

“What Does the Ideal of Deliberative Democracy Demand?”

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I. Intro.

Deliberative democracy has traditionally been defined in opposition to self-interest, to bargaining and negotiation, to voting, and to the use of power. Our assessment differs in two ways from the traditional one. First, we contend that self-interest, suitably constrained, ought to be part of democratic deliberation. Moreover, some forms of negotiation that involve self-interest meet all of our criteria for deliberation. We adopt a central feature of the traditional view by distinguishing between deliberative and non-deliberative democratic methods on the criterion that in their ideal form deliberative methods eschew coercive power. But, in our second departure from the classic theory, we argue for a complementary rather than antagonistic relation of deliberation to many of the democratic methods that involve coercive power, including aggregation through voting as well as fair bargaining and negotiation among cooperative antagonists.

II. Forms of deliberation

¹ The ideas in this paper are not solely those of the authors, but derive from the collective thinking of a Workshop on the Role of Bargaining, Negotiation, Compromise, and Voting in Deliberative Democracy that included Samantha Besson, James Bohman, Simone Chambers, Joshua Cohen, David Estlund, Andreas Follesdal, Archon Fung, Cristina Lafont, Bernard Manin, José Luis Martí, Philip Pettit, and Dennis Thompson, continuing from a workshop in Granada organized by Samantha Besson and José Luis Martí (see Besson and Martí 2007). These individuals should not, however, be assumed to agree with the conclusions reached here. We thank the Ash Institute for Democratic Innovation at the Kennedy School of Government at Harvard University and the Safra Center for Ethics, also at the Kennedy School, for supporting this workshop, as well as Roberto Gargarella, x, y, z, and participants at a seminar sponsored by the University of Pennsylvania and Temple University for their comments.

Although deliberation might be defined broadly as “communication that induces reflection on preferences, values and interests in a non-coercive fashion,”² deliberative *democracy* involves a decision binding on the participants or those for whom the participants are authorized to speak.³ There is considerable consensus among theorists on the regulative ideals of deliberative democracy.⁴ The deliberation should, ideally, be open to all those affected by the decision.⁵ The participants should have equal opportunity to influence the process, have equal resources, and be protected by basic rights. In the process of mutual justification, participants should treat one another with mutual respect and equal concern. They should give reasons to one another that they think the others can comprehend and accept. They should aim at finding fair terms of cooperation among free and equal persons. They should speak truthfully. The criterion that most clearly distinguishes deliberative from non-deliberative forms of democratic decision is that in the regulative ideal, coercive power should be absent from the

² Adapted from Dryzek 2000, 76; for other definitions see also, inter alia, Stokes 1998, 123, Przeworski 1998, 140, Knight and Johnson 1994, and Goodin 2005. Manin forthcoming identifies the two elements of mutual communication and arguments based on intrinsic validity.

³ On the requirement for the concept of deliberative democracy that it aim at a binding decision, see Gutmann and Thompson 1996 and others. Deliberation aimed at a binding decision may produce a decision not to decide, in which case the status quo is binding. Deliberation more broadly may also take place in the public sphere outside the forum of a binding decision in other arenas of the larger deliberative system in civil society, ideally producing mutual clarification or individual enlightenment, which then may affect the authoritative allocation of values either through the formal political process or more informally (see Habermas [1992] 1996 on the two “tracks” of state and public sphere; see also Bohman 1996, 1997b and 1999).

⁴ We define a “regulative” ideal, often unachievable in its full state, as an ideal to which, all else equal, a practice should be judged as approaching more or less closely. (See Kant [1781] 1998, 552 [A569/B597; also A570/B598] on a “regulative principle” as a standard “with which we can compare ourselves, judging ourselves and thereby improving ourselves, even though we can never reach the standard.” For the “rationality of pursuing unattainable goals,” see Rescher 1987, 114; for an application of regulative ideals to deliberative democracy, see Martí 2006, ch. 1). We assume a plurality of regulative ideals that may sometimes conflict. An ideal may be unachievable in its full state for practical reasons (as in the case of the ideals of absence of coercive power or absolute equality of coercive power) or because in many instances it conflicts with other ideals (as the ideal of equality sometimes conflicts with the ideal of liberty). For reasons of “the second best,” for example, it may in some instances be appropriate to act contrary to the ideal (see below notes 58-60 and accompanying text).

⁵ The question of what input into democratic decision on a policy affected parties outside the deciding polity should have is currently highly contested. One possibility conceives of affected non-citizens as having a right to some input into deliberation without the full panoply of deliberative rights (e.g., the background equal resources) or the right to equal power in a non-consensual decision. Unborn affected parties pose further questions. On this issue see, e.g., Gould 2004, Dryzek 2006, and Goodin 2007. This analysis is restricted to living adult members of the polity.

deliberation. Participants should not try to change others' behavior through the threat of sanction or the use of force.

Within these criteria, democratic deliberation can take different forms. In addition to classic deliberation and more recently expanded versions of the classic ideal, four forms of communicative agreement – convergence, incompletely theorized agreements, integrated solutions, and purely cooperative negotiation – can be assimilated within the deliberative ideal.

1) *Classic deliberation*

In the classic ideal of deliberation, individuals enter a deliberation with conflicting opinions about what is good for the polity, but after voicing and hearing the reasons for different options, converge on one option as the best, for the same reasons. In the ideal, the deliberation is based on reason. It aims at consensus and the common good. In most formulations it explicitly excludes bargained compromise. It excludes self-interest. It is posed as antithetical to aggregative decision mechanisms such as voting, because deliberation is a matter of reason, aggregation typically a matter of will and power.⁶

The antithesis between aggregation and deliberation has at least three facets. First, democratic deliberation is necessarily interactive and collective, while aggregation through voting can be, although it is not necessarily, individual and solitary. Second and relatedly, deliberation in public has social features that tend to promote the common good, while aggregation through secret ballot can facilitate concern for private interests. Third, deliberation allows creative solutions and the transformation of preferences, while aggregation takes the structure of the problem and existing preferences as given.

⁶ Hannah Arendt made one of the strongest statements along these lines: "Opinions are formed in a process of open discussion and public debate.... The same is not true for questions of interest and welfare, which can be ascertained objectively, and where the need for action and decision arises out of the various conflicts among interest groups. Through pressure groups, lobbies and other devices, the voters can indeed influence the actions of their representatives with respect to interest, that is, they can force their representatives to execute their wishes at the expense of the wishes and interests of other groups of voters. In all these instances the voter acts out of concern with his private life and well-being, and the residue of power he still holds in his hands resembles rather the reckless coercion with which a blackmailer forces his victim into obedience than the power that arises out of joint action and joint deliberation" (1965, 272-3; see Mansbridge 1996 for critique).

In the classic antithesis, the rejection of self-interest is a central part of the larger rejection of aggregation, negotiation, and interest-group pluralism.⁷ Iris Marion Young summarizes the classic contrast between deliberative and “interest-based” models of democracy as follows: “Democratic processes are oriented around discussing [the] common good rather than competing for the promotion of the private good of each. Instead of reasoning from the point of view of the private utility maximizer, through public deliberation, citizens transform their preferences according to public-minded ends, and reason together about the nature of those ends and the best means to realize them.”⁸

In Jürgen Habermas’s early work (and that of earlier scholars in this tradition), public and legislative deliberation should ideally rest only on “the standards of ‘reason’” and “the authority of the better argument” on matters of “common concern.”⁹ This view is inseparable from a concept of “law as an expression of reason,” not will.¹⁰ Laws ideally embody “the reasonable consensus of publicly debating” persons, not a

⁷ See Habermas 1989, 45 on the necessity of “overcoming” one’s “egocentric viewpoint.” For the antithesis between deliberation and aggregation, see, e.g., Habermas [1962] 1989 (contrasting “reason” and “will”), Elster 1986 (contrasting the forum and the market), Michelman 1988 (contrasting “strategic” action with deliberation), Sunstein 1988 (rejecting the conception of the electoral process “as a self-interested struggle”), Cohen 1989 (rejecting the aggregative model), Estlund 1993 (contrasting deliberative and “strategic” models), Cohen 1996, 107 (contrasting “deliberative politics” with “a politics of bargaining”), and Marti 2006 (contrasting deliberation with bargaining and voting). Mansbridge 1980 (contrasting “unitary” and “adversary” democracy) argues for both models in different contexts. For more on these contrasts, see Miller 1992, 182-3, Gutmann and Thompson 1996, 1-4; 2004, 13-21, Knight and Johnson 1997, Bohman 1998, and Johnson 1998.

⁸ Young 1996, 120-121, citing Habermas, Cohen, Spragens, Barber, Sunstein, Michelman, Mansbridge, Dryzek, Bohman, and Fishkin.

⁹ Habermas [1962] 1989, 28, 36, 37.

¹⁰ Habermas [1962] 1989, 81. Cf. Aristotle, “The law is reason unaffected by desire” (*Politics*, 1287a34) and Schmitt [get cite], the “law is not the will of one or of many people, but something rational-universal; not *voluntas*, but *ratio*” (quoted *Idem*).

“compromise between competing private interests.”¹¹ This definition excludes from deliberation not only self-interest but also bargaining and negotiation.¹²

2. The classic ideal expanded

Contemporary deliberative theorists have moved away from the language of “reason,” with its Enlightenment overtones of a unitary and knowable entity, to a focus on mutual justification. Participants in deliberation advance “considerations” that others “can accept” -- that are “compelling” and “persuasive” to others (Cohen 1989, 101-4; 1996, 100), and that “can be justified to people who reasonably disagree with them” (Cohen 1996, 2). This criterion of “mutual justifiability” (Bohman 1998, Gutmann and Thompson 1996, 2004; Lafont 2006) has become central to the concept of deliberation.

As the theory has developed, disagreement, conflict, arguing, and the confrontation of reasons pro and con have emerged more clearly as crucial to most deliberative democratic forms (Gutmann and Thompson 1996, Bohman 1996, Estlund 200x, Chambers 2003, Manin forthcoming).

Other features of an expanded understanding of deliberation are more contested. Mutual justifiability, for example, opens the door to storytelling and the non-cognitive evocation of meanings and symbols that can appeal to actual or imagined shared experiences. Stories can produce information, establish credibility, create empathy, and trigger a sense of injustice, all of which contribute directly or indirectly to justification. But not all deliberative theorists have accepted storytelling or other such methods as compatible with

¹¹ Habermas [1962] 1989, 132, 195. As Carl Schmitt put it, distinguishing “discussion” from “negotiation,” “Discussion means an exchange of opinion that is governed by the purpose of persuading one’s opponent through argument of the truth or justice of something, or allowing oneself to be persuaded of something as true and just. ... laws [should] arise out of a conflict of opinions (not out of a struggle of interests). To discussion belong shared convictions as premises, the willingness to be persuaded, independence of party ties, freedom from selfish interests” ([1926] 1988b, 4–6).

¹² Marti 2006, 28, n2 points out that Sunstein 1986a: 895, and 1988, Cohen 1989: 17-18, Gutmann and Thompson 1996: 1-4 and 2004, Bohman 1998: 400, Knight and Johnson 1997, Barber 1984: 136-137, and Pettit 1989 and 2003: 139-140 all explicitly distinguish between deliberation and negotiation.

deliberative ideals, particularly excluding from deliberation any form of “irrational” persuasion.¹³

The stance of mutual respect required for good deliberation also often requires extending toward the other participants an empathy that attends not only to commonalities but to differences. Such acts of empathy, which require trying to put oneself in another’s place, usually engage the non-cognitive faculties and require non-cognitive forms of communication. Again, the role of these non-cognitive faculties in deliberation is contested.¹⁴

The very goal of the common good admits of several meanings. The classic ideal implied a relatively unitary conception, discoverable through reason. Expanded theories point out that the giving of good reasons will not always, even ideally, lead to a unique result. Expanded theories also entertain plural conceptions of the common good, ranging from agreement on the structure of conflict to aggregative understandings of the common good. The definition and meaning of the common good remains highly contested.¹⁵

Finally, when interests or values conflict irreconcilably,¹⁶ deliberation can ideally end not in consensus but in a clarification of conflict and structuring of disagreement, which sets

¹³ The “inclusion of all views and arguments” (Lafont 2006, 10) also opens a door to arguments that rest for their persuasive power on emotions such as empathy. Sanders 1997 and Young 1996 argue in favor of storytelling, on the grounds that disadvantaged participants are more likely to use this form and use it successfully. Benhabib (1996, 83) is skeptical, as are those who specifically exclude rhetoric and irrational forms of persuasion (give cites). See Bohman 1996 for an expansive construal of reason giving. The arguments in this essay do not require a position on this point.

¹⁴ On the use of emotions in deliberation, see e.g., Nino 1996, 124ff, Hall 2005, Krause forthcoming.

¹⁵ For analyses of different meanings of the common good, see Held 1970, Mansbridge 1998; for interests held qua member of public see Barry 1965; for cooperatively avowable considerations see Pettit 2000. For the good of agreement on the structure of conflict, see Miller 1992, List 2003, and Pettit 2006, 99 (for critique, McGann 2006, 130ff). For an aggregate understanding, see Steiner et al, 2004.

¹⁶ We use the word "interest" here to mean an “enlightened” preference, that is, what hypothetically one would conclude after ideal deliberation was one’s own good or one’s policy preference, including other-regarding and ideal-regarding commitments. Any guess as to what such a conclusion would be is necessarily open to further thought, testing through practice, and political struggle. The word "interest" connotes objective, static or eternal states discoverable through revolutionary action or through reason, and "revealed" by removing the sources of oppression or repression. We want to discard these connotations, while retaining some

the stage for a decision by the non-deliberative methods of aggregation or negotiation. We assume that the goal at the outset of deliberation ought not necessarily to be a substantive consensus. Indeed, when the more powerful actors have unequally influenced the definition of the situation and its appropriate norms, deliberation ought to make less powerful actors more aware of their interests and, when interests conflict, increase their perception of the conflict.¹⁷ Having made the structure of the conflict clearer, the participants must turn to democratic forms of decision that do not involve further deliberation. Yet the relation to deliberation of the non-deliberative democratic methods to which they now must turn is contested. In this paper we begin the process of articulating that relationship.¹⁸

Before we turn to the relation of deliberation to other democratic methods, we take up the idea that deliberative democracy can and must encompass self-interest. We introduce four significant deviations from the classic ideal, arguing that the processes of convergence, incompletely theorized agreements, integrative negotiation, and fully cooperative negotiation can all incorporate self-interest without deviating from the criteria for good deliberation. All four processes are thus forms of deliberation, with the last three being forms of *deliberative negotiation*.

3. *Convergence*

distinction between surface preferences, opinions, or prereflective understandings, and understandings of self and commitments that are more considered, emotionally and rationally, and more thoroughly tested in action. Using this definition, transforming interests requires transforming the self, including one's identity, in contrast to transforming only one's preferences or one's perceptions of one's interests. When we specify "self-interest," we exclude other-regarding and ideal-regarding interests. As in this sentence, we sometimes use the phrase "interests and (or) values" not to create a distinction between these two but to clarify to the casual reader, who might not include values in interests, that we intend both material and less tangible interests.

¹⁷ Others who have criticized the classic ideal for over-emphasizing consensus include, e.g., Knight and Johnson 1997: 286, Przeworski 1998 and 1999, Johnson 1998, Gambetta 1998: 21, Shapiro 1999a: 31, and 2002: 121-125, and Bell 1999. Bachrach 1974 early argued that when underlying conflict has previously been obscured (usually by the hegemony of the more powerful), participation in politics should increase conflict.

¹⁸ In so doing, we build on suggestions in Habermas [1992] 1996, Gutmann and Thompson 1996 (e.g. 71-72) and 2004, Bohman 1996, chap. 2, esp. 83-95; Nino 1996; and Estlund 1997: 185, who have all pointed out that in some circumstances deliberative democracy must include negotiation.

Moments of conflict-free convergence originate without significant conflicts of opinion or interest and conclude with participants agreeing on a single outcome and for the same reasons. Individuals enter this kind of deliberation with interests or opinions on what is good for the polity that do not greatly diverge, bring together facts and insights from their various sources of information, and converge on one option as the best for all. The participants need to reflect together – perhaps in depth -- on the question at hand, considering what information everyone brings to the table and sorting out by talking with one another what they think is best, but the significant opening conflict that some theorists consider a required feature of deliberation is missing. We consider this kind of communication deliberation because the mutual communication of the participants involves reflection on their mutual preferences, values and interests. We do not classify it as negotiation, because we adopt the usual use of “negotiation” as beginning with a conflict that requires some form of settlement.¹⁹ In political deliberations, moments of convergence may engage self-interests that turn out to be compatible, opinions on a common good that converge, or both. These moments of convergence build mutual respect and trust, generate collective agency, mutual respect, satisfaction and goodwill, and forge bonds on the basis of common action. Defining politics to require conflict and relegating such moments to the category of “administration” blinds us to the complexity of political processes, which in almost all cases, and properly, include convergence.²⁰

4. *Incompletely theorized agreements*

Incompletely theorized agreements originate with conflicting opinions on the common good and conclude with participants agreeing on a single outcome, but for different

¹⁹ The Oxford English Dictionary has two parts to its first entry on “to negotiate.” The first is “To communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement.” This definition does not necessarily imply conflict. The second, however, is “to discuss a matter with a view to some compromise or settlement.” The word “compromise” implies an originating conflict, as do the OED’s examples.

²⁰ Per contra see, e.g., Barber 1984, 129.

reasons. The participants may agree on an outcome while maintaining profound disagreements over ultimate foundations.

Cass Sunstein argues that because incompletely theorized agreements rest on participants' different reasons, such agreements are more likely than fully theorized ones to preserve openness for future evolution, allow effective decisions in limited time, accommodate the limited human capacity for reason-giving, and encourage the humility and mutual respect required in plural societies.²¹ Although Sunstein originally conceived the concept to apply to opinions regarding correct interpretation of the law or good public policy, this process of reaching agreements on outcomes but not on the reasons for those outcomes has some structural similarities, as we will see, to the integrated solutions of seemingly conflicting interests proposed by Mary Parker Follett.

Incompletely theorized agreements do not fulfill the demands of the criterion of mutual justification "all the way down."²² By definition such agreements leave certain issues unresolved. But in deliberating to an incompletely theorized agreement, the parties offer mutually acceptable justifications regarding outcomes and even regarding the principles (such as precedent) that generate those outcomes. One metaprinciple that might generate such agreement, for Sunstein's reasons, is precisely that of leaving ultimate principles unresolved.²³ When the parties genuinely offer one another such justifications, the process of generating incompletely theorized agreements meets the deliberative criteria of mutual justification, mutual respect, fairness, equality among participants, and the absence of coercive power.

²¹ Sunstein 1995 makes this argument primarily in the context of the judicial system, but intends it to apply more broadly. See also Sunstein 1996: 35-61, 1997 and 1999. (For an argument that Sunstein's examples sometimes combine both integrative and distributive elements, see below, footnote 30.) Bohman 1996, 80ff also argues for deliberative agreement on the basis of "*different* publicly accessible reasons" (83; also 92). But see Pettit 2003 for caveats. Habermas would exclude incompletely theorized agreements from the process of producing a "rationally motivated consensus" on the grounds that such a consensus excludes different parties accepting the result "each for his own *different* reasons" ([1992] 1996, 166, emphasis in original).

²² See Rescher 1993: 44-45.

²³ See also Rawls 1993, and Gutmann and Thompson 1996, 2004 on "the economy of moral disagreement."

4. *Integrated solutions, integrative negotiation*

“Integrated solutions” (Follett [1925] 1942), or “win-win” solutions based on “integrative” negotiation, are, like incompletely theorized agreements, forms of coordination that originate with conflict and conclude with agreement on one outcome but for different reasons. They differ from incompletely theorized agreements in being originally conceived to deal explicitly with differences in self-interest, including material interest, and in stressing the creation of new “value.” In Follett’s original example of an integrated solution, she wanted the window in a library shut to avoid a draft while another patron wanted it open to get more air in the room. Her solution, opening the window in the next room, gave both parties what they wanted. In a classic textbook example, two parties discover through mutually probing their interests that one actually wants the icing and the other the center of a cake, allowing them to avoid dividing the cake down the middle or fighting over who will have the whole.²⁴

Contemporary textbooks on negotiation enthusiastically promote integrated solutions, although many exaggerate the prevalence of problems susceptible to such solutions (Wetlaufer [1996] 2004). Integrated solutions are possible only when the parties have different valuations of the different aspects of the negotiation. In integrative negotiation, negotiators “expand the pie” and “create value” by bringing to light and coordinating on outcomes that meet the needs of each party while being either not costly at all to the others or less costly than originally envisioned. In some ways integrated solutions may be said to “dissolve” a conflict or show that a perceived conflict was only apparent. Yet the parties involved do want different things, which at the origin of the deliberative negotiation seem to present a conflict. They do not agree on an outcome “for the same reasons.” Only through deliberation, weighing, and exploring their mutual and

²⁴ Walton and McKersie’s 1965 classic analysis of labor negotiations first introduced the language of “integrative bargaining” and “distributive bargaining” to distinguish between 1) the system of activities that is “instrumental to the attainment of objectives which are *not* in fundamental conflict with those of the other party” and 2) the “system of activities instrumental to the attainment of one party’s goals when they are in basic conflict with those of the other party” ([1965] 1991, 4-5).

conflicting interests, can they discover how to resolve the apparent conflict by expanding the borders of the problem or introducing new perspectives.

Within a negotiation, achieving integrated solutions usually requires the parties to act in all the ways that deliberative theory promotes. Thus, as Follett put it, “The first step toward integration is to bring the differences out in the open” ([1925] 1942, 36). Other negotiation theorists recommend “openness, clear communication, sharing information, creativity, an attitude of joint problem solving, and cultivating common interests.” They insist that “to create value, a negotiator needs *to learn* about her counterparts’ interests and perceptions, to help them learn about hers, to *foster ingenuity and creativity*, and to *blunt the escalation of conflict*” (Lax and Sebenius 1986, 113, emphasis in original). In practice, integrated negotiations can approach our criteria for ideal deliberation as closely as any other form of deliberation.

5. *Fully cooperative distributive negotiations*

In each of the previous forms of mutual discussion ending in agreement, no individual had to settle for an outcome less than he or she wanted or thought was right, whether in matters of the common good or self-interest. The classic *integrative* solution (Follett’s opening the window in the next room) does not involve compromise. By contrast, in a *distributive* negotiation or bargain, the parties reach an agreement that is better for each than the status quo or the other alternatives available, but all give up some part of what they want to get agreement. Unlike integrative solutions, the distributive part of an agreement is zero-sum.²⁵ One form of such a compromise is a bargain achieved through

²⁵ We use this term colloquially to include what strict game-theorists would call “constant-sum” and “zero-sum” games, in both of which my gain requires your loss. (Thanks to Joseph Mazer for this point.) In one of Sunstein’s examples of a non-judicial incompletely theorized agreement, the members of the United States Sentencing Commission, in spite of having deeply divergent theoretical perspectives on punishment (some retributive, some based on deterrence), reached a compromise on sentencing guidelines by deciding to use as a guide “typical, or average, actual past practice” (1995, yy, citing Breyer 1988). Strictly speaking, this process produced a pure incompletely theorized agreement (or something like an integrated solution) only when the outcomes on a particular sentence matched exactly what each member considered right from the perspective of his own theory of sentencing. Sometimes, however, the process must have generated outcomes that some members considered wrong from their own perspective but decided to live with for the sake of getting an agreement they considered better than the status quo. This

bidding. In bidding, one party makes an offer, the other accepts or makes a counteroffer, and the first either accepts or makes a further counteroffer, until the two either reach or fail to reach agreement.²⁶

It is relatively easy to envision convergence, incompletely theorized agreements, and integrative negotiation proceeding without the use of coercive power, meaning the threat of sanction or the use of force. By contrast, distributive negotiations in the form of bidding to a bargain are implicitly based on each party's threat of withdrawing from the potential agreement. Yet if each party in a distributive negotiation is concerned not only with self-interest but also, dominantly, with outcome fairness, deliberative negotiations may involve self-interest but, through the forbearance of each party, not coercive power. We call distributive negotiations so constrained *fully cooperative negotiations*.²⁷

Howard Raiffa, who coined the term “fully cooperative negotiation” in an early text, wrote that the partners in such a negotiation

have different needs, values, and opinions, but they are completely open with one another; they expect total honesty, full disclosure, no strategic posturing. They think of themselves as a cohesive entity and they sincerely want to do what's right for that entity. This would be true, for instance, of a happily married couple or some fortunate business partners (Raiffa 1982, 18).²⁸

part of the example thus resembles not an integrative negotiation (no one loses; no zero-sum game) but a distributive negotiation (a compromise in which each loses something; a zero-sum game). The compromise may have been reached by “fully cooperative” negotiators who, while not forgoing principle, adopted a principle or mandate far shallower than those which would otherwise have driven the guidelines.

²⁶ Thanks to Phillip Petit for the concept of “bidding.” We treat “bargaining” as interchangeable with “bidding” and define a “bargain” as the outcome of a bidding process that results in agreement. Negotiation has greater epistemic potential than bargaining, because to create integrative negotiations each party must enter into the underlying needs and desires of the other. But even bargaining has some epistemic value, because through the process of offering and counter-offering the parties are likely to come closer to understanding how much they value their own and the others' offerings.

²⁷ The correct term should be “fully cooperative *distributive* negotiations” (the title of this section), because incompletely theorized agreements and integrated negotiations are also ideally fully cooperative. We have shortened the unwieldy “fully cooperative distributive negotiations,” hoping that leaving out the important modifier “distributive” will not cause confusion.

In such a negotiation the participants want to do not only what is right for their “cohesive entity,” as Raiffa put it, but also what is right for themselves. They recognize their own interests, identify the distributive and zero-sum quality of the interaction, and see themselves as “partners in a hardheaded, side-by-side search for a fair agreement advantageous to each” (Fisher, Ury and Patton 1991, 37). Honesty and a search for fairness characterize the ideal of fully cooperative distributive negotiation.

As with many ideals, neither honesty nor fairness can be fully reached except perhaps in extremely simple interactions. Self-serving bias and other cognitive and emotional schemas lead human beings to be capable only rarely of seeing their own positions completely honestly, let alone of conveying those positions to others without self-serving nuance. Similarly, fairness takes many forms, and in practice human beings will gravitate toward conceptions of fairness that implicitly benefit them. Nevertheless, human beings can attempt honesty and full disclosure, and their partners in negotiation can both discern and respect their efforts toward authenticity. In response to the multiplicity of forms of fairness, partners can explore tradeoffs among ideals of fairness or resort to fair procedures to settle the differences.²⁹

In the ideal, the participants in a fully cooperative negotiation understand the others’ interests, appreciate those interests, and think those interests deserve fair consideration and fair weight in the outcome. They may also make the good of the others to some degree their own.³⁰ Moreover, in fully cooperative negotiations the participants often

²⁸ Although Raiffa described “fully cooperative” partners only briefly in this one paragraph, to distinguish them from the “cooperative antagonists” of and for whom he was writing, he nevertheless believed that such a relationship could exist in practice, e.g. among married or “fortunate business” partners. We assume that fully cooperative negotiations can never be completely achieved in practice, but also assume that such relationships can be approached and can stand as a regulative ideal.

²⁹ Fisher, Ury and Patton 1991, 153-4 suggest the idea that participants can resort to fair division to handle differences that arise from different perceptions of fairness.

³⁰ This criterion is not the same as making the other’s interests fully one’s own, a process that would a) dissolve the difference between participants and b) leave each without anyone with interests to make her own.

have significant commitments to a collective “cohesive entity.” They have many common as well as conflicting interests. All these factors undergird their search for fairness and agreement. But in a good negotiation the partners do not give their own interests less than fair weight. Indeed, they understand that by not pursuing their own interests they may actually fail to do their part in the effort to find the most integrative and fairest solutions.³¹

Most importantly, the participants in a fully cooperative negotiation ideally do not rely on sanctions or the use of force against the interests of the others in the negotiation.

Although, as we will discuss later, it is impossible to achieve the absence of coercive power in any human interaction, in fully cooperative negotiations, friends or partners aim at fairness. In fully cooperative negotiations the threat of sanctions or the use of force against the other’s interests would threaten the relationship. Each party expects that the others will not exert such coercive power but will advance considerations regarding a fair solution that the other(s) can accept. In the ideal, the parties do not behave strategically, aiming only at their own success, but act to promote a fair solution acceptable to all, given their conflicting interests.³² When fully cooperative negotiations take place in conditions of equality, they can meet all of our criteria for deliberative democracy.

III. Self-interest

Although judges and administrators should recuse themselves if they have self-interests in a matter they must decide for the public good, in politics participants make decisions for themselves. Those who know their interests best, namely (in general) those whose interests they are, need to deliberate with others about those interests, come to understand

³¹ Negotiators warn that friends and other individuals who trust one another and want to do right by their “cohesive entity” may fail to pursue their self-interest fully enough to realize the gains that can be achieved in negotiation, because their concern for the relationship is so great that they hesitate to cause conflict (see e.g., L. Thompson 2005, 143).

³² Offers of fair compensation and predictions of negative consequences characterize fully cooperative negotiations, while promises and threats characterize strategic action aimed at individual success (see Elster 1995). In practice it is not always easy to distinguish between an offer of fair compensation and a promise, a prediction of negative consequences and a threat.

them, express them, and stand up for them. Even in a deliberation aimed classically at consensus on the common good, the exploration and clarification of self-interests must play a role.³³ Excluding self-interest from deliberative democracy is likely to produce obfuscation and prevent integrated solutions.

Self-interest plays an important role in deliberation in four ways: as information on the common good, as constitutive of an aggregative common good, as information on the conflict that deliberation uncovers, and as information necessary to a fair and fully cooperative negotiation.

First, even in classic deliberation, where participants try to understand what policy best promotes the common good, self-interested statements serve as information regarding that common good.³⁴ The deliberation preceding a decision helps to clarify interests and preferences in addition to transforming them. In this process of clarification, participants in the deliberation must be able to explore what they really want and what is right for them as well as for others in a way that does not take self-interest off the table. A participant should be able to come to a realization of self-interest, saying, “But that policy would hurt me [or my constituents],” and hear from others that other policies will hurt or

³³ Several theorists have made a role for self-interest and conflicting interests in their understandings of deliberation. Seyla Benhabib writes: “...the deliberative model of democracy proceeds not only from a conflict of values but also from a conflict of interests in social life. ...Procedures can be regarded as methods for articulating, sifting through, and weighing conflicting interests. The more conflicts of interest there are the more it is important to have procedural solutions of conflict adjudication...” (1996, 73). Drysek concurs that deliberation should include “the individual or collective needs and interests of the individuals involved” (1990, 43). See also Mansbridge 1996, 2002, 2006. Criticizing the classical model, Sanders argues for attending to “the interests of particular groups” (1997, 353) and Young for not asking participants “to leave behind their particular experiences and interests” (1996, 126). Johnson (1998, 174) concludes that “a plausible argument for deliberation must not – in the effort to differentiate deliberation from bargaining – categorically exclude either self-interested claims or the conflicts that such claims might generate from the range of admissible topics that participants to deliberation might address.”

³⁴ Cohen and Rogers write: “Deliberation does not preclude statements of self-interest. The deliberative view holds that expressions of self-interest do not qualify as *justifications* for anything – as statements of reasons in the desired sense. But it admits them as ways to present *information*. For example, a relevant consideration in deliberation, and a possible justification or reason for a policy, is that it represents a fair accommodation of the interests of all, or advances the good of those who are in greatest need. But to know that it does either of these things, we need to know what those interests are, and expressions of self-interest by relevant persons are one way to find that out” (2003, 247). Below, however, we make the case that expressions of self-interest can also play a legitimate role in a process of mutual *justification*.

help them.³⁵ If self-interest is not part of the process of exploration and clarification, the chances increase greatly of a group's adopting a version of the common good that does not take everyone's interests into account. If members of the group can speak only as "we" and not as "I," neither they nor the other participants may be able to discover what is really at stake and forge integrated solutions.³⁶ Crucially, without this exploration of self-interest, the understandings of the common good of the more powerful in the polity may dominate, even without ill will or the intent to exercise power.

Second, when the common good is an aggregation of individual goods, each individual's self-interest is a constituent part of that common good. In this case, one's presentation of one's self-interest is in itself a justification, a reason in itself for adopting a particular policy. In a highly simplified and completely aggregative case, the members of the polity could deliberate about their interests, explore their options together, flesh out the implications of different choices, contemplate the different forms of common good

³⁵ Pettit argues, for example, that interventions such as "That's going to make life difficult for those of us who are [group characteristic]" are "likely to be accepted as relevant on all sides" in a deliberation and to "secure acceptance as reasonable" (2006, 100).

³⁶ Per contra, Benjamin Barber (1984, 200) articulates the classic position against expressing or pursuing self-interest: "In place of 'I want Y,' the strong democrat *must* say 'Y will be good for us.'" Jon Elster reports congruently that "There are certain arguments that *simply cannot* be stated publicly. In a political debate it is *pragmatically impossible* to argue that a given solution should be chosen just because it is good for oneself. By the very act of engaging in a public debate – by arguing rather than bargaining – one has *ruled out* the possibility of invoking such reasons" (Elster 1986, 112-3, citing Midgaard 1980; Gutmann and Thompson 1996, 126 respond with an example from the U.S. Senate floor showing that such claims are in fact "pragmatically possible"). Elster later gave the label, "the civilizing force of hypocrisy," to the pressure of the norms by which "even self-interested speakers are *forced* or induced to argue in terms of the public interest" (1995, 251, 1998, 13, 111). Other theorists use language that while coming close to Elster's could include self-interest in the context of fairness. See e.g. Hannah Pitkin (1981, 347): "[In public life] we are there *forced* to acknowledge the power of other and appeal to their standard, even a we try to get them to acknowledge our power and standard. We are *forced* to find or create a common language.... We are *forced*, as Joseph Tussman has put it, to transform 'I want' into 'I am entitled to,' a claim that become negotiable by public standards," Benhabib (1996, 71-72): deliberation "*forces* the individual to think of what would count as a good reason for all others involved. One is thus *forced* to think from the standpoint of all involved.... a standpoint that Hannah Arendt, following Kant, had called the 'enlarged mentality,'" and Young (1996, 128): "Knowledge that I am in a situation of collective problem solving with others who have different perspectives...cultures and values from my own...*forces* me to transform my expressions of self-interest and desire into appeals to justice." (All emphases ours.) Against at least the positions of Barber and Elster, we argue that if two individuals have conflicting interests (e.g., one member of a married couple being offered a job in Chicago and the other one in Boston), it would distort their communication and decision-making to "force" them to discuss the issues solely in terms of what is good for "us" (e.g., for the "marriage" or for the children). Only by recognizing their self-interests and the conflict between them can the couple negotiate a fair, perhaps even integrative, agreement.

applicable to the problem, realize that the appropriate form in this case was purely aggregative, and each individually announce what they had concluded was good for them from the perspective of their own self-interest, saying, “This policy is in my (my group’s) interest.”³⁷ If all the participants (perhaps for different reasons) converge on one policy as in their self-interest, then that policy, formed by the aggregation of those interests, is the common good in an aggregative form. In these circumstances, for each individual and for the others in the group the unadorned fact of self-interest is a reasonable and sufficient justification of the individual’s stance.

Third, one purpose of deliberation should be to clarify conflict as well as commonality, sometimes leading to the conclusion that the issue cannot be handled with deliberative processes alone. If, after deliberatively exploring both the common good and individual interests, participants find that either their understandings of the common good or their more self-regarding interests cannot be reconciled, they need to recognize this fact and authorize another form of decision-making, perhaps a form of voting, to produce a relatively legitimate decision. In this situation too the simple fact of one’s self-interest constitutes a justification to others for desiring one policy, resisting another policy, and coming to the conclusion of irreconcilable conflict.

Fourth, as explained earlier, the statement and pursuit of self-interest are in many cases necessary in constructing a fair and fully cooperative negotiation, even if that negotiation is distributive rather than integrative.

In the deliberative ideal, the expression and pursuit of self-interest is constrained by a concern for fairness and mutual respect. Thus many forms of self-interest are ruled out as justifications. “The desire to be wealthier come what may,” for example, is in most instances incompatible with fairness and mutual respect. But the “desire to be as wealthy

³⁷ Per contra, Cohen and Rogers devised the sentence “This policy is in my (my group’s) interest” to exemplify a statement that could not be a justification (2003, 247). Nino also includes among the statements that “would be rejected as arguments in any genuine discussion” the “mere expression of wants or description of interests,” e.g., “This is what I want” (1996, 122). We, however, consider it legitimate for a participant to begin a deliberation, perhaps to convergence, by saying invitationally, “This in my self-interest; is it in any of yours?”

as possible consistent with a fair level that others (i.e. equal citizens) find acceptable” is compatible with the values of mutual respect, equality, reciprocity, fairness and mutual justification that help constitute the deliberative ideal.³⁸

We thus define the common good ideally to include those “interests, aims and ideals” (Cohen 1989, 25) that would survive an ideal deliberation of free and equal citizens in a speech situation uncompromised by the use of coercive power. We do not define the common good as necessarily including the interests, aims, and ideals that survive real deliberations, which are always suffused with coercive power. Rather, we use the hypothetical to construct an ideal by which to measure the real.³⁹ That ideal, derived from the hypothetical, must itself be debated by actual publics, in order to determine what interests “on public reflection, we think it legitimate to appeal to in making claims on social resources” (Cohen 1989, 25). Our claim in this paper is that many forms of straightforward material self-interest, under the constraints of fairness and mutual respect, will survive that scrutiny. We can think of these as *fairness-compatible self-interests*.

We have used the word “fair” rather than “impartial” to describe the ideal deliberative process because we contend that to create integrated solutions and fully cooperative bargains the participants often should at one and the same time both try to conceive and follow a goal of fairness, which requires an impartial or third person perspective, and also stand up for their own self-interests. They thus need to be partisan or partial in identifying their own interests and promoting them. But they should also want to reach an accommodation that is fair, be willing and able to justify their self-interests to others in terms of fairness, understand the arguments from fairness from the other side, and look for fair adjudications among competing understandings of fairness. They should seek impartial outcomes in the sense of outcomes that do not benefit one side or another unfairly. But partial as well as fairness-regarding motivations both permissible and in

³⁸ Cohen originally contrasted “the desire to be wealthier come what may” with the “desire to have a level of wealth that is consistent with a level that others (i.e. equal citizens) find acceptable” (1989, 24). We have modified the second formulation to 1) allow the desire for as much wealth “as possible” within constraints and 2) add fairness to acceptability.

³⁹ See Marti 2006 and note 4 above on regulative ideals.

some institutional instances required. Participants need not be fully neutral or detached in the deliberative process.⁴⁰

Many negotiation theorists strongly advise making self-interests central to a negotiation, in contrast to both power and fairness. They define interests as the deeper desires that lie underneath surface positions:

Interests are a person's needs, desires, concerns, fears – in general the things a person cares about or wants. Interests underlie people's positions in negotiation (the things they *say* they want). Reconciling interests in negotiation is not easy. It involves probing for deep-seated concerns, devising creative solutions, and looking for trade-offs. ...Negotiators who use an interests-based approach frequently ask other parties about their needs and concerns and, in turn, disclose their own needs and concerns" (L. Thompson 2005, 102).

Using definitions of this sort, most negotiation theorists believe that "[f]ocusing on interests fosters creativity, which in turn promotes economic efficiency and mutual gain" (Wheeler 2004, xlvi). They contrast concerns for interests positively not only with concerns for power but also with concerns for justice or fairness, which they see as more rigid and less open to rethinking and thus accommodation than concerns for interests (e.g., Ury, Brett, and Goldberg 1988, L. Thompson 2005, 103). Against this position, we contend that participants can learn how to discuss justice and fairness concerns in ways that foster changes in view and accommodation (Gutmann and Thompson 1996, 2004).

⁴⁰ This point opens up a complex discussion that cannot be explored further here. Nagel 1986 and other works on impartiality have sparked an immense literature pro and con (see e.g., Williams 1973, 1981). Our point here differs from Nagel's (1991) argument that workable institutions have to find some way of incorporating both impartial ideals and some (not necessarily dominant) self-interested motivations. We argue that in democratic deliberation, partiality constrained by fairness should be part of the constellation of values within the ideal itself. In the past some normative deliberative theorists have made impartiality a criterion for good deliberation (e.g. Nino 1996, Estlund 1993 [with caveats in n. 61]), while others have used as a criterion such terms as "generality" and "generalization" (Manin 1987) or "a general point of view" (Pettit 2003). Some have explicitly distinguished from impartiality their criteria of reciprocity (Gutmann and Thompson 1989, 59-63, 2004, 152-153), publicity (Bohman 1996, 40-46, 80-88), or universalism (Sunstein 1988, 1574 n. 195). Habermas distinguishes from impartiality (appropriate for "discourses of application" when judges or others decide on the basis of already justified norms) the criteria appropriate for "discourses of justification," when those affected decide in an open and free discussion among equals on the basis of each taking the internal perspective of the affected others. (Cite to come; my thanks to Cristina Lafont for this clarification.)

But we agree that concerns for interests, including narrow material self-interests, should play a role in the deliberative forms of negotiation.

Many normative theorists have emphasized the power of deliberation to transform individual participants' perceptions and even identities in the direction of the common good.⁴¹ These transformations are often important and laudable features of deliberation. Coming to understand another's reasons for a policy or a political approach to policy, for example, can lead one to discard one's own reasons as inadequate or wrong. Coming to understand another's needs can lead one to make the other's interests one's own.

When participants change their minds in deliberation, as in practice they often do, they most frequently do so because they have acquired new factual information.⁴² They also sometimes change their minds because they have detected logical mistakes in their reasoning, or developed new perspectives on the information they have, for example, taking a more long-range view. We usually speak of the "transformative" effects of deliberation not in these instances but instead when participants change their minds because they have adopted to some degree the perspective of another or taken the other's interests as their own. (This might be the case, for example, when a predominantly male faculty, or one whose members are mostly past the age of childrearing, decides to hold faculty meetings at a time that makes it possible for one of their number, with a child in daycare, to pick that child up on time.) In another form of transformation, participants also sometimes change their minds because the deliberation has evoked and strengthened perceptions of, and a commitment to, justice, which now overrides or modifies the self-interested perspective with which they entered the deliberation. They sometimes forge new understandings of justice in the deliberation. They sometimes change their minds because the deliberation has evoked and strengthened ties to a communal entity to which they had given less weight before deliberation and that now overrides or modifies their

⁴¹ E.g., Barber 1984, Elster 1986, Warren 1992, Mansbridge 1980, 1992, Chambers 1996. For skepticism, see Knight and Johnson 1994, 282ff.

⁴² Goodin and Niemeyer 2003. See also Luskin, Fishkin and Jowell 2003. The new information could include a) relevant circumstances not previously considered, b) relevant interests previously neglected, c) consequences not previously analyzed, and d) alternative decisions not previously contemplated.

original self-interested perspective. They sometimes help create, as they deliberate, the entity that now claims their allegiance.⁴³ Ideally, such transformations should create or increase conflict when before the deliberation real underlying conflicts were obscured.

Transformations of preferences, and even on rare occasions transformations of underlying identities, in the direction of a common good can be among the most valuable features of deliberation. To insist on a role for self-interest in deliberation is not to deny that value. The problem in practice is, as Archon Fung points out, “Discussions aimed at fostering and clarifying individual preferences, for example, by airing conflicts and advocating conflicting principles,” particularly if they encourage the exploration of self-interest as well as common interest, may render “participants less flexible and more self-interested” (Fung 2003, 348-9), thus less open to transformation. It is admittedly not easy to explore commonalities collectively, remain open to transformation, and forge a common good while at the same time exploring and keeping an appropriate grasp on one’s own self-interest and potential conflicting interests. But the task is neither impossible nor a contradiction in terms.

IV. The use of power

1. Power antithetical to deliberation

In all of the deliberative forms of decision-making specified above, power – in the sense of coercive power – is ideally absent.⁴⁴ Because, as Foucault points out, every human being is constituted by power relations, including coercive power relations, and at the same time exercises coercive power over others, the absence of coercive power is a

⁴³ The value of these transformations must, of course, be judged not only by the fairness of the procedures that produce them but also by external criteria regarding, for example, the value of the entity or common good that claims the participants’ allegiance. Such transformative processes may, for example, lead participants to adhere to a good for them and their allies that is bad for others.

⁴⁴ In Habermas’s early and later formulations, ideal deliberation embodies “the power-free flow of communication” ([1962] 1989, 202).

regulative ideal, impossible to achieve but serving in many circumstances as a standard against which to measure practice.⁴⁵

We understand power in general as A's preferences or interests causing outcomes, and coercive power as A's preferences or interests causing B to do what B would not otherwise have done through the threat of sanction or the use of force.⁴⁶ Coercive power arises only when the preferences or interests of A and B conflict. Of the two forms of coercive power, only the threat of sanction engages the will of the coerced. If I threaten you with a sanction ("Leave this room or I'll shoot you"), you can always accept the sanction and deprive me of what I want. You will your action, although you do not prefer it and it is not in your interests. Force differs from the threat of sanction in not engaging the will of the coerced. When I use force, I achieve my goal without a choice on your part (I carry you out of the room, kicking and screaming). Because force works against your interest without engaging your choice, it includes any structuring of alternatives that, unknown to you, is detrimental to your interests.

The power that is antithetical to deliberation is not power in general, which could include the simple capacity to act, but coercive power defined as the threat of sanction and the use of force against the others' interests. Lying is a form of force, thus of coercive power.⁴⁷ A's lying leads B to act, without B's willing it, against B's own interests in ways that B would otherwise not act.

⁴⁵ Some of the mystique of Foucault's analysis derives from conflating power as capacity with power as coercion. This analysis focuses only on power as coercion. For more on Foucault's understanding of power, see Fraser [1981] 1989 and McCarthy 1990. See below for the "second best" point that in non-ideal circumstances it is not always best to approach the ideal as closely as possible.

⁴⁶ More strictly, we define power in general as "the actual or potential causal relation between the preferences *or interests* of an actor *or set of actors* and the outcome itself," a definition adapted by the addition of the words in italics from Nagel's 1975 definition, which improves on Weber's and Dahl's definitions by including anticipated reactions. The categories of the threat of sanction and use of force derive from Bachrach and Baratz 1963. Our definition of coercive power applies only in situations of conflicting interests (see Lukes 1974, 2005 on power and conflicting common interests).

⁴⁷ As Sissela Bok puts it, "Deceit and violence.... Both can coerce people into acting against their will." (Bok 1978, 18). Referencing Arendt 1989, Mark Warren also concludes that "deceit is the principal means of coercion in a system that valorizes speech and persuasion" (2006b, 166). We adopt the category of "force" from Bachrach and Baratz 1963, recognizing that the word has physical and violent connotations that we reject. We do not use the word "force" (a form of *coercive* power) for actions that structure

In normal conditions, occupying the status quo gives one power through both the threat of sanction and the use of force, because established institutions and their accompanying social settings facilitate what everyone has always done, making actions that depart from this pattern subject to automatic and even unintended social and institutional sanctions. Those institutions and settings also propel participants in certain directions whether or not anyone is conscious of this propulsion or knows what the costs to different participants will be. The coercive power of the status quo becomes normatively problematic when it promotes the interests of one individual or group against the interests of another. In the deliberative ideal, including the ideal instantiated in a fully cooperative negotiation, coercive power should have no effect. In this ideal, even the status quo should have no weight other than through persuasion on the merits (for example, in an argument that if something has worked up till now, it will probably work in the future).⁴⁸

alternatives in ways not contrary to the other's interests. We avoid the word "strategic," because it can mean both 1) actions that merely take account of the potential reactions of other actors, a neutral usage that describes much ideal deliberation (see Johnson 1991), and 2) (the more common usage) actions, forbidden in ideal deliberation, that take account of others' potential reactions only in order to further the interests or preferences of one actor against the interests or preferences of others. Acts commonly described as strategic in the second sense, such as manipulating an agenda, withholding information, and misrepresenting facts or perceptions (which, except when paternalistic, arise only when interests or preferences conflict), involve forms of coercive power and are antithetical to deliberation. We thus do not describe as deliberation the kind of interactions analyzed in Austen-Smith and Feddersen 2006.

⁴⁸ Inducements pose a problem as yet unresolved in the theory of power. Many discussions of power (e.g. Bachrach and Baratz 1963) define coercion, as we have, to include threats of sanction and the use of force against an individual's interests but not to include inducements that enhance those interests. Most ordinary language speakers also call threats of sanction and the use of force "coercive," but do not use that term for inducements. One reason for this distinction is that in general coercion is a deprivation of freedom, and freedom itself is often defined by reference to the status quo. I "freely" choose to improve my lot in response to a promise, but am "coerced" when my lot is worsened in response to a threat. From an economic perspective, the distinction is nonsense. Gains and losses come in the same coinage. From a psychological perspective, the distinction has more bite, because the loss of a certain amount often decreases happiness more than a gain of the same amount increases happiness (Bentham [1789] 1961, 290, Kahneman and Tversky 1979). From a philosophical perspective that tries to capture, rationalize and improve normative intuitions, the status of inducements remains unclear (cf. Nozick 1972 on coercion, Barry [1979] 1991 on inducements). Classic deliberative theorists, rejecting bargains and negotiation as part of deliberation, bundle together both "threats and promises" (e.g. Habermas 1996, 166, Marti 2006; also Elster 1995). To correspond with common intuitions, we have singled out "coercive power" as antithetical to deliberation and define coercive power as the threat of sanction or use of force. Yet inducements may also be antithetical to ideal deliberation. Proposals for positive measures designed to achieve an integrated solution or produce a fair outcome are not properly inducements, just as predictions and warnings are not threats (see note 35 above).

We grant that the ideal of fully absent coercive power (henceforth simply “power”) is not only impossible to achieve but even hard to envision. We are all the products of power relations and exercise power by our very presence in the world. Yet in practice power plays a more or less important role in affecting the outcomes of any interaction. Human beings can recognize a rough spectrum that runs from the minimal role of power to a far greater role. The regulative ideal of absent power in deliberative interactions prescribes reducing to a practical minimum the threat of sanction and the use of force against another’s interests.

2. *Power versus power*

The most acceptable use of power consonant with deliberation arises in attempts to achieve balance when one party in a negotiation has more power resources than the other party and intends to use those resources to achieve her ends against the other’s interests or in other ways to depart from the deliberative ideal. In cases like these, it is morally acceptable for the other party also to exercise power or consonantly depart from the deliberative ideal.

Two arguments excuse these departures. The first, closer to the deliberative ideal, aims at creating the conditions for good deliberation. If in a two-party interaction one party has greater power than the other, the less powerful party may appropriately increase its power to equal the first in order to neutralize the first, thus producing as close as possible an approximation to the ideal of no power in the deliberation.⁴⁹ A deliberative democrat might, for example, justify strikes or the threat of strikes on these equalizing or neutralizing grounds.⁵⁰

⁴⁹ David Estlund gives the following example: “If you put a gun to my head, and I put a gun to your head in reply, your use of power has been (at least to some extent) countervailed, in the sense that its ability to skew the deliberations has been scaled back by my response. Still, the power-free ideal of the ideal speech situation...has not been restored” (2006, 87). This logic may lie behind the requirement in some negotiations that each party (e.g. labor and business) have an equal number of representatives, even though the number of individuals that, say, labor represents is presumably much greater than the number business represents. This neutralizing strategy works only in two-party situations.

⁵⁰ Lani Guinier argues along these lines that minority representatives should occupy crucial strategic locations in a legislature to insure that the process is responsive to their views (1992, 288-92).

The second argument is simply self-defense. Deliberative democrats should not be expected to cleave to the norms of deliberation when opposing parties do not meet those norms.⁵¹ From the perspective of self-defense, derogations from the deliberative norm are authorized to the degree of the other's derogation (Fung 2005).⁵² Jon Elster underscores "the harm that can be done by unilateral attempts to act morally" and enunciates the theory of the "second best," pointing out that "When others act nonmorally, there may be an obligation to deviate not only from what they do, but also from the behavior that would have been optimal if adopted by everybody."⁵³

The self-defense argument for the use of power plays a frequent role in everyday negotiation. Individuals in negotiation indulge in strategic misrepresentation, for example, in part because they expect that others will and they need to equalize the

⁵¹ Estlund thus argues, "Even for a theorist who advocates a deliberative model of legitimacy, it may be entirely consistent to recommend strategic, nondeliberative political activity for certain individuals or groups as a response to largely strategic action in the rest of the population. ...Indeed, tit-for-tat resorts to strategic behavior may even produce a more legitimate political process than if some voters acted strategically while others were naively public spirited" (1993, 1474; see also 2006, 81-87). Gutmann and Thompson also conclude: "Individuals and groups are not obligated to deliberate if others refuse to do so, and if doing so would put them at a further disadvantage. Citizens engaged in cooperative institutions do not have moral obligations to do their share unless they have reasonable assurance that others will not take advantage of them" (1996, 72-3). In addition, "Citizens may find it necessary...to refuse to cooperate with opponents, and even threaten retaliation. These strategies may be justified when, for example, they are required to gain attention for a legitimate position that would otherwise be ignored, and thereby to promote mutual respect in the long term" (1996, 90). See also Young 2001.

⁵² Drawing an analogy to civil disobedience, Fung argues that deliberative democrats should abandon deliberative means and pick up "the more common weapons of the political arena only with hesitation and only for compelling reasons" (402), following the principles of fidelity, charity, exhaustion, and proportionality. Fidelity requires that one "tolerate substantial imperfections in deliberative governance processes and outcomes" as well as imperfections in the larger structure (402-3). Charity requires that one act as if one's "would-be interlocutors are willing to engage in good faith deliberation, until they prove themselves unwilling to comply with the norm of reciprocity," exhaustion that one "refrain from using nondeliberative political methods until reasonable efforts to persuade and institute fair, open, and inclusive deliberations fail," and proportionality that one choose nonpersuasive means "according to the extent to which political adversaries and opponents reject the procedural norms of deliberation and the substantive values that ground it" (403).

⁵³ Elster 1986, xx, drawing on a line of thought begun by Lipsey and Lancaster 1956-57. E.g., in a collective action problem one might have in general a duty to cooperate, but if the other defects one might have a duty to defect in a tit-for-tat response that might induce the other to cooperate in the future.

balance.⁵⁴ In practice, self-serving bias often leads participants somewhat to overestimate the amount they must do to redress a balance, thereby encouraging escalation.

3. Power in implementation

Even if a group deliberates to genuine consensus on a common good in as close to a completely uncoerced setting as possible, the decision will still often have to be implemented through coercive power. Collective action problems must often be solved by participants agreeing to impose some form of coercion on those (including themselves) who, after the agreement, would otherwise rationally be tempted to defect. Much of modern government begins with the decision to use coercive power to respond to collective action problems.⁵⁵ In this paper we assume that democracies will use coercive power (in addition to deliberative processes) in implementing legislative decisions. We address here only the use of coercive power in the process of making these decisions.

V. Is the deliberative ideal impractical?

It is unrealistic to try to eliminate power from any situation, but not unrealistic in appropriate circumstances to try to approach that ideal, as with any regulative ideal. In real world negotiations, many incentives draw participants toward reducing power to a minimum. Even in purely self-interested negotiations with no commitment to a deliberative ideal, the potential for integrative agreements with joint gains produces incentives to honesty and the potential for repeated interaction produces incentives to fairness.

⁵⁴ Shell [2000] 2004, Meltsner and Schrag [1974] 2004, Freund [1992] 2004. Machiavelli similarly advised princes that “as [others] are bad, and would not observe their faith with you, so you are not bound to keep faith with them” ([1513] 1950, 64).

⁵⁵ For the structure of the collective action problem, see, e.g., Olson 1965, Hardin 1982. For Rousseau’s general will as a response to a collective action problem, see Grofman and Feld, 1988.

The logic regarding honesty is simple: full disclosure on both sides increases the chances of information coming out of an interaction that will allow the negotiators to find creative solutions and “increase the pie.” Non-disclosure creates only strategic advantage; it does not increase the pie.⁵⁶

Honesty in negotiation therefore takes the form of a classic collective action problem: It is best for both parties if both are honest, but it is (often) even better for each individual to be dishonest when the other is honest. As with all collective action problems, the parties will benefit collectively if they, or the larger society, can find ways of making the cooperative move “pay” individually, usually either through internal sanctions (morality) or external sanctions (social or institutional rewards or punishments). By changing the individual reward structure to make honesty more attractive than dishonesty, sanctions allow the individuals in the negotiation to reap the benefits of full disclosure.⁵⁷

The U.S. law of fraud institutionally helps solve the collective action problem of dishonesty. The law makes illegal any bargaining move in which the speaker makes a knowing misrepresentation of a material fact on which the victim reasonably relies, causing damages. Even silence is illegal when “the negotiator makes a partial disclosure that is or becomes misleading in light of all the facts” or “has vital information about the transaction not accessible to the other side” (Shell [2000] 2004, 58, 60).

This language in the law of fraud leaves considerable room for strategic misrepresentation. In essence, the law makes illegal only the dishonest behaviors that can be easily monitored and documented. It does not try, for example, to regulate honesty regarding either party’s reservation price or other internal states.⁵⁸ In an attempt

⁵⁶ This conclusion requires several caveats. On the normative side, Donald Moon argues that “genuinely free and uncoerced” agreement requires that “participants...can resist the demand for self-disclosure.” (1993, 95). On the efficiency side, many argue that parties to a negotiation should be able to withhold information that they produced with substantial investment on their part, in order to create an incentive for such investment, in analogy with a patent (Posner 2007, 111; Langevoort [1999] 2004, 398).

⁵⁷ For dishonesty in negotiation as a collective action problem, see Cramton and Dees [1993] 2004.

⁵⁸ What the law allows in market negotiations “may simply arise from a recognition by the law of its limited power to shape human behavior. By tolerating exaggeration and puffing in the sales transaction, by

to go farther, Roger Fisher proposes a “Code of Negotiation Practices for Lawyers” that utilizes informally the internal sanction of guilt and the external sanction of reputation. He suggests that lawyers voluntarily sign on to a proposed code (summed up by the general maxim, “[B]ehave toward those with whom you negotiate in ways that incorporate the highest moral standards of civilization” [1985] 2004, 25), make public their adherence to this code, and inform their clients of that adherence. If practices of dishonesty could easily come to light, public adherence to such a code, backed by reputation, could allow sincere adherents to negotiate only with other sincere adherents, reaping efficiency gains and leaving the non-adherents out in the cold.⁵⁹ This has not happened. Were such an informal effort to succeed, however, the result would both more closely approximate fully cooperative negotiation and in most cases produce greater efficiency in negotiation.

Fairness follows the same pattern as honesty. One significant external sanction against unfair dealings in the real world is the refusal of others to enter into negotiations with individuals whom they perceive as unfair. Whenever interactions with the structure of a collective action problem are voluntary, effective signaling can allow the trustworthy to seek out the trustworthy, leaving the sharp dealers to negotiate only with one another – usually far less efficiently.

Reputation (which triggers the sanction of withdrawal from interaction) therefore helps move actual negotiators toward the fully cooperative state. Where reputation is easy to establish, as in small communities, local norms promote honesty, fairness, and other cooperative behaviors. In larger, more impersonal, communities, where social sanctions are less effective and reputation is harder to establish informally, solving the collective action problem requires more formal institutions. To the degree that larger societies are able to invent, relatively costlessly, more sources of reputational information that can

refusing to make misstatement of one’s intention actionable, the law may simply have recognized the bounds of its control over human beings” (White [1980] 2004, 98).

⁵⁹ For the effectiveness of refusal to participate in voluntary collective action problems, see Gauthier (1986), Frank (1988), and Mansbridge (1990).

apply in a large-scale world of strangers, the more those societies will be, overall, efficient and successful in comparison to other societies.⁶⁰

Yet even without an effective public code of behavior, the frequent potential for integrated solutions and repeated interactions leads negotiation theorists to offer as “rules of thumb” maxims that include adherence to “basic values” such as “*Be honest. ...Keep promises. ...Consult. ...Be open*” (Fisher [1985] 2004, 29, his emphasis). The relation of these rules to success depends on the prevalence of interactions with a potential for both repetition and integrated solutions.⁶¹ When those conditions are in place, the rules are consonant with, and drive their practitioners in the direction of, fully cooperative negotiation. Accordingly, many individuals in close interaction, where dishonesty and unfairness become quickly known, find that their negotiations closely approximate fully cooperative negotiation. Power is not absent from these interactions, but it is tamed by other forms of power.

VI. Is the deliberative ideal dangerous?

Deliberative democracy is dangerous when aiming at the deliberative ideal distracts participants unrealistically from their conflicting interests or when the definition of a common good that emerges from unequal participation in deliberation benefits some participants more than others. These are common features in practice of aiming at deliberation. They are not, however, intrinsically necessary to the practice. As Follett pointed out long ago, “The first step towards integration is to bring differences into the open” ([1925] 1942, 36).

The deliberative ideal also has other dangers. To the degree that in practice aiming at the absence of power makes it more likely that participants in deliberation will not recognize

⁶⁰ See Cramton and Dees [1993] 2004 for examples in the U.S. of such institutions, such as the Better Business Bureau.

⁶¹ Note again Wetlaufer’s [1996] 2004 caveats about the relative prevalence of the conditions for integrative negotiation.

underlying structures of power, that aim will undermine the very equality and disclosure on which ideal deliberation depends. Agonist democrats are right in signaling the dangers of assuming that the members of a polity always have a common good that can be accessed through, in Habermas's words, "the unforced force of the better argument."⁶² It is particularly dangerous to assume that the most accessible and common arguments are not biased against the weak or that the weak will have equal capacities with the strong in any deliberative forum.⁶³

If one is concerned primarily with disadvantage to the weak, it is also true that certain forms of coercive power, such as sabotage or guerrilla war, can significantly harm the strong. In certain conditions, such as having a numerical majority or an advantageous strategic position like fighting on one's own turf, those who are individually weak may even acquire more power collectively than the strong. By definition, however, the strong have, all things considered, more power than the weak. In the absence of moral and institutional constraints, in a straight power struggle the strong will win. The search for fairness may in practice produce outcomes that marginalize or exclude some participants, and thus the results of every deliberation should be considered revisable. Democratic mechanisms should include the possibilities for reopening seemingly settled decisions. But in the presence of large power imbalances, many gains for the weak come about, in the right circumstances, not by means of coercive power but by means of persuasion, often based on considerations of justice. When the weak do not have a numerical or other tactical advantage, or when the costs of exercising coercive power are unequally high, as they are for many in structurally weak positions, the mutual use of coercive power will tend to harm the disadvantaged even more than the mutual use of persuasion. The civil rights, feminist, and environmental movements in the United States have succeeded, to the extent that they have done so, in large part not because they could marshal overwhelming power but because they could make arguments that resonated on their merits.

⁶² Habermas 1987, 130. For the agonist argument, see Honig 1993a, 1993b and Mouffe 2000. There seems to be no intrinsic reason why what Connolly calls "agonistic respect" (2002, 166) cannot be instantiated in democratic deliberation.

⁶³ Sanders 1997, Young 1996.

Power and deliberation are not necessarily antithetical. As we have seen, power is often necessary in an unequal world to help equalize the playing field before deliberation. In such a world, power is also necessary to facilitate the structures, such as rules against interrupting or making sure that all perspectives are heard, that make deliberation productive. Within deliberation, institutional arrangements with coercive power are often required to maintain basic rights, equality of opportunity, and the other conditions that help approach the ideal. After the deliberation, coercive power is often required to implement the decision.

VII. Is the deliberative ideal all there is to democracy?

Democracy is a practical form of decision-making that derives its normative legitimacy from the degree to which it approaches the ideals on which it is based. It derives its sociological legitimacy from the degree to which it works in practice, and that effectiveness in turn depends in part on its approaching the ideals on which it is based.

To attain significant sociological legitimacy, democracy requires normative ideals that can apply not only to situations of common interest or potential agreement on what is best for the polity, but also to the situations, far more common in national politics, of conflicting interests or irreconcilable disagreement about what policies are best. Thus deliberations in democracy must be structured to clarify conflict as well as commonality. When interests and opinions continue to conflict irreconcilably after this clarifying process, democracies need non-deliberative ideals and institutions that facilitate mutual accommodation and produce reasonably fair and acceptable decisions.⁶⁴ When, as is almost inevitable in these circumstances, the decisions that eventuate do not in fact meet

⁶⁴ For the legitimacy of non-deliberative forms of democracy, see, e.g., Walzer 1999 and Shapiro 1999. Many deliberative democrats have emphasized the complementarity of these mechanisms (e.g., See Manin 1987: 341-344 and 355-361, Gutmann and Thompson 1996: 79-91, and 2004: 79-90; Bohman 1996: chap. 2, esp. 83-95; Nino 1996; and Estlund 1997: 185, Waldron 1999a: 91-93, and Besson 2003).

every participant's needs, these ideals and institutions should also help keep the potential for conflict alive.⁶⁵

From a deliberative perspective, the non-deliberative institutions necessary for democratic decision may be considered legitimate when they result from agreements either in actual deliberations that sufficiently approach the ideal or in an appropriately constructed hypothetical deliberation, such as agreement in the original position (Rawls 1971). In deciding on such non-deliberative institutions, the deliberators must consider, in Rousseau's words, "men as they are," or in Rawls's words, "the facts of human psychology," realizing that human psyches can themselves be changed, for better or worse, by the institutions in which they act.

The non-deliberative democratic mechanisms that we believe free and equal individuals would choose in either real or hypothetical deliberation include aggregation through voting and negotiation among cooperative antagonists. Each of these involves power in the decision-making process itself. Thus each departs from the deliberative ideal. But because power is inevitable in the full spectrum of political life, the legitimacy of each mechanism is measured by ideals appropriate to its sphere. In democracies these ideals always include the freedom and equality of the contending parties.

1) *Voting*

Deliberative democrats have often downplayed the virtues and even anathematized the aims and mechanisms of voting -- whether in face-to-face assembly, in referenda, or for representatives who then make decisions binding on the voter.⁶⁶ Voting undoubtedly has the significant drawbacks of taking preferences as given, assuming conflicting interests, being frequently aimed at success rather than mutual understanding, and, in the form of a

⁶⁵ See Honig 1993a on remainders; also Schwartz 1999.

⁶⁶ See notes 7-9 above on deliberation versus aggregation, notes 22 and 71 above for complementarity.

secret ballot, not requiring justification to others and thus encouraging private-regarding impulses.⁶⁷

Voting has, however, one significant virtue. In important ways it is more inclusive and egalitarian than deliberation. In a polity of any size, it is impossible to give everyone a “say” in the literal sense of having one’s individual voice heard by all other members of the polity. Even in extremely small polities, it is almost always counterproductive to design institutions in which each member has a literal equal say, and impossible to design institutions in which what each member says is taken with equal weight. By contrast, voting has the capacity to bring every full member of the polity into the decision and give that member’s “say” an equal weight, at least in the decision as constructed. In doing so, the voting process makes a statement of equal respect parallel to, but qualitatively different from, the respect accorded by listening in a deliberation.

Deliberative democrats recognize the democratic necessity of some form of aggregation by voting after deliberation when interests conflict irreconcilably, negotiation to agreement is impossible, or an assembly simply runs out of time. Traditionally, aggregation by voting has taken the form of majority rule. Yet majority rule is not a fair method of aggregation when the question involves distributive outcomes in a deeply segmented polity with an entrenched minority (or minorities). In polities with cross-cutting cleavages (such as, in general, the United States, the United Kingdom, France, or Germany), an individual or group who loses on one issue may expect to win on another. But when a polity is segmented, so that economic, religious, linguistic, and cultural issues cluster together, the minority on one issue will be in the minority on another, and can expect to lose on all important issues. In such cases, majority rule is less fair than forms of decision-making based on one-person/one-vote that generate proportional outcomes.⁶⁸

⁶⁷ The privatizing effect of voting may have been exaggerated. In a large election, the small effect of any one person’s vote seems in practice to encourage both “expressive” voting to give voice to one’s values (Brennan 1993) and “sociotropic” voting for the common good (Kinder and Kiewiet 1979).

⁶⁸ See Mansbridge 1980 on proportional outcomes, Guinier 1994 on “taking turns,” and Lijphart 1977, 2004 on consociationalism. Lijphart’s theory of consociationalism, based on the mechanisms that have evolved in small segmented European societies (primarily the Netherlands, Switzerland, and Belgium), includes several features designed to accommodate minority segments, such as proportional representation

No form of aggregation is perfect. Procedures that meet some of the criteria of fairness – and even of equality – are likely to fall short on others. But in a democracy all aggregative procedures must meet the criteria that they acknowledge every citizen’s “status as an equal member of the polity” and protect them all against political outcomes that would place their prospects “in serious jeopardy” (Beitz 1989, xiii).⁶⁹ In societies with sufficient cross-cutting cleavages, majority rule with minority rights can meet this requirement. In such societies, as Gutmann and Thompson write, “Members of the losing minority can accept majoritarianism as a fair procedure even when it yields incorrect results because it respects their status as political equals” (1996, 27).

Although majority rule can meet the requirement of treating citizens as political equals, theorists differ on the reasons that make majority rule legitimate. Deliberative democrats tend to choose theories that stress mutual justification; others choose theories that stress the equal division of power.

Some deliberative theorists adopt a rationale for majority rule that may date from ancient Athens, concluding that all else equal, the majority is more likely than the minority to choose correctly.⁷⁰ Seyla Benhabib makes a version of this epistemic claim by stressing the burden of proof, writing that majority rule is a “fair and rational decision procedure, not because rationality lies in numbers but [because]...if a large number of people see certain matters a certain way as a result of following certain kinds of rational procedures

in the parliament and the civil service, segmental autonomy (often through geographical federalism), a grand coalition of elites from each segment, and a mutual veto among segments. Consociationalism has several drawbacks from a democratic perspective, including reifying and intensifying the segmented identities, assuming cohesion and identity of interests within segments, and requiring elite negotiation and consensus, thus minimizing popular participation. Majority rule aggregation also has democratic drawbacks, including not only the problem of entrenched minorities but also the problem of cycling, first pointed out by Condorcet and later by Arrow, in which the particular majority that wins depends on the order of the options up for vote.

⁶⁹ Beitz 1989, xiii. More recently, see Risse 2004 (critiquing Waldron 1999) for alternatives to majority rule that meet the criterion of respecting each citizen’s equal status.

⁷⁰ This rationale can be traced to Condorcet [1785] 1972. For Athens, see Mansbridge 1980; Kendall 1959 attributes a version of this theory to Locke.

of deliberation and decision-making, then such a conclusion has a presumptive claim to being rational until shown to be otherwise.”⁷¹ Christina Lafont makes the burden of proof claim more explicit, dynamic, and embedded in a deliberative process. She writes that in an ongoing deliberation, a majority vote tracks “*where the burdens of proof lie in the deliberative process,*” indicating “which side of the argument failed to provide convincing arguments in support of a given decision at a given time” (2006, 18-19, emphasis in original). In her view, those in the minority accept the decision not because it is correct or more likely than other choices to be correct, but because the vote against the minority makes them realize that they need to satisfy more effectively the criterion of public justifiability.

These deliberative theories hinge on the minority having reasons to respect a majority’s conclusion even when the minority disagrees with that conclusion. Such deliberativists understand majority vote as producing a majority conclusion, not majority rule. By contrast, theories of democracy based on power assume that sovereignty is at least in part a matter of will, not reason, and conclude that each citizen has a right to an equal part of that will. Theorists in this vein may simply define democracy as equal power.⁷² Implicitly or explicitly assuming conflicts in interests, they prescribe a fair resolution of the conflict through giving each participant equal power in the struggle.⁷³

⁷¹ Benhabib 1996, 72. Manin 1987, 359, in addition to arguing that majority rule after deliberation is legitimated by “in that context, the greater strength of one set of arguments compared to others,” points out that the process of majority rule “nevertheless institutionalizes the admission that there were also reasons not to desire the solution finally adopted” (on the rule’s respecting disagreement see also Waldron 1999, 111ff). Nino 1996 defends majority rule deliberatively as requiring more people to be convinced (and therefore provoking the most rational, universalistic arguments) than any other rule; McGann adds that the possibility of cycling makes majority rule more revisable than other rules (2006, 135ff) and defends the rule as appropriately structuring the deliberative process.

⁷² E.g. Lively 1975, Pateman 1970.

⁷³ Although we think the distinction between deliberative and power-based theories of majority rule is a helpful guide to underlying assumptions, no theorist has as yet espoused or worked through the implications of an explicitly power-based theory. Nor do deliberative and power-based theories exhaust the arguments for majority rule. Some justify majority rule through implicit preference utilitarianism, some “by something akin to the rule of insufficient reason” (Barry [1979] 1991, 27). In a formulation closer to ours (but that omits self-interest), Waldron evokes the equal respect embodied in the commitment to give equal weight to each person’s “opinion” on “matters of common concern” (1999, 13, 114ff).

Because the practice of politics often encompasses power as well as reason, and because sovereignty is at least in part a matter of will, we combine both deliberative and power rationales for majority rule. We see equal power in majority rule not as an ultimate ideal but as one ideal-based mechanism established to deal reasonably fairly with certain realistic non-ideal conditions. We assume that citizens facing distributive conflicts of interest will rarely conduct themselves like fully cooperative negotiators, as they would in the ideal. In moments of conflicting interest, those citizens will not always search for fair divisions. Nor, in the face of conflicting views of fairness, will those citizens search for a fair way of adjudicating between these views or splitting the difference fairly. Rather, power relations will enter into the production of decisions as well as into their application. Thus rather than ignoring ideals, a power-based theory looks to relevant ideals to deal with the absence of ideal behavior on the part of individual citizens. Just as in general equal citizen rights respond to the non-ideal tendencies of governments to deny those rights, so the specific right to an equal vote (or more broadly the right to equal power) responds to the non-ideal tendencies of individuals and groups in decision-making to exercise as much power as they can.

We therefore accept as legitimate some amount of voting as simply the exercise of power in the forming of a collective will. That voting has the greatest legitimacy when it comes closest to the ideals of free access and equal power appropriate to its practice, and when it is preceded by thorough deliberation under as close as possible to ideal conditions.

The process of voting is integrated with deliberation, and not just complementary to it, when the deliberation structures the voting, for example by ruling out options, creating single-peaked (or other) preference orderings or, on a more macro level, choosing the form of voting itself. The expectation of voting also structures deliberation, for example by forcing choices into a simple yes-or-no vote. When participants fail to disclose

information or otherwise game the deliberation knowing it will end in majority rule, these efforts at structure impede good deliberation.⁷⁴

The more the polity faces a question of basic rights or justice, the more important good deliberation becomes and the less that question should be settled purely on the basis of power, even equal power. One might be tempted to say that constitutional moments ought to be more deliberative and removed from the exercise of power than moments of ordinary politics, but at constitutional moments, power considerations are often critically important for the future stability of the polity. When a polity has genuinely generalizable interests, particularly ones of fundamental importance such as basic rights, those matters are ideally both deliberated upon in depth and deliberated to a genuine consensus.

Subjecting these matters to a vote conceived as a temporary conclusion that establishes a political burden for further justification is a practical and reasonable step when genuine consensus cannot be reached. The more the issue involves basic rights and fundamental justice, the less ought it to be decided by votes conceived simply as the exercise of power in a field of competing wills.⁷⁵

What does the deliberative ideal demand of a citizen facing a vote? Ideally, that the citizen first deliberate with others in the sense of actively seeking out opposing views, listening to those views, offering justifications of his or her own views, taking seriously the objections to those views, and being willing to revise his or her views on the basis of the objections of others and with the goal of promoting the common good and fairness to all concerned. If the citizen concludes that one policy or candidate would promote the common good more than another, the citizen should vote for that policy or candidate. If there does not seem to be a justifiable “common” good (loosely defined) but instead a relatively fair adjudication of conflicting values or interests, the citizen should vote for

⁷⁴ For an example of the forced binary choice, see Chambers 1996, 235; for the information-suppressing effects of such a binary choice on deliberation, see Mansbridge 1986; for the role of an expected vote in structuring legislative deliberations, see Waldron 1999, ch. 4.

⁷⁵ In these circumstances Arendt’s strictures, quoted in note 6 above, apply. On generalizable interests in Habermas and more generally, and on the greater importance of deliberation on foundational issues, see Chambers 1996, 102 ff and 187.

the fairest adjudication possible. If the citizen concludes, however, that this particular vote is no more than a way of aggregating self-interests, preferences, or competing values, then the citizen should feel free to vote his or her self-interests, preferences, or values as part of that aggregation process. Only a small number of votes in governmental matters will justifiably be construable, through this tripartite staged process, as no more than aggregations of self-interests or preferences. Such votes will tend to occur on the lowest level and in the smallest settings, for example when a third-grade teacher asks, “How many people want to play dodgeball? How many want to play baseball?”

2. *Fair bargains among cooperative antagonists*

In *Between Facts and Norms*, Jürgen Habermas recognized that democracies often face instances in which no “generalizable interest or clear priority of some one value” is “able to vindicate itself.” In those cases, citizens deliberatively establish the possibility of solving some of their differences through a negotiated agreement. They assess when and how negotiation is adequate and possible. In Habermas’s words, democracies require, in addition to deliberation, bargains that deploy “threats and promises...material resources, manpower and the like,” but the “bargaining power should at least be disciplined by its equal distribution among the parties.”⁷⁶ Thus for the bargains to be “fair,” their procedures should “provide all the interested parties with an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing” ([1992] 1996, 166-7).

All democratic theorists who define democracy as equal power would presumably endorse equal power in bargaining, whether in direct assemblies, legislatures, or legislatively-endorsed extra-parliamentary venues. But equal power is even harder to achieve in bargaining than in voting. Every feature that could affect the cost of leaving or not entering the negotiation affects bargaining power, including one’s best alternative

⁷⁶ Habermas [1992] 1996, 165-66, quoting Elster 1991 on threats and promises, etc. See also pp. 108-9.

to a negotiated agreement and the effects of the status quo on one's position. Possessing information and the resources to gather information, not requiring an immediate resolution, and many other factors all affect bargaining power. Moreover, as with the vote, equal power can be defined either individually or in context. An actor may individually have equal power with all other individuals, but if she is in a minority, particularly a permanent minority, equal power in the sense of "equal opportunity for pressure" will not translate into an equal or even a proportionate chance of "prevailing." Nor will it translate into outcomes in which all interests have equal consideration. With equal individual power but without sufficient allies in a given context, the interests of a participant may be given infinitesimal consideration. For the member of a minority, the principles of equal opportunity, equal power, equal outcomes, and equal satisfaction can each produce different outcomes, in both majority rule and bargaining.⁷⁷ Because the procedures for producing political equality are multiple and indeterminate (Beitz 1989), what constitutes a fair balancing of conflicting interests and values will often be intrinsically contestable.

Habermas suggests that bargaining processes count as "rational discourses" insofar as they are "regulated by discursively grounded procedures" ([1992] 1996, 107-8). He argues, moreover, that from a "normative perspective...fair compromise does not stand on its own, for the procedural conditions under which actual compromises enjoy the presumption of fairness must be justified in moral discourses" (Ibid, 167). While recognizing that human beings cannot in the long run think well without deliberating with one another, we suggest that some principles, such as equality, stand from a normative perspective more or less on their own. Rational deliberators choose them because they are morally right rather than their being morally right because rational deliberators have chosen them. If this is the case, the democratic procedural principle of equal power, whether in aggregative voting or in bargaining, can be defended independently of its

⁷⁷ Mansbridge 1980 and Beitz 1989 explore these distinctions. Who is to count as a participant is also intrinsically contestable and perhaps "essentially contested" (Gallie 1955-56). Habermas distinguishes between moral questions that affect all humanity and those that apply only to "the totality of social or subcultural groups that are directly involved" ([1992] 1996, 108). Yet neither the principle of direct involvement nor that of affected interests provides determinate boundaries (see Goodin 2007). See also note 5 above.

being discursively grounded. Yet equal power, as we have shown, is not a self-explanatory concept, particularly in the practice of negotiation.

The process of cooperative antagonist negotiation is frequently integrated with deliberation, and not just complementary to it. Often deliberation structures the negotiation, for example by ruling out options, defining the situation, or, on a more macro level, selecting the partners to the negotiation and setting the rules of the game (see Risse 2000). Even more often, deliberation (e.g. arguing over facts and norms) is deeply intertwined with bargaining and negotiation, determining which parts of a problem can be agreed upon deliberatively and which require negotiation through power. As Holzinger puts it, a “*pure* conflict of interest (free of all factual and normative disagreements) could be resolved by *pure* bargaining; however, a conflict of interest will rarely be free of normative and factual disagreement, and thus arguing is also needed.”⁷⁸ Even in international politics “truth-seeking arguing” can play an important role in negotiation among cooperative antagonists, as when James Baker convinced Michael Gorbachev that a united Germany would be less threatening within NATO than outside it (Risse 2000, 26).

Matters of value as well as material self-interest can also trigger cooperative antagonist negotiation with little deliberation. In Germany, for example, the controversy over embryonic stem cell research was settled temporarily by allowing existing stem cell lines to be used (giving the scientists some of what they wanted) but prohibiting the use of new stem cell lines (giving those opposed to the use of embryos some of what they wanted), in a context where, if power had not been relatively equally balanced, each side would have simply imposed its values on the other.⁷⁹

⁷⁸ Holzinger 2004, 200. Holzinger reports in detail on the mixed nature of speech acts within a failed cooperative antagonist negotiation. This particular negotiation (over siting an incineration plant) falls toward the deliberative end within the cooperative antagonist spectrum. A government-sponsored mediation, it had more speech acts coded as arguing than ones coded as bargaining, with a miniscule number of bargaining acts coded as threats and very few as promises, and with about 30 percent of the participants reporting that they changed some beliefs on “important factual issues” (although none changed their positions). See also Elster 1995 on mixed acts.

⁷⁹ In this case, prior deliberation had identified a winning position that for some members may have been genuinely integrative. For most, however, it was probably a compromise. We adopt the distinction drawn

Although ideally in democracies the negotiations of cooperative antagonists are constrained by equal power (as well as by open access and basic rights), cooperative antagonists differ from fully cooperative negotiators in not hesitating to use the power they have. The circumstances of power in politics thus pose another facet of the problem of the “second best,” making it problematic in reality for participants always to strive for ideal deliberative negotiation, including fully cooperative negotiation. If the game revolves around power, those who eschew power will simply lose. An even more fundamental critique of deliberation might argue that a spirit of partisanship, trying to win within certain rules of the game, along with an active spirit of contest and opposition, might in practice produce just the organization and protection of ideas that lively deliberation demands.⁸⁰

If, as we believe, the exercise of power is inevitable in human politics, then we must, like Madison, design democratic institutions that incorporate that power rather than ignoring it. Those institutions should include aggregation by voting. They should facilitate relatively productive integrative, distributive, and mixed forms of negotiation among the cooperative antagonists in the legislatures. They should probably also accommodate a role morality among legislators in which some conscious and strategic use of power is legitimate. Although we cannot in this space spell out the range and limits of the non-deliberative democratic mechanisms that deliberative democrats might recognize as legitimate, such democratic mechanisms will always require, in the ideal, some significant forms of liberty and equality for all participants.

by Risse 2000 between rhetorical reason-giving and deliberation on the criterion of whether or not the actors are prepared to change their own beliefs and be persuaded by the better argument. Thus Holzinger reports on the German parliament’s plenary debate over stem cell research that although coders categorized 1775 speech acts as arguing and only 8 as bargaining, among the ostensibly “argued” acts there were “not many” justifications of positions and “no dialogue” (2005, 250). Because the issue would be decided by majority vote and because the plenary, being public, served primarily to present the different positions to the public, one would not expect much genuine deliberation in this setting (Ibid., 40. See Elster 1995, 1998b and Chambers 2004, as well as empirically Checkel 1999 and Ulbert and Risse 2005, on the negative effects of publicity).

⁸⁰ For the virtues and ethics of partisanship, see Muirhead 2006; for the need actively to promote adversarial debate, see Manin forthcoming.

VIII. Conclusion

Deliberative democratic theory continues to “come of age” (Bohman 1998). In this contribution to its development, we assume that deliberation should clarify conflict as well as discovering and forging common interests. We argue that deliberation can and should in certain conditions include both self-interest and the negotiation of conflicting interests. Convergence, incompletely theorized agreements, integrative negotiation, and fully cooperative negotiations are compatible with deliberative ideals. Voting and the strategic negotiation of cooperative antagonists are not themselves deliberative acts but, when they follow democratic principles, can be accepted by deliberative theorists as legitimate components of democracy complementary to deliberation. Although we cannot here fully explore the questions of which forms of partisanship in voting and negotiation among cooperative antagonists are compatible with deliberation, in which contexts, or which forms are subject to which criteria of legitimacy, we consider some version of these forms of exercising power a necessary component of legitimate democracy.

Future theorists will want to investigate further the ways in which specific forms of bargaining and negotiation are compatible or incompatible with deliberative ideals. “Log-rolling,” for example, can muster unanimity among participants on the basis of balanced self- or group interests, but create externalities that are bad for the whole. Similarly, important parties can be left out of negotiations (e.g., labor and business can agree on solutions that are bad for consumers; rich countries can agree on agricultural subsidies that are bad for poor countries) in ways that subvert both deliberative and other democratic ideals. The role morality of cooperative antagonists in partisan politics can undermine both good deliberation and the equal distribution of power. The question of the legitimate use of power in democratic decision-making remains undertheorized, along with the relation of the second-best to democratic ideals and the mechanisms for insuring revisability in deliberation and decision.

We conclude by pointing out that “deliberation” is not just any talk. In the ideal, democratic deliberation eschews any form of coercive power in the process of coming to decision, although such power is necessary in implementation. Rather, democratic deliberation takes mutual justification as a central task. Ideally, participants in deliberation are engaged, with mutual respect, as free and equal citizens in a search for fair terms of cooperation. These terms can include the recognition and pursuit of material self-interests. Thus although democratic deliberation can include self-interest and negotiation, these aims and forms are constrained by the deliberative democratic ideals of equality, mutual justification, the search for fairness, and the absence of coercive power.

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