end of what one may qualify as a *crescendo* of modes of closure or decision-making.

### 2.1. The Need for Closure

Now that the circumstances of reasonable disagreement have been elucidated, it remains to be clarified why parties to a political disagreement cannot just agree to differ or to pursue the matter another time. For all that they disagree on, they face a deadline and they must reach a decision; political deliberation is not merely conversation, but it is concerned with resolving a political conflict.

The combination of disagreement and the need to coordinate our efforts and reach a common course of action constitutes what Waldron calls 'the circumstances of politics';<sup>71</sup> after Hume's and Rawls' 'circumstances of justice': disagreement would not matter if people did not prefer a common decision; and the need for a common decision would not give rise to politics, as we know it, if there was not at least the potential for disagreement about what the common decision should be.

Thus, short of unanimity, one needs a collective choice mechanism to aggregate opinions.<sup>72</sup> The deliberative process is brought to a *close* by a choice and a decision – the *vote*.<sup>73</sup> Voting does not exhaust democratic practice, but deliberation cannot either; the transformation of opinions can never do more than supplement the aggregation of opinions that remains central to democratic politics in large pluralist societies.<sup>74</sup> One critic even goes as far as saying that 'no matter how much deliberation takes place, heads have to be counted – aggregated – at some point if a democratic decision is to be reached. No adequate model of democracy can fail to be 'aggregative'. There is no such thing as a purely 'deliberative model of democracy'.'<sup>75</sup>

A plausible and successful account of democratic deliberation must therefore include an account of the *institutional* forms of decision-making that deliberative processes might take. Deliberative democrats must come to

<sup>71</sup> Waldron 1999a, 101.

<sup>72</sup> See Elster 1998, 9.

<sup>73</sup> Manin 1987, 359.

<sup>74</sup> Elster 1986, 115.

<sup>75</sup> Saward 1998, 64.

terms with the need for existing practices of democracy such as voting. As Benhabib holds, "a theory of democracy, as opposed to a general moral theory, would have to be concerned with the question of institutional specifications and practical feasibility."<sup>76</sup> "For this reason, the deliberative theory of democracy is not a theory in search of practice: rather it is a theory that claims to elucidate some aspects of the logic of existing democratic practices better than others."<sup>77</sup>

More and more deliberative democrats have realized this.<sup>78</sup> Thus, rather than simply assert their ideal procedure and a few practical approximations of it, some of them have developed a two-step argument, where ideal and practical dimensions of deliberation are given concrete shape and relate dynamically to each other. This is the case, for instance, of Carlos Santiago Nino's two-stage account of the constitution of deliberative democracy, in which he opposes ideal deliberation to different institutional arrangements of practical deliberation,<sup>79</sup> or of Habermas's two track approach of the interaction between the public sphere and formal institutions of democratic closure.<sup>80</sup>

But even if most deliberative democrats have now acknowledged the need for institutional forms of closure, they still disagree over the different means to reach it. Some of them even still deeply distrust voting.

## 2.2. *Various Proposals of Modes of Closure*

### 2.2.1. General

Most theories of deliberative democracy are characterized by the proliferation of designs they promote for ensuring the best conditions of deliberation and collective choice. It is through the interlocking net of these multiple forms of associations, networks and organizations that, according to Benhabib, an anonymous public conversation results.<sup>81</sup>

I will discuss only a few of those designs here, dividing them into non-institutional (2.2.2.) and institutional modes of collective choice (2.2.3.).

<sup>76</sup> Benhabib 1996, 70.

<sup>77</sup> Benhabib 1996, 84.

<sup>78</sup> See Manin 1987, 359 ff.

<sup>79</sup> Nino 1996, 218.

<sup>80</sup> Habermas 1998, ch. 8.

<sup>81</sup> Benhabib 1996, 73.

### 2.2.2. Non-institutional Modes of Collective Choice

Echoing the call for concretizations of deliberative democracy, some authors, like Dryzek, have developed concrete ideas on *non-institutional* 'associative' or 'discursive designs' and the role of rhetoric means of communication in deliberative decision-making arrangements.

Discursive design is "a social institution around which expectations of a number of actors converge".<sup>82</sup> On this account, the public sphere is home to a constellation of discourses which compete with each other. This idea of a competition of discourses implies an ontological shift in the way to think of democracy in terms of intersubjective communication in the public sphere, as opposed to voting in the state. Discursive design is a way of making public policy responsive to public opinion through non-electoral means, thus conceptualizing it as something other than the registration of preferences by voting.<sup>83</sup>

Although such a deliberative design based on rhetoric means of communication outside of the institutional forum is very illuminating and should be encouraged, it is incomplete.

First of all, this model neglects the ways in which the balance ought to be struck between the different discourses in the *public sphere*. According to Dryzek, "the balance of competing discourses matters a great deal, but there is never a vote on which discourse should prevail. Votes may sometimes occur as part of the larger contest, but they are largely epiphenomenal, functioning mainly as markers of the prevailing balance".<sup>84</sup> This sounds a bit optimistic, however, in the face of deep political disagreements. The larger the scale at which an issue arises, the harder it will be to introduce discursive designs to resolve it entirely.

Moreover, before public opinion can be *transmitted*, it has to be unified and formulated.<sup>85</sup> How else could this be done but through taking a vote? There is rarely a third party in political conflicts that can mediate or decide on controversial issues in which everybody is asked to deliberate. Besides, if there is one, it will itself usually be a disagreeing multi-member body, by contrast to what the extensive literature on discursive designs seems to hold.<sup>86</sup> Dryzek himself acknowledges that he "does not mean that voting as a form of interest aggregation should be banished, because election campaigns do provide one opportunity (among others) for discursive transmis-

<sup>82</sup> Dryzek 1990, 43.

<sup>83</sup> Dryzek 2000, 47 ff.

<sup>84</sup> Dryzek 2000, 51.

<sup>85</sup> Johnson 1998, 175.

<sup>86</sup> See Dryzek 2000, 49, with references. See also Bohman 1995, 270.



sion, and elections themselves constitute a reason for state actors to listen to the public sphere".<sup>87</sup>

Secondly, this model neglects the way in which public opinion can finally be *conceptualized* and *formulated*. Even transmitted through rhetoric means, a vote will have to take place in the legislature. It is crucial therefore to focus on the fact that the only way we can actually measure will formation is through the casting of votes.<sup>88</sup> Even Dryzek acknowledges this: "Democratic life is not just the endless interplay of discourses. There have to be moments of decisive collective action, and in contemporary societies it is mainly (but not only) the state that has this capacity."<sup>89</sup>

This conclusion does not seek to create an ontological shift from thinking of democracy in terms of intersubjective *communication* in the public sphere to thinking of it in terms of *voting* in the official or institutional sphere; both processes belong together and should be combined. It remains, however, that communication in the institutional and non-institutional spheres culminates in voting. As Dryzek himself acknowledges, "the authenticity of democracy requires that reflective preferences influence *collective outcomes*, and so both an orientation to the state and discursive mechanisms for the transmission of public opinion to the state are required, so long as the state is the main (though far from exclusive) locus of collective decision".<sup>90</sup>

### 2.2.3. Institutional Modes of Collective Choice: From Deliberation Through Accommodation to Vote

Now that we have seen that it is necessary, even in a non-institutional deliberative design, to have recourse to modes of closure in case of persistent deliberative disagreement, it is useful to assess the different modes of closure that have been suggested as *alternatives to voting* in the institutional sphere of deliberation.

Faced with deliberative disagreement, some deliberative democrats, and Dryzek in particular, have recently claimed that not only is consensus of reasons in plural societies implausible, but also that such a consensus is not essential or even necessarily central to the theory of democratic deliberation.<sup>91</sup> For them, therefore, collective choice can be reached, without recourse to aggregative modes, through *alternative forms of reasoned agree-*

<sup>87</sup> Dryzek 2000, 54.

<sup>88</sup> Van Mill 1996, 744.

<sup>89</sup> Dryzek 2000, 79.

<sup>90</sup> Dryzek 2000, 162; my emphasis.

<sup>91</sup> Dryzek 2000, 48.

*ment*'. On this account, collective choices are indeed produced by near-universal assent, but people support those decisions for different reasons. Real consensus of reasons is opposed to the convergence on a solution for different reasons. Reasoned agreement and convergence are, however, *not mere modi vivendi*; getting along and living with others in a productive way despite our moral differences with them, can in itself be morally valuable.<sup>92</sup>

There are different ways of achieving such convergence of different reasons.

First of all, one may mention Cass Sunstein's '*incompletely theorized agreements*' where convergence is achieved by not wholly theorizing the conflict: the parties converge before seeking agreement on all the theoretical commitments that underlie their judgements.<sup>93</sup>

Despite their advantages in many areas of political decision-making, and in particular judicial decisions, I do not think that such workable agreements can escape complete theorizing at the legislative level. They cannot therefore avoid deep reasonable disagreements in those cases, nor the need to take a vote. In fact, Sunstein has recently acknowledged this himself: "there are substantial differences between deliberation on a court and deliberation in politics generally. The argument I have sketched has everything to do with role-related constraints on judicial behaviour. In politics, citizens occupy a distinctive role, and while it is generally good for them to economize on moral disagreement, there is nothing like a rule to this effect".<sup>94</sup>

Secondly, without renouncing to complete theorization, it is possible to retain a focus on public reason and justification through an allowance that public reason itself can be plural. This is Bohman's account of '*pluralistic agreement*' or '*moral compromise*'; such an agreement merely requires continued cooperation in public deliberation despite persistent disagreement.<sup>95</sup>

This idea is very similar to Amy Gutmann's and Dennis Thompson's model of '*mutual accommodation*'.<sup>96</sup> On their account, mutual accommodation of our conflicting convictions is one of the possible ways to live on moral terms with reasonable moral disagreement when it persists despite deliberation.<sup>97</sup> It requires that citizens continue to seek fair terms of *mutual*

<sup>92</sup> See Wong 1992, 774.

<sup>93</sup> Sunstein 1999, 123 ff.

<sup>94</sup> Sunstein 1999, 147.

<sup>95</sup> Bohman 1995, 267.

<sup>96</sup> The literature seems to lack a clear distinction between mutual accommodation and moral compromise, which is a specific form of mutual accommodation. For instance, Bohman's (1995, 263) definition of compromise corresponds more to a general conception of mutual accommodation than of compromise *stricto sensu*.

*restraint and cooperation among equals* rather than camp on their dogmatic positions and impose them through a vote.<sup>98</sup>

Seeking such an 'economy of moral disagreement' should not, however, be confused with (internally<sup>99</sup>) *compromising one's moral convictions*.<sup>100</sup> It need not lead to accepting other ways of life as equally valid as one's own; it may only lead us to incorporate in some partial way what one sees of value in the other ways of life.<sup>101</sup> The final aim is only to *seek a balance* between holding firm convictions and being prepared to change them on the basis of objections that one cannot answer.

Maintaining such a balance is no doubt psychologically as well as intellectually delicate, however. Moreover, there are further limitations to the principle of mutual accommodation itself.

First of all, despite the value of mutual accommodation and understanding, when we need to get along with our differences, one of the major difficulties with mutual accommodation principles is that people will often *disagree* about them and on what amounts to a reasonable accommodation or compromise of their differences.<sup>102</sup> As Dryzek himself acknowledges, therefore, reasoned agreement may be easier to achieve in locality-specific disputes and problems with a relatively small number of identifiable participants.<sup>103</sup>

A second difficulty is that, even if one is committed to the moral value of finding a common settlement or accommodation, it cannot always take precedence over *one's other moral values*.<sup>104</sup> In particular, it cannot always take precedence over the values that constitute the source of serious disagreement with others. Whereas it is plausible that private interests may converge in some cases with views of the public good,<sup>105</sup> convergence on matters of principle where conceptions are conflicting are less likely.

Finally, unless an external compromise can be reached or unless one of the parties voluntarily changes her mind through her efforts to accommo-

<sup>97</sup> Note, therefore, that, *contra* Gutmann/Thompson 1996, I do not regard mutual accommodation as encompassing deliberation.

<sup>98</sup> See Wertheimer 1999, 172.

<sup>99</sup> I borrow this opposition between internal and external compromises from Dworkin 1991, 179.

<sup>100</sup> Gutmann/Thompson 1996, 3.

<sup>101</sup> Wong 1992, 780; Gutmann/Thompson 1996, 85.

<sup>102</sup> See Mason 1993, 144–145.

<sup>103</sup> Dryzek 2000, 50.

<sup>104</sup> See Wong 1992, 782.

<sup>105</sup> This kind of example is the only example Dryzek 2000, 49 gives of reasoned agreements.

date the other, they might sometimes want to go *beyond mutual understanding or agreement on applications* and join their forces on acting upon a single principle. The same is true when mutual accommodation fails and *no mutually acceptable settlement* can be reached.

When this happens, what should citizens or their representatives do? The standard answer is that they should *vote*. The parties might indeed prefer to adopt a procedure they deem fair enough to make some decision for them, such as a mode to choose one reasonable view or the other, instead of attempting to compromise them into a view no reasonable person holds.

It follows therefore that deliberation, mutual accommodation and procedural settlements are not competing methods of decision making.<sup>106</sup> They complement each other as a *crescendo* of measures that replicates the *crescendo* existing in practice in the persistence of reasonable disagreement; some disagreements can be solved through deliberation and, when they cannot, mutual accommodation can help to reach a mutually acceptable decision. If not, the parties can still take a vote. While voting cannot substitute for deliberation, it is also true that deliberation cannot substitute for voting. Voting is most of the time the ultimate and inescapable decision-making moment of deliberation.<sup>107</sup>

Now that I have established the inescapability of voting after deliberation, I would like to argue that we need a justification of this voting practice and in particular a truly deliberative justification of it.

### 3. Voting after Deliberating: A Deliberative Justification of Voting

After moving back from deliberation to voting, it is necessary to stress how important it is to go beyond the mere accommodation of existing voting practices in a theory of deliberative democracy. More than just practically necessary devices or second-best approximations, decision-making institutions must be the best way of achieving widespread deliberation in a large and diverse citizenry.

Not many deliberative democrats now think of deliberation independently from voting. The question remains, however, of how to make voting more consistent with deliberation rather than undermining it. As Werthei-

<sup>106</sup> In a sense, the *crescendo* of these three decision-making methods corresponds to the three logics of deliberation, bargaining and voting Elster 1998 describes in his account of deliberative democracy. Although I disagree with most of Elster's account of voting, I thank José Luis Martí Marmol for drawing my attention to this similitude.

<sup>107</sup> See Waldron 1999b.

mer puts it, "the question is how deliberative democrats should *think* about voting. The question is not whether some electoral mechanism is necessary. Obviously it is."<sup>108</sup>

In the recent literature on deliberative democracy, however, a merely *pragmatic* line of argument for voting has become standard. Voting is necessary, according to Jon Elster, "given the constraints of time and resources".<sup>109</sup>

Habermas, for instance, claims that current democratic practices are pragmatically necessary and second-best solutions in complex and pluralistic societies.<sup>110</sup> According to him, procedural settlements amount to '*arrangements*' that accommodate the pressure for decision with rational decision-making.<sup>111</sup> One of the most important modes of reaching institutional settlements is the *majority rule*. For him, majority decisions only represent a *caesura in an ongoing discussion*.<sup>112</sup> They record the *interim results* of a discursive opinion-forming process that would in the long run lead to a general consensus<sup>113</sup> and that can be reopened at any time by a new majority.

Even Nino's arguments about institutional design cannot provide the full normative account of deliberative voting that one needs. According to him, "the ideal constitution of power is based on a justification of democracy that relies on the transformation of people's interests through the process of participatory discussion and *majoritarian decision*".<sup>114</sup> Nino's argument seems therefore at first sight to give reasons for voting that are not merely *pragmatic* but also *normative*. The prospect that, at the end of the discussion, there will be a vote and the social decision will be taken by majority rule, is, on Nino's account, an important element in the transformation of partial expressions of individual preferences into opinions that are somewhat more impartial.<sup>115</sup> It is not clear, however, what role the majoritarian process plays on this account, and hence what its normative justification amounts to, when people come to deliberation with reasonable and impartial opinions about justice rather than mere preferences or partial interests. Of course, deliberation may have a transformative effect in providing infor-

<sup>108</sup> Wertheimer 1999, 180–181.

<sup>109</sup> Elster 1998, 14.

<sup>110</sup> Habermas 1998, 323 ff.

<sup>111</sup> See Habermas 1990, 42; Habermas 1998, 220 f., 254 f., 369, 613 f.

<sup>112</sup> See Habermas 1998, 220–221.

<sup>113</sup> See Habermas 1998, 612 ff.

<sup>114</sup> Nino 1996, 219.

<sup>115</sup> Nino 1996, 117.

mation and confrontation, but the role of the voting dimension of deliberative democracy in this transformation remains *normatively* unaccounted for.

On most of those accounts, then, deliberation and voting are made to seem 'odd bed-fellows', to borrow Waldron's expression.<sup>116</sup> There is something embarrassing about justifying voting, like an admission of failure.<sup>117</sup>

Furthermore, even the deliberative theorists, who acknowledge that voting must somehow be reconciled with deliberation, do it in such a way as to avoid the problems deliberative democrats have been criticizing and constructing their alternative account of democracy against. The simplest model is to have as much deliberation as possible in the public sphere and then have citizens vote, as Benhabib argues.<sup>118</sup>

The problem with such *sequential* models is not only that deliberation does not clearly influence the outcome of voting processes,<sup>119</sup> but that the voting stage itself is not accounted for democratically. It is important therefore to look for a true *combination of deliberation and its decision-making stage, the voting process*, rather than playing by this fake opposition between deliberation or consensus and aggregation or voting. Questions such as Dryzek's "should deliberation be oriented to consensus, or is it just a prelude to voting?"<sup>120</sup> are mischievous. Deliberation should not automatically be oriented to real consensus, but this does not mean that it is just a prelude to voting either.

The same simplistic opposition is at the origins of the very little discussion of voting *qua* procedure for the resolution of disputes in Gutmann and Thompson; according to these two authors, indeed, "voting en masse is *no substitute* for deliberating in forums that permit representatives to challenge and respond to the views expressed by citizens and allow to engage with representatives and one another".<sup>121</sup> In the meantime, however, both authors seem to have recognized what they call "the morally powerful combination [of deliberation and voting] for justifying laws and policies democratically".<sup>122</sup>

*Combination* aims at achieving more than the mere cohabitation or substitution of deliberation by aggregation feared by many deliberative theorists. Democracy, as a "unified exercise of political virtue",<sup>123</sup> amounts as

<sup>116</sup> Waldron 1999b, 211.

<sup>117</sup> For instance, the terms 'voting' or 'election' do not appear in the index of Gutmann/Thompson 1996.

<sup>118</sup> Benhabib 1996, 72; my emphasis.

<sup>119</sup> Bohman 1995, 417.

<sup>120</sup> Dryzek 2000, 170.

<sup>121</sup> Gutmann/Thompson 1996, 142.

<sup>122</sup> Gutmann/Thompson 1999, 267.

much to deliberation as to voting and it would be wrong to reduce it to one or the other. As Hannah Arendt warned us, we should favour measures that do more than "allow the people a share in public power without providing them at the same time with more public space than the ballot box and with more opportunity to make their voices heard in public than election day".<sup>124</sup> John Dewey expresses the same idea: "majority rule is as foolish as its critics charge it with being. But it is never *merely* majority rule". This is because the "counting of heads compels prior recourse to methods of discussion, consultation and persuasion".<sup>125</sup>

What we need therefore is a *normative* theory that not only reconciles deliberation with disagreement and voting, but also makes voting seem the natural culmination of deliberative democratic decision-making.

#### 4. Deliberative 'Voting Ethics': Voting Ethics *from within*

In this section, I will argue for the elaboration of a truly deliberative voting ethics (4.1.). To do so, I will present a two-pronged argument:<sup>126</sup> first, an argument for the ethics of voting (4.2.) and, second, an argument for the ethics of majority rule (4.3.).

##### 4.1. General

As Waldron claims, a theory of deliberative democracy is *radically incomplete* unless it dovetails its account of deliberation with an account of what procedures the participants invoke to resolve disputes when deliberation fails.<sup>127</sup> Many deliberative democrats have started acknowledging this lately.<sup>128</sup>

Of course, there have been arguments in the past for majority-decision, that were made from *outside* of the deliberative democracy movement. None, however, has been very convincing.<sup>129</sup>

<sup>123</sup> Waldron 1999b, 223.

<sup>124</sup> Arendt 1973, 253.

<sup>125</sup> Dewey 1927, 207–208, 144.

<sup>126</sup> Waldron 1999a, ch. 5 and 1999b does not distinguish the justification of the majority rule from the justification of voting, but I think that Gutmann's (1999) reply to his argument requires one to do so.

<sup>127</sup> See Waldron's (1999b) argument.

<sup>128</sup> See Gutmann 1999, 233.

<sup>129</sup> See Manin 1987, 359 on the need for a justification of majority *from within* deliberative democracy theory.

The strongest argument to date, the *utilitarian* argument, relies on the assumption that voters do not vote on the basis of reasonable and impartial opinions, but instead vote their own *self-interest*.<sup>130</sup> The argument goes as follows: if people vote their own preferences, there may be some rough equivalence between the formal outcome of a majority process and the substantive recommendations of a utilitarian political morality.

The logic of this argument, however, does not apply to most democratic instances, be they legislative or judicial, where reasonable people disagree in good faith about conceptions of the right and have to reach a single decision by taking a vote on their convictions about those controversial issues. Moreover, this argument presupposes that the principle of *utility* provides the criterion of substantive correctness, whereas most of us believe that it does in some cases, but not in all.

We ought therefore to develop a theory that explains why it is reasonable to require people to submit to voting and to majority decision not only their self-interest, but their most impartial convictions about what justice requires.<sup>131</sup> Deliberative democracy theories offer the best framework for such a justification and the elaboration of a true *ethics of deliberative voting and majority rule*.<sup>132</sup> Those theories will in fact greatly benefit from a rethinking of deliberation's own justification that cannot be avoided while developing a justification for voting from *within* deliberative democracy.<sup>133</sup>

I do not seek, however, to provide a general theory of deliberative democracy. For instance, I have assumed here that deliberation is normatively justified, as some deliberative democrats have argued.<sup>134</sup> What I am concentrating on, then, is the deliberative and normative justification for voting and majority decision *qua* decision-making procedure when deliberation fails. Note, however, that I do not aim at offering a complete theory of the specific principle of majority rule in circumstances of disagreement.<sup>135</sup>

<sup>130</sup> See Waldron 1999b, 214.

<sup>131</sup> Waldron 1999b, 214–215.

<sup>132</sup> On the notion of 'deliberative majority rule', see Bohman 1996, 182 ff.

<sup>133</sup> Note that it is not my aim to assess the moral value of the outcomes of majority rule when the *legitimacy* of those outcomes is said to flow out of the *preceding deliberative stage* (for such an account, see Benhabib 1996, 72 who talks, however, of "the normative justification of majority rule as a decision procedure following from this model"). This is a distinction some authors omit, such as Wertheimer 1999, 181. My aim here is to provide a normative justification of the voting stage itself, i.e., of how it can be regarded as justified and truly democratic, independently of what the deliberative stage will do to make its outcomes legitimate.

<sup>134</sup> See among others Gaus 1996, 1997; Estlund 1995, 1997; Nino 1996.

<sup>135</sup> In particular, I am not taking a specific stance as to the level of entrenchment or 'openness' to change, to borrow Juan Carlos Bayón's terms (Bayón 1998).

#### 4.2. *The Deliberative Ethics of Voting: Minimal Decisiveness*

One may think of two main deliberation-based arguments for voting: equal respect for all opinions in circumstances of disagreement, first, and the focus of deliberation on the need to decide, second.

First, each person's opinions about justice should be respected in circumstances of reasonable disagreement where none of them is self-certifying. It is the principle of *equal respect* for people and their opinions that justifies that each member of the deliberating body be given an equal voice and an equal right to participate and to have her voice counted in the final vote.<sup>136</sup> As Waldron puts it, "because each member's vote counts equally, deliberation under circumstances of equality is respectful of its audience in a way that deliberation under circumstances of inequality might not be".<sup>137</sup>

By contrast to different decision-making alternatives, such as flipping a coin or singling out a leader, voting best respects individual differences of opinion about justice.<sup>138</sup> First, *coin-tossing* does not give positive decisional weight to the fact that a given individual member of the group holds a certain view. Although it gives some weight to that fact when setting out the options, coin-tossing does not accord each individual's view the same decisiveness; in a vote, once a set of options has been established, the fact that an individual favours an option A is a reason for the group to pursue option A and this in each individual case. Bruce Ackerman identifies this specific dimension of voting, and of the majority rule, as '*minimal decisiveness*' or the recognition to each citizen of "the right to have his considered judgement determine the social outcome".<sup>139</sup> Second, the method of singling out a leader *à la Hobbes* gives decisive weight to just one of the competing views, and little or none to the others.

Note, however, that it is not because there is a general *justification* of voting on the basis of fairness or equal respect that correctives and constraints are not justified, that plain voting is *required* and that plural voting schemes, for instance, cannot be justified<sup>140</sup> or that some issues cannot be delineated away from popular voting. A conception of equal respect which is responsive to proven – if that is possible in circumstances of disagree-

<sup>136</sup> I assume, for purposes of clarity, that in a representative legislature, as in a direct democracy, a representative's claim to respect is a function of his constituents' claim to respect. Of course, in practice, things can get more complicated.

<sup>137</sup> Waldron 1999b, 224. Of course, this assumes that the minimal value of equal respect is taken as a consensual standard, as Estlund 2000b, 120 rightly notes.

<sup>138</sup> Waldron 1999a, 111–112.

<sup>139</sup> Ackerman 1980, 283.

<sup>140</sup> See Waldron 1999a, 115.

ment – acknowledged differences in wisdom might justify some sort of cumulative voting scheme rather than the equal weight implicit in plain majority-decision.<sup>141</sup>

Secondly, a further argument for the justification of voting is that it focuses the mind on the *need to decide*. Hence deliberation without voting loses a large part of its point. Gutmann, for instance, now recognizes that "voting is an essential value of democracy".<sup>142</sup>

This second argument for voting based on equal authority presents the advantage of being a justification from *within* deliberation. There is a sense indeed in which it is only *deliberation in circumstances of final equality of decisional authority* that has the beneficial consequences of deliberation. In this sense, the informative and transformative work one often identifies as the consequence of deliberation, on the model of Nino's theory,<sup>143</sup> may really trace to deliberation *in the shadow of voting*.<sup>144</sup>

#### 4.3. *The Deliberative Ethics of Majority Rule: Maximal Decisiveness*

Based on the argument of the previous section, many deliberative democrats will agree that *voting* is an essential part of democracy and deliberation. Fewer would, however, want to go one step further and argue that deliberation should dovetail with *majority rule* because majoritarianism is distinctively democratic.

This is because those authors make the mistake, I think, of assimilating a deliberative justification of the majority rule with the rejection of all other voting procedures that may also respect equal political authority. For instance, they assume that if one accepts a deliberative justification of the majority rule, one cannot accept that, in some cases, a unanimous vote will be as democratic or deliberative.<sup>145</sup>

This argument is misleading, however. It is not because there is such a general *justification* of the majority rule that correctives and constraints are not justified, that majority decision is necessarily *required* and that qualified or proportional majorities or even unanimity cannot be required in specific cases. Thus, a conception of voting which is responsive to acknowledged differences in gravity of the issue proposed to vote, or to past discri-

<sup>141</sup> For such an argument, see Bohman 1996, 96 ff.

<sup>142</sup> Gutmann 1999, 228.

<sup>143</sup> Nino 1996, 219.

<sup>144</sup> I borrow this expression from Kohl/Slye 1999, 15.

<sup>145</sup> See for instance Gutmann 1999, 229.

mination in case of proportional voting, may justify unanimity, supermajority rule or qualified majority-decision, rather than plain majority-decision.<sup>146</sup> In fact, all those alternatives are variables, or correctives founded on the same principle, that is to say, the *simple rule of a larger number of votes when each person has one vote*.<sup>147</sup>

Provided those correctives are possible, it remains that, given the persistence of reasonable disagreement and the political need to decide, unanimity is not likely to provide deliberation with the *decision-making procedure* it needs. Nor will the rule of the minority. As Rawls rightly states, "if minority rule is allowed, there is no obvious criterion to select which one is to decide and equality is violated".<sup>148</sup> It follows, therefore, that the rule of the larger number of votes is a much more plausible and practical answer to the existence of disagreement. Not only is it compatible with equal liberty, and as such a proper voting procedure, but it possesses a certain *naturalness*.

The view that there is something inevitable about the majority rule was expressed forcefully by John Locke.<sup>149</sup> There is no disgrace in realizing the *practical or mechanical nature* of the majority rule. As Arendt contends, "majority decision is a technical device, likely to be adopted almost automatically in all types of deliberative councils and assemblies, whether these are the whole electorate or a town-hall meeting or small councils of chosen advisers to the respective rulers".<sup>150</sup> In fact, as Arendt notes, "the principle of majority is *inherent* in the very process of decision-making and thus is present in all forms of government, including despotism, with the possible exception only of tyranny".<sup>151</sup> As such, the majority rule, I hold, tends to arise and persist naturally out of coordination needs and reasons<sup>152</sup> and I will not attempt a more detailed account of its origins nor of its persistence.<sup>153</sup>

<sup>146</sup> See Waldron 1999a, 115.

<sup>147</sup> See Bohman 1996, 96. See also Rousseau 1997, IV:2: "Between unanimity and a tie there are *various uneven divisions*, at any one of which this proportion can be fixed, taking the state and the needs of the body politic into account".

<sup>148</sup> Rawls 1971, 356.

<sup>149</sup> Locke 1999, 375–376.

<sup>150</sup> Arendt 1973, 164.

<sup>151</sup> *Ibid.*

<sup>152</sup> On the presumptive legitimacy of majority rule and democratic decision-making procedures that flows from its being the extant outcome of a continuing constitutionally grounded democratic culture, see Walker 2001, 126–127.

<sup>153</sup> I shall assume, therefore, that there is no need in principle for the majority rule itself to become a "closed rule" in the sense defined by Bayón (1998) nor is there a need for it to be absolutely constitutionally entrenched; of course, this does not mean that other minimal democratic principles and preconditions, like the right

Having established the practical inescapability of the majority rule as a successful coordinating tool is not enough for my purpose in this essay.<sup>154</sup> I need to propose a *normative argument for the democratic essentiality of the majority rule* that proves it to be a morally respectable method, not only because it is a voting method, as in the prior section, but also because it is majoritarian.

As an argument for the specific legitimacy of majority-decision *qua* voting procedure, one may say that it gives each individual and each opinion more than the minimal decisiveness other voting procedures or the unanimity rule accords them. Majority decision gives each individual's view the greatest decisive weight possible in this process compatible with an equal weight for the views of each of the others.<sup>155</sup> As Waldron states, "not only may each person's view be minimally decisive, but the method accords *maximum decisiveness* to each, subject only to the constraint of equality".<sup>156</sup>

In this sense, majority-decision is a *fair* method of decision-making, at least in the most impoverished or formal sense of fairness and equal respect.<sup>157</sup> This last qualification is called for since usual understandings of equal respect and fairness convey substantive concerns. Such substantive conceptions are of little use in the circumstances of disagreement where *reasonable disagreement* over the justice and fairness of a substantive issue also applies to the justice and fairness of a dispute-settlement procedure. Indeed it is because we disagree about what counts as equal respect or fairness that we need a decision-procedure.<sup>158</sup> Thus, to avoid a vicious regress, all we can work with in those circumstances is what Charles Beitz calls the "narrow understanding of the more basic principle" of equal respect.<sup>160</sup>

to minimal deliberation, e.g., or other rights which enable democracy to remain fluid and minorities to be respected, ought not to be entrenched in order for democracy and the majority rule not to be dispensed with through a majority decision. Many thanks to Ernesto Garzón Valdés and Paolo Comanducci for enabling me to make this clarification. On the ambiguities of constitutional entrenchment and precommitment, however, see Waldron 1999a and Elster 2000.

<sup>154</sup> Note that I accept Barry's (1991, 30 ff.) point that majority rule is a natural and inevitable procedure, provided (1) we assume that there is only one decision to take at a time, (2) that only two alternatives are envisaged, (3) that the constituency is not open to doubt, and (4) that the outcome is of no vital importance for any of the parties.

<sup>155</sup> See Vlastos 1984, 62 ff. And for more technical evidence, see Brennan/Lomasky 1993.

<sup>156</sup> Waldron 1999a, 114.

<sup>157</sup> On this formal sense of political equality, see Barry 1991, 26. Note that this argument assumes that the minimal senses of equal respect and fairness identify the same value.

<sup>158</sup> See for a similar argument Dworkin 1991, 180.

The same idea may be found in Peter Singer's contention that the majority rule is a "paradigm of a fair compromise".<sup>161</sup> By this, Singer means that, in circumstances of reasonable disagreement about the merits of legal decisions and the fairness of decision-making procedures to reach them, the *equal division of power* through the use of the majority rule to reach a decision among equal votes can be seen as the paradigm of a fair compromise.<sup>162</sup> The type of compromise at stake here is an *external* compromise *qua* procedure, because each party gets its turn in choosing for the whole community.

In this context, fairness is understood in terms of compromise, rather than in absolute terms that would imply full objective knowledge of what is just and fair on the part of all parties<sup>163</sup> or at least a rationally demonstrable proof of what is just and fair. What makes majority rule *the fairest* 'as a compromise', and provides a stronger reason to respect it than to respect other voting procedures, is that what is asked in return for the acceptance of the compromise *qua* procedure is a minimal sacrifice on the part of each party that is given equal weight and maximal decisiveness in the procedure.<sup>164</sup>

This idea of maximal decisiveness compatible with the equal weight of other people's views is very close to Hans Kelsen's *idea of democracy qua synthesis of the ideas of freedom and equality*. According to Kelsen, indeed, "the greatest possible degree of individual liberty, and that means, the greatest possible approximation to the ideal of self-determination compatible with the existence of a social order, is guaranteed by the principle that a change of the social order requires the consent of the simple majority of those subject thereto".<sup>165</sup>

Deliberative democrats usually resist these arguments for the majority rule on two grounds.

<sup>159</sup> Beitz 1989, 64.

<sup>160</sup> Note that, although this account attempts as much as possible to avoid a strong vicious regress of disagreement over the concept of equality by reducing the level of controversy of its claims in the cases where coordination is needed, it does not assume that it is possible to avoid any regress and that a justification of the majority principle can avoid being normative and hence contestable. *Contra* Estlund 2000b, 118 ff., I do not think that Waldron 1999a and 1999b is claiming anything different nor that he needs to.

<sup>161</sup> Singer 1974, 32.

<sup>162</sup> See Dworkin 1991, 179.

<sup>163</sup> Singer 1974, 33–34.

<sup>164</sup> Singer 1974, 32, 36. This holds, of course, provided participants have a pre-existing reason to coordinate and hence to follow the rule made salient by a decision-making procedure.

<sup>165</sup> Kelsen 1961, 286.

First of all, they give majority-decision an *epistemic edge* and move its legitimacy beyond the mere "numerical version of might makes right".<sup>166</sup> Thus they argue, like Gutmann, that "majority rule typically comes into its own, morally speaking, only when it turns out to be the best way of either expressing the equal political status of citizens or securing at least provisionally justifiable outcomes or both".<sup>167</sup>

The problem with this kind of argument is that it presumes that people initially agree on what is in the interest of democracy or on what is just. I have argued earlier that there is no such reasonable agreement on those issues to hope for and this is precisely the reason why we need a majority decision. Moreover, were unanimity to be realized on such issues, it might easily be due to *conformity* rather than to rational agreement. In fact, I share Elster's confidence in the outcome of a democratic decision, when a minority voted against it, rather than when it is unanimous.<sup>168</sup> People may be unanimously wrong,<sup>169</sup> as Jean-Jacques Rousseau first noted.<sup>170</sup>

Secondly, a further objection deliberative democrats usually make is a variant of the '*tyranny of the majority*' argument. According to this objection, democratic decisions entail the danger of subordinating minorities or individuals to the oppression of a majority.

On the present approach of deliberation, however, the majority's opinion that is acted upon takes my interests, along with everyone else's, properly into account<sup>171</sup> through deliberation. The fact that this opinion is not mine is not a threat to my freedom and autonomy.<sup>172</sup> The process institutionalizes the admission that there were also reasons not to desire the solution finally adopted; it comes at the close of a deliberative process in which everyone was able to take part, choose among several solutions, and remain free to approve or refuse the conclusions developed from the argument.<sup>173</sup> Although the majority decision does not conform to all points of view, it is the result of their confrontation. Moreover, even if I disagree with the ma-

<sup>166</sup> Gutmann 1999, 232.

<sup>167</sup> Gutmann 1999, 233. Note that I intentionally leave aside the question of constitutional precommitments and constraints on the majority rule, which do not affect the question of the democratic legitimacy of majority decisions when there are no constraints of that sort or where the majority rule is actually used by the supreme constitutional courts whose task it is to interpret the constitutional constraints themselves!

<sup>168</sup> Elster 1986, 117.

<sup>169</sup> Przeworski 1998, 142.

<sup>170</sup> Rousseau 1997, IV: 2. See Waldron 1990, 63.

<sup>171</sup> See Manin 1987, 359.

<sup>172</sup> See Gutmann 1993, 144, 149.

<sup>173</sup> Manin 1987, 359.

majority, there is no reason to take my opinion more seriously than the majority's; the majority is not necessarily right, but it is not necessarily wrong either.<sup>174</sup>

Thus, there is a distinction to be drawn between the majority's decision being *justified* in its content and having moral value and its *legitimacy*.<sup>175</sup> That the majority votes for some policy gives me no reason to think that that policy is justified or is the substantively correct one, but it gives me good reason to think that it should be the *community's* policy.<sup>176</sup> Even Gutmann and Thompson now concede, following Wertheimer, that "if the majority vote comes on the heels of a deliberative discussion, it may do a lot to *legitimize* a decision – whether or not basic liberties or opportunities are at stake".<sup>177</sup>

In summary, as Arendt contends, majority decisions are in order, as long as they are pursuant to a genuine exchange of opinions, on the one hand, and do not degenerate into '*majority rule*', on the other. What Arendt calls majority rule is a process in which majority decision degenerates so that a majority "liquidates politically, and in extreme cases physically, the opposing minority".<sup>178</sup> This idea is similar to Kelsen's distinction between the majority principle and the dominion of the majority.<sup>179</sup>

### Conclusion

In this essay, I have argued for the necessity to build a justification of democratic decision-making institutions into the core of any serious theory of deliberative democracy. The time has come for deliberative theorists, I claim, to move back from deliberation to vote and to develop a truly deliberative 'voting ethics'.

My argument is a four-pronged one in which each prong corresponds to one of the four steps it takes for deliberative democrats to move back to vote. First of all, I have argued that deep political disagreement undermines the plausibility and desirability of the regulative ideal of reasonable consensus and calls for institutions and procedures of closure. Secondly, I have claimed that, in cases where deliberation and mutual accommodation do not succeed in resolving our moral conflicts, voting procedures are the incapable culmination of the decision-making process. Thirdly, I have criti-

<sup>174</sup> Waldron 1990, 65.

<sup>175</sup> See Simmons 1999 on this distinction. See also Wertheimer 1999, 181.

<sup>176</sup> See Manin 1987, 359.

<sup>177</sup> Gutmann/Thompson 1999, 267, following Wertheimer 1999.

<sup>178</sup> Arendt 1973, 164.

<sup>179</sup> Kelsen 1961, 287.

cized the fact that, although most deliberative democrats grant this, they still look down on voting. I have therefore argued, fourthly, for the need to develop a truly deliberative account of voting and have then embarked on the elaboration of a deliberative voting ethics and especially a deliberative justification of the majority rule that is based on a minimalist sense of political equality and fairness. I have argued that only *deliberation in circumstances of final equality of decisional authority*, that is, deliberation in the shadow of voting and in particular majority-decision, has the beneficial consequences it claims.

The general conclusion of this essay is, therefore, that a normative account of decision-making institutions in circumstances of disagreement is needed in deliberative democracy theory. This does not, however, affect its role as an oppositional ideal. Because it is a practical ideal as well as a critical one, demonstrating its institutional feasibility and normative justification ultimately makes deliberative democracy a more rather than a less appealing basis for genuine reform.

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