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Wisdom and numbers

Abstract. *There is a permanent tension between the requirements of substantive goodness or wisdom and those of formal legitimacy in public decision-making. This article charts the various attempts to reconcile the two requirements within decision rules. First, the history of decision rules from medieval times to the 19th century is briefly reviewed. Second, it is shown that the most popular contemporary attempt to justify a decision principle in epistemic terms, based on Condorcet's famous Jury Theorem, does not actually support democracy. Finally, it is argued that the contemporary theorists of deliberative democracy are ultimately struggling with the same old problem as the medieval political theorists. All attempts to combine the two requirements in a systematic way are doomed to fail.*

Key words. *Condorcet's theorem – Deliberative democracy – History of voting – Majority rule*

Résumé. *Il y a une tension permanente entre deux exigences de légitimité des processus de décisions publiques: une légitimité substantive en termes de qualité ou de sagesse de la décision; une légitimité formelle par le biais du nombre de voix. L'article inventorie plusieurs tentatives de réconcilier les deux exigences par le moyen des règles de décision. Une première partie montre que la difficile acceptation de l'autorité du nombre ponctue l'histoire des règles de décisions du Moyen Age jusqu'au 19e siècle. La seconde partie montre que la justification épistémique de la règle de majorité la plus évoquée par les théoriciens contemporains, celle qui est fondée sur le célèbre théorème de jury de Condorcet, n'est pas réellement congruente avec les principes de la démocratie. Finalement, la troisième partie explique que les théoriciens contemporains de la démocratie délibérative sont à la fin confrontés au même vieux problème que les théoriciens politiques médiévaux. Toutes les tentatives pour combiner les deux exigences de manière systématique sont vouées à l'échec.*

Mots-clés. *Démocratie délibérative – Histoire du vote – Règles de majorité – Théorème de Condorcet*

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We set two requirements for public or collective decisions. First, they should be *good*: reasonable, well informed and morally acceptable. Second, they should be *made in the right way*: by legitimate authorities who follow a procedure that is in itself legitimate. There is a potential tension between these two requirements, for decisions that are made in the right way are not always good decisions. This article is about the tension between these two requirements and about various attempts to resolve it.

The above two aspects of decisions are interrelated. One reason why a decision procedure is considered legitimate is that it is more likely to produce good decisions. Even those who emphasize the purely procedural aspect of decision-making would reject a procedure if it could be shown that it *invariably* produces worse decisions than the alternative procedures. However, many people would like to have a stronger connection between goodness and legitimacy. They think that the requirement of goodness should somehow be built into the decision procedure itself. This is understandable. There is something deeply disturbing in the idea that a purely mechanical, content-free procedure could determine what we should do. After all, we do not apply such procedures in the making of private decisions; why should such a procedure be decisive in our collective life? In 'An examination of the political part of Mr Hobbs, his Leviathan', the English political theorist, George Lawson, presented the basic problem involved in determining the legitimacy of decision-making procedures:

> In all Assemblies and Societies, which proceed by the way of suffrage, the major part concludes and determines for the whole, to avoid confusion and dissention, and to preserve unity and order. Yet so that the major part may err; because they are not infallible: and one good reason being evident should prevail against ten millions of vote; We find that most men in their suffrages, follow the example of some eminent person or persons, or their own affection; few are determined by reason. And in doubtful matters, men should first debate and thoroughly examine the thing debated, before they proceed to give their voices; and this is most properly and conveniently done, when after a diligent search, no preponderant reason can be found for either part of the proposition: Men's votes are inferiour to reason and superiour Laws, and are not good because votes, but because agreeable reason. (Lawson, [1657]1995: 33)

I try to chart the history of the various attempts to combine the two requirements in an institutional way. First, I briefly review the history of decision rules from medieval times to the 19th century. This story is usually presented as a march towards the general acceptance of majority rule. The simple-majority principle is, however, only one mechanical procedure among many. The opponents of majority rule have often asked: What is so special about a majority of 50% plus one additional vote? It may equally well be asked: What would make the will of a majority of two-thirds, or five-sixths, or even the will of a unanimous electorate, binding if the decisions

are not good? So, the real question is: Why accept the authority of any purely 'arithmetical' procedure? I try to show how political theorists and institution-builders have struggled with the problem for centuries. Second, I discuss one of the most interesting attempts to justify the majority principle by showing that it is likely to produce good decisions. Finally, I argue that the contemporary theorists of deliberative democracy are ultimately struggling with the same old problem.

Wisdom vs numbers: a concise history of *sanior pars*

Following Aristotle, the medieval and the early-modern theorists interpreted decision-making in *epistemic* terms. From this perspective, the aim of collective decision-making is not to solve interest conflicts but to find the truth of a proposition (for example, 'Is this the right policy or not?'). According to Aristotle, groups, when deliberating in common, are more likely to reach the truth than individual members. This epistemic view was, however, compatible with the unequal distribution of the decision-making power. Decisions should be reasonable, and there was no guarantee that reason would lie in numbers.

Melissa Schwartzberg argues that the practice of the exact counting of votes has aristocratic roots. According to Schwartzberg (2008a), its original purpose was to assess the independent votes of those, and only of those, who possessed the special faculty of political judgement, like the members of the Spartan council of elders (*gerousia*) and of the Athenian *areopagos*. Thus, voting had an epistemic function, but only when it was practised by those who were wise – and *equal* in worth. The masses, lacking the developed faculty of political judgement, expressed their public sentiments in major gatherings by shouting or waving their hands. Their individual preferences were not worthy of an exact reckoning; rough estimation was considered sufficient to reveal the current mood of the people. The practice of vote counting developed in democratic Athens. But even there, it was restricted primarily to circumstances in which preserving independence of judgement was paramount, such as jury trials (Schwartzberg, 2008a: 3). After the fall of Rome, the practice of vote counting lost its significance and was more or less forgotten.

For centuries, the Catholic Church was the most organized political institution in the Western World and the preserver and transmitter of the intellectual and political heritage of Antiquity. Moreover, its offices could not (legitimately) be inherited, bought or acquired through military superiority. Nevertheless, in the medieval Church there was no consistent and generally accepted method of making decisions or electing superiors. In the

early history of the Church, decisions were occasionally made using the simple-majority rule. Generally, however, the ideal of unanimity prevailed, and disagreement was seen as a defect, a sign that the Holy Ghost was not present: *in scisura mentis Deus non est*, as Gregory the Great said.

In Western political thinking, the ideal of unanimity or consensus survived in various forms to the 18th century. There is a connection between the ideal of unanimity and the epistemic conception of decision-making. Suppose that we are not quite sure who are the wisest members of the decision-making group, but we know that they are likely to be in a minority. Then, the unanimity rule is the only rule which *guarantees* that all the positive actions taken are approved by the wisest members, whoever they might be. Of course, the unanimity rule also allows ignorant but stubborn members to block actions supported by the wise.

Unanimity is not always attainable. In the 6th century, Saint Benedict introduced the famous rule that, in cases of disagreement, the *major et sanior pars* ('greater and wiser part') of the relevant assembly should decide. This formula was enforced by the Lateran Council in 1179, and it remained in canon law up to 1917. Until the 15th century, *sanioritas*, or reasonability of an opinion, could override mere numerical superiority. In all subordinate bodies, minorities thus had a loophole. A minority could always appeal to the superiors, arguing that, although it was a *pars minor*, it was nevertheless the *pars sanior*, so that a superior could legitimately change a decision made by the majority. The role of majority rule was to create presumption for the majority opinion: the *pars minor* had to prove that its opinion embodied *sanioritas* (Heinberg, 1926: 60; Moulin, 1953: 123–6). However, the problem of determining the proper weight was never resolved in a satisfactory way. The *sanioritas* of an opinion was deduced from *auctoritas* (the external attributes of the supporter of an opinion), from *meritum* (the advantages and merits of voters and candidates) and from *zelus* (their motives). How should these criteria be weighed against mere numerical majority? At the end of the 12th century, the canonist Huguccio proposed a precise interpretation. The number, the *auctoritas* and the *zelus* of the supporters of an opinion should be treated as equal; if two of the criteria were in agreement, they would together override the third (Pennington, 1995: 451). However, the notions of *auctoritas*, *meritum* and *zelus* themselves required further interpretation. William of Mandagout (at the end of the 13th century) argued that electors who were either more numerous, older or more dignified were likely to have better motives (Théry, 2001: 670). But what if these criteria pointed in different directions?

The problem was most acute in bodies that had no formal superiors. Popes asserted supremacy over all decisions made in the Church, but there was at

least one decision that could not be submitted to them – the election of a new pope. In papal elections, a regular practice was badly needed; in the years between 1000 and 1200, there were no fewer than 12 'antipopes', claimants to the papacy whose legitimacy was not generally recognized. Theoretically, the choice was supposed to be a unanimous one. Unanimity in papal elections was decreed by Emperor Honorius in 420, and as late as 1059 Pope Nicholas II confirmed the requirement. When unanimity could not be reached, the final choice was sometimes delegated to a small commission, which could be authorized to use less restrictive election rules (*compromissum*). In some capitulary elections, the task of the commission was to judge who were the *sanior pars*. But the commission itself had to be elected unanimously.

The first pope who was not elected unanimously was Innocent II (1130). After the death of his predecessor, a hastily assembled meeting elected him unanimously. However, 23 cardinals, who were not present at the election, elected an antipope, who also enjoyed the support of the Roman nobility. Finally the schism was submitted to Saint Bernard, who declared Innocent II to be the pope by appealing to the *sanioritas* rule. However, a saintly authority was not always available. In practice, it was gradually accepted that 'considerable majorities' did not need to justify the reasonability of their opinions. This practice was then specified as a two-thirds–majority rule. A decretal issued by Alexander III in 1179 required a two-thirds majority for the election of popes:

> Moreover, if anyone is elected to the office of pope by fewer than two-thirds …unless greater concord is attained, he shall by no means be accepted, and shall be subject to the aforesaid penalty if he is unwilling to humbly abstain. From this, however, let no prejudice to the canonical and other ecclesiastical decrees arise, with regard to which the opinion of the greater and the sounder part (*maior et sanior pars*) should prevail; for when a doubt arises with regard to them, it can be defined by the judgment of a higher power. But in the Roman Church, special decrees are made because recourse cannot be had to a higher power. (quoted from Colomer & McLean, 1998)

Thus, the cardinals were considered as equals. In other clerical elections, practices varied, but over the course of time, the majority principle gained ground. Some monastic orders, especially the Dominicans, applied the simple-majority rule. In the early 13th century, Johannes Teutonicus argued, against Huguccio, that numbers should always prevail in decision-making, unless the numerical difference was very small ('*Numerus prevalet zelo et auctoritati, nisi mumerus in modico excederet, tunc conferrem zelum vel auctoritatem cum numero*'; quoted from Pennington, 1995: 451). Of the popes, Innocent IV (pope 1243–54) referred to 'considerable majorities', and the Council of Lyons (1274) extended the two-thirds principle to other capitulary elections (Moulin, 1953: 130). In his decree *Ubi periculum* (1274),

Gregory X[1] confirmed the principle that '*non zeli ad zelum, nec meriti ad meritum, sed solum numeri ad numerum fiat collatio*' (not zeal to zeal, or merit to merit, but solely numbers to numbers are compared). However, up to the 16th century, many canonists still defended the *sanioritas* requirement and the *compromissum*.

In the medieval Church, there were, then, at least four competing principles: the ideal of unanimity, the qualitative principle that the opinion of the *maior et sanior pars* of an assembly should prevail, and the two purely numerical requirements – the simple (absolute) majority, and the two-thirds–majority requirement. According to Baty, the first modern instance of majority rule in church councils was at Pisa in 1409 (Baty, 1912: 21), but its legitimacy was still in doubt. At Basel (1437), the question arose as to whether the council deciding on the union with the Greek Church should be held in Savoy or in Italy. The majority appealed to their numbers, the minority to their reasonableness. This disagreement led to a deadlock. Finally, the Pope confirmed the minority outlook. The Council of Ferrara, immediately convened by the Pope, decided that only a two-thirds majority would be conclusive. Moreover, the Council sat in three orders – bishops, abbots and doctors – and unanimity of the orders was required. The Council of Trent (1545–63) affirmed definitively the simple-majority principle; the justification was that majority opinion was presumed to embody the required *sanioritas*. The closed ballot (*scrutinium*) was made obligatory; thus it became impossible to estimate the authority or merits of the voters. However, 'points of doctrine' could be established only by 'considerable majorities' (presumably the two-thirds), while 'points of reformation' could be established by narrow majorities. This caused endless disputes as to what were 'points of doctrine' and 'points of reformation' (Baty, 1912: 22–3).

In the Italian city-republics, the numerical rules were in general use and, in some cases (Venice and Florence), they were combined with another mechanical device, namely a lottery. The resulting rules were often very complex and detailed. By contrast, in many secular representative bodies outside the Italian republics, the status of decision-making procedures was more or less unclear. Usually, these bodies consisted of two, three or four chambers or estates. The members represented corporate groups and were often bound by the views of the corporations. Thus, there were two parallel problems: how the individual estates made their decisions, and how these decisions were combined as the decision of the whole of the body. Quite often, consensus was the official requirement, while the actual practices varied. In the absence of unanimity, majority rule was used as an auxiliary principle. The *sanioritas* principle was occasionally used by submitting disagreements to an outside arbitrator, and sometimes the unanimity requirement was circumvented by referring controversial issues to separate committees which

could apply less restrictive decision-making rules. For example, Alfonso V enforced the *sanioritas* principle in the Sardinian Parliament in 1446 – but there was no norm or precedent saying what it might mean in practice (Marongiu, [1949]1968: 139). In the Empire the majority election of the emperors was established in the Diet of Rhens (1338) and confirmed in the Golden Bull of Charles IV (1356). However, the ideal of unanimity remained prevalent in the Reichstag. In the Protestation of Speyer in 1529, the Protestant Estates refused to follow the Catholic majority and claimed exemption in religious matters. Although, in modern terms, the question was about rights, the Protestant Estates did not put the question in that way. Rather, they appealed to the unanimity principle as well as to the qualitative principle; the majority decisions were not considered binding because '*die vota nit ponderirt sonder numeriert warden*' (the votes were not weighed but only counted; Schulze, 1986: 52).

Writing about early England, Baty states that 'there existed no notion that a mere majority could control a considerable minority. The equation of the will of the majority to the will of the whole was simply unknown' (1912: 2). Although there were individual instances of majority decisions in British parliamentary history, the first clear cases date from the 15th century. The majority principle did not become decisive in elections to the English House of Commons until 1430. However, even three centuries later, in many constituencies the elections remained uncontested, that is, unanimous. According to Kishlansky (1986), election contests were still anathema to local communities in the early 17th century. Candidates were chosen by local elites in closed negotiations: the choices were based on rank and status, rotation and compromises. Sometimes lotteries were used. Contests did appear, but usually they were not 'political'; they were caused by personal animosities and sometimes by sheer misunderstandings and failures of communication. The local magistrates did their best to prevent contested elections. The ideals of unanimity and *sanior pars* were still predominant; as late as 1604, the losing candidate in the constituency of Worcestershire argued that he was actually entitled to the seat, for his voters were 'of better sorte and qualytie' (Hirst, 1975: 13–14). In some cases, the majority election had to be confirmed by a second, unanimous ballot with only one candidate. It was not until the 1640s that political divisions became accepted and institutionalized in England.

Wisdom and numbers: *sanior pars* in the 19th century

After the democratic revolutions, the traditional link between democracy and majority rule was re-established. Thus, Lord Bryce defined democracy as 'government in which the will of the majority of qualified citizens rules',

while, according to de Tocqueville, 'the very essence of democratic government consists in the absolute sovereignty of the majority'. But although the majority principle prevailed in the 19th century in general elections and in parliamentary decision-making, its range of application was still constrained in many ways. The conservatives criticized the 'purely numerical' majority principle and contrasted it with 'qualitative' considerations. It was a 'fundamental right of the Germans', declared the Prussian ultraconservative Ludwig von Gerlach, 'not to be counted piece by piece like herrings' (Anderson & Anderson, 1967: 316). The Swedish politician, Louis De Geer, wrote in the 1860s:

> The duty of a minority to obey the arbitrary will of a majority is actually an evil which cannot have a theoretical defence. In contrary, there exists for every man a duty to obey a law which is higher than the human law, namely that of truth and justice, and only such a basis of voting is defensible which gives the decision to those who are most able to understand and apply this higher law. (quoted from Mellquist, 1974: 106–7)

In England, Walter Bagehot warned about the increasing power of the lower classes: 'their supremacy, in the state they now are, means the supremacy of ignorance over instruction and of numbers over knowledge' (Bagehot, [1867]2003: 278). The conservatives of the next century continued the tradition: in his *Verfassungslehre* (1928), Carl Schmitt speaks in the same tones about 'the mathematical orientation toward the mere tabulation of voting results, which is a purely quantitative, arithmetic idea', and praises Rousseau, who knew that 'it is in no way democratic, if ninety corrupt persons rule over ten honourable persons' (Schmitt, [1928]2008: 280). Here an echo of the medieval *sanioritas* requirement can be detected.

Ultimately, the conservatives were just trying to square the same old circle. The 'qualitative' requirements could be institutionalized only in the form of purely 'numerical' restrictions and qualifications of individual voting rights, usually based on traditional social hierarchies. The most important 19th-century method was setting the suffrage limit: majorities were disenfranchised because of income, property and gender requirements. Moreover, many systems featured two chambers, and although these bodies themselves used majority rule in their decision-making, the concurrence of both chambers was often required for collectively binding decisions. Besides these obvious methods, there were several, partly complementary institutional solutions. First, there were the curiae, or non-territorial constituencies, usually based on taxation. In Prussia, for example, voters were divided into three classes on the basis of the taxes they paid. Each class elected a third of the electors, who in turn elected the deputies to the Landtag. The two classes of high-income taxpayers – 13–20% of the adult male population – could therefore dominate Prussian politics. This system did not establish a uniform pattern,

for the class distinctions were based on *relative* contributions. A *Junker* in a poor eastern precinct might belong to the highest class (perhaps alone), while someone paying the same absolute amount of taxes in a wealthy town might belong to the lowest class (Anderson & Anderson, 1967: 316–17). Similar class-based systems were in use in other German states. In Austria, there were four *curiae*: the great landowners elected 85 deputies; the members of commercial chambers, 21; the male inhabitants of cities, 116; and those of rural communes, 131. In the Danish local elections, the high-income taxpayers – one-fifth of all – elected a half plus one of the members of the communal councils (*sogneraadet*). Similarly in France after 1831, three-fourths of the members of the communal councils were elected by those with high incomes.

Second, multiple-vote systems were used, especially in local elections. In Belgium, owners of real estate had one additional vote and citizens with higher education two additional votes; in Saxony, voters had from one to four votes; and in the Swedish and Finnish local elections, voting rights were gradated, with voters deploying between one to one hundred votes, depending on the amount of taxes they paid. After the Sturges–Bourne Act in 1819, English local-government votes were also gradated, the maximum number of votes being six (Mellquist, 1974: 30–3).

Third, parliamentary representation was often indirect (for example, in France until 1816, in Germany until 1848, and in Norway, Prussia and Hesse as late as the early 20th century). After 1907, Imperial Russia established an extremely complex and capricious indirect system for electing the members of the Duma. The biggest landowners participated in the election directly, while the smaller landowners had to choose electors, and peasants' votes had to go through a third screening.[2] Thus, J. S. Mill's famous plural-vote scheme (Mill, [1861]1972: 283–90) – based on epistemic considerations – can be seen as an attempt to balance his radical proposal of general suffrage with a relatively familiar and widely accepted conservative element. After some consideration, Mill rejected an alternative traditional device, the use of indirect elections (pp. 293–8).

All the conservative 'anti-numerical' arrangements were brilliantly discussed (and ridiculed) by Max Weber in his important text 'Suffrage and Democracy in Germany' (1917):

> There is no getting away from the fact that the real and approximate *counting* of votes is an integral and essential element both of modern electoral contest and the conduct of business in parliament. Our romantics, for all their horror of 'numbers', will not change this fact. Let them stay away from politics if 'counting' seems to them too prosaic a device. (Weber, [1917]1994: 102)

Weber remarked that all proposed 'organic' alternatives to majority rule and equal suffrage – including the Prussian three-class system – were based 'purely and simply [on] electoral arithmetic'.

Wisdom in numbers: the epistemic justification of democracy

We have seen how, over the space of a thousand years, the epistemic conception of decision-making predominated. However, the problems attached to it seem to be unsolvable. If decision-making is an epistemic task, those who are wiser and possess more knowledge should have the final say in important decisions. But how can this be captured by a decision-making rule? In order to give the decisive say to those who are wiser or have better reasons than the rest, we have to recognize them. How can we know who the knowledgeable are? As the leading historian of the subject, Leon Moulin, comments: 'The meaning of the expression *sanior pars* has been disputed by canonists and theologians for six centuries without, of course, any agreement being reached: the attempt to "saniorise", to qualify, the principle of the vote has therefore failed' (Moulin, 1965: 38). Ultimately, the conception has simply worked to legitimize the power of traditional social hierarchies.

But the epistemic conception could also be applied for democratic purposes. Since Aristotle, many political theorists have argued that collectives are more likely to reach correct solutions than are their individual members. The largest collective is, of course, the people as a whole. In his defence of the sovereignty of the people, Jean-Jacques Rousseau clearly accepted the traditional epistemic conception; the sovereignty of the people was an instance of epistemic authority. As Rousseau famously explained in *Du contrat social*:

> When a law is proposed in the People's assembly, what they are being asked is not exactly whether they approve the proposal or reject it, but whether it does or does not conform to the general will, which is theirs; everyone states his opinion about this by casting a ballot, and the tally of the votes yields the declaration of the general will. Therefore, when the opinion contrary to my own prevails, it proves nothing more than that I have made a mistake, and that what I took to be the general will was not. (Rousseau, [1762]1966, Bk IV.2)

In a recent article, Melissa Schwartzberg (2008b) traces Rousseau's epistemic view back to Pufendorf's *Of the laws of nature and nations*. I have no quarrel with this view. For over a hundred years, Pufendorf's works were used as standard textbooks in jurisprudence and political theory, and any educated Westerner interested in these issues could be expected to be familiar with his ideas.[3] However, in accepting the epistemic conception, Pufendorf was simply presenting the prevailing view, which had dominated Western political theory for over a thousand years. Unlike his predecessors, Pufendorf had read

Hobbes – the most important modern critic of the epistemic interpretation – and recognized the relevance of the Hobbesian central question: 'Who shall be the judge?' When there is disagreement over substantive issues, there is also likely to be disagreement on who are the best experts. The most important decision to be made actually concerns the identification of the *sanior pars*. According to the epistemic conception, this decision should therefore also be made by those who are the wisest. But somebody has to have the power to arbitrate between the competing claims of epistemic authority. One of the central lessons of Hobbes's political theory was that the practical meaning of all the noble-sounding words like 'right', 'justice', 'Natural Law', 'equity' or 'wisdom' was dependent on authoritative interpretation. Hobbesian logic, confirmed by the actual history of the Church, demonstrated that the conception of *sanior pars* simply transferred the power of decision to the ultimate arbitrator. Hence, although a decision based on wisdom and on arguments was still the ideal, Pufendorf recognized that, if decision-making were to be conceived as a collective task, *at some level of hierarchy* an equality of wisdom had to be presumed. As Pufendorf wrote:

> … neither would it be always expedient to give any one man in the council … the power of controlling the whole matter by his vote, and declaring which of the opinions is the better. For if the prerogative should be granted to him, he might prefer the judgment of the smaller party to that of the greater; nay he might reject both Proposals on pretence that neither was good; and thus he would, to all intents and purposes, be the sole arbitrary governor of the state. ([1688]1934, VII, ii, 15)

In practical issues at least, all who were entitled to participate in the decision-making were to be considered as equally competent. Then the only possibility was recourse to a purely mechanical vote-counting procedure. Among such procedures, the simple-majority principle was the most efficient. For Pufendorf, majority rule was not based on a 'natural' ethical principle but on practical expediency. Ironically, the defenders of Absolutism – Hobbes, Filmer and Pufendorf – opened the road to the modern democratic conception of majoritarian decision-making by demonstrating that the traditional ideal, the government of the Wise, could not be institutionalized.

Rousseau, however, wanted to have it both ways. He wanted to defend majority rule on epistemic rather than on practical grounds. His answer to the Hobbesian question was that the ultimate judge has to be the people. This view may be called *epistemic populism*. As in the traditional conception, a legitimate political authority is a species of epistemic authority. Wisdom is in numbers.

According to Rousseau's epistemic populism, majority voting provides good evidence about the content of the general will. However, the problem of justification does not disappear when the epistemic authority is transferred

from the *sanior pars* to the people as a whole. How can we know that the evidence produced by voting results is actually good? We may present the following dilemma for epistemic populists. If there exists an independent general will which is not simply constituted by voting results, then either we can recognize its content or we cannot. If we cannot, it is uninteresting; but if we can, we recognize it either by voting only, or by both voting and in some other way as well. If we can recognize the general will by some other means, it cannot be a part of the justification of democratic institutions that they are needed to reveal the general will. If there is an independent way to reach the content of the general will (say, philosophical argumentation), why not use that method instead of voting? On the other hand, if the general will can be revealed *only* by voting, we have no way to assess the reliability of voting as a source of evidence. What we need is an independent justification for voting as a source of evidence of the content of the general will. We should, for example, be able to justify the claim that a majority is more reliable in its judgements than some self-proclaimed avant-garde. The required justification cannot be another, more reliable method, but must be a theoretical account that explains what a voting rule is supposed to do. Such an account would also indicate when voting is *not* a reliable source of evidence.

The 18th century produced an interesting theoretical answer to the problem. Condorcet's famous Jury Theorem shows that, if there are only two possible kinds of answers to a question – correct and incorrect – and if the average probability of an individual voter answering a question correctly is slightly better than random, the probability of getting the correct answer from an absolute (simple) majority of a group of voters is higher than the average, and it increases rapidly as the size of the group increases. To be more precise, the Jury Theorem is based on the following presuppositions:

1. There exists a correct alternative.
2. Voters have to choose between two alternatives only.
3. The voters are motivated by epistemic reasons; they are striving for truth, not trying to produce their most preferred outcome.
4. Votes are independent of each other.
5. The average competence of the voters – that is, the probability of their voting for the correct alternative – exceeds .5.

For example, when the average competence is .505 and the number of people participating in decision-making is ten thousand, the probability that the majority of them hit on the right solution is .8413. If their average competence is slightly higher – say .525 – the probability of their being right is .999. In other words, a sufficiently large electorate is virtually infallible! Here the epistemic populist can find support for her confidence that majority

voting provides reliable evidence on the content of the general will – supposing, of course, that the content of the general will is a matter of truth or falsity (Cohen, 1986: 35; Grofman & Feld, 1988; Waldron, 1990: 63–4; Estlund, 1993; Martin, 1993: 142–4; Nino, 1996: 127). This argument is prima facie an appealing one. Decision-making is conceived as an epistemic task, but there are theoretical reasons for believing that the *maior pars*, in sufficiently large groups, is almost always the *sanior pars*. The result challenges the old wisdom, repeated by F. A. Hayek (1960: 110), that majority decisions 'are bound … to be inferior to the decisions that the most intelligent members of the group make after listening to all opinions'. Although Rousseau could not know the result, which was proved only after his death, it seems to provide one coherent interpretation of his version of populism (Grofman & Feld, 1988). While Schwartzberg (2008b) contrasts Rousseau to Condorcet and connects him with Pufendorf, I would rather see them all as continuing the same epistemic tradition. In what follows, I point out some problems in the democratic version of the epistemic argument.

The problems of democratic authority in epistemic populism

First, contrary to the widespread claim, *Condorcet's Jury Theorem does not, strictly speaking, constitute an argument for democracy* at all – except when applied to relatively small communities, for the theorem does not give any support to the fundamental principle of modern democratic equality: the principle of maximal inclusion. The theorem is only an argument for collective decision-making based on majority rule. It seems to show that large groups perform better on decision-making than even the best among experts. But it does not show that the decision-making group has to be coextensive with the group of all adult citizens. According to the theorem, the epistemic competence of majorities increases rapidly when the size of the group increases: this competence is strictly a function of the absolute size of the group. If the average competence is slightly over .5, the majority in a group of, say, 100,000 citizens is already almost infallible. And no further increase in the size of the decision-making group will have any significant epistemic impact.

Of course, if the average competence were expected to be very near to .5 (say .50001) a further increase of the group might be motivated. But such exact measurements of competence do not make sense; if they did, it might be safer to apply them at the individual level and include only those citizens who are found to be sufficiently competent. For if the average competence is slightly below .5, the competence of majorities approaches zero when the size of the group increases. Thus, if the average competence were expected to be

very close to .5, an increase in the size of the group might actually reduce its competence below the critical limit. But supposing that we have good reasons to trust the voters' competence, a large modern state where only 5% of the adult population is entitled to participate in decision-making is, according to the theorem, practically as effective a truth-seeker as a democracy. Any attempt to extend the suffrage beyond that point seems to be wasteful.

Therein lies a deeper problem, however, related to the difference between epistemic and practical authority. In some contexts, a common deliberation process may be taken as epistemically authoritative. Suppose that I try, together with 10 other people, to solve a mathematical problem. When the task is concluded, I realize that all the others have reached a different solution from mine. Unless I know that I am a supreme mathematician, I have a rational reason for concluding that the others have probably got it right, even when I cannot follow their reasoning. Rousseau thought the fact that the majority disagrees with me about the general will is a similar reason for me to change my view about the nature of the general will. But is it? In pluralistic conditions, we may continue to disagree on the rightness of political decisions even when we see the consequences. I may believe that policy *x* is better than policy non-*x* and that, therefore, policy *x* ought to be implemented. However, I may recognize that the majority supports the opposite opinion. This fact may cause me to withdraw my view that policy *x* ought to be implemented under present circumstances. But the epistemic justification of democracy requires more. According to Rousseau, if the majority disagrees with me, I should also reject my initial judgment that *x* is better than non-*x*. This is in accordance with medieval practices: if a vote was taken, the losing minority often had a duty to publicly renounce its earlier opinion and to admit that the majority was right.[4]

For this reason, the epistemic interpretation of democratic decision-making is troubled by a motivational problem. Suppose that I am participating in democratic decision-making. Together with the others, I accept the ideal that our decisions should be optimal in epistemic terms, based on the best possible knowledge. Accordingly, I think that I am under a duty to contribute to our common search for truth – supposition (3) above. Consequently, I should try to maximize my own epistemic contribution. What is the most rational thing for me to do? Supposing that I know the content of the Jury Theorem, I recognize that the majority in our democratic community is much more likely to find the correct solution than I alone. I may suspect that my competence to hit on the correct solution is not much higher than the critical .5, and it may even be lower. The majority, however, is known to be almost infallible. For me, the most rational thing to do is try to find out what the majority thinks and to vote with it, rather than try to form an independent opinion.

And my reasoning is faultless. If the conditions of the theorem do hold, and if my suspicions about my own competence are correct, my voting with the majority rather than trying to make up my own mind is likely to increase the total competence of the group. But, of course, we all find ourselves in the same situation. The more numerous those who think this way, the smaller the epistemic competence of the majority, for then our votes are no longer independent of each other as condition (4) requires.[5] At the limit, when we all try to rely on the majority opinion, there is no majority opinion to be relied on. This problem of collective action arises from the impeccable motive of maximizing the value of individual epistemic contributions – but it may be reinforced by the fact that forming an independent opinion about an issue also requires some effort. I think that this motivational problem is a real one for some decision-making bodies. 'Groupthink' ('crowd mentality' for the early social psychologists) is a real phenomenon.

But there is a further problem. Consider the normal case: a majority decides for *x*, but there is strong opposition (say 45%). The opposition insists, even after the decision, that the correct alternative would be non-*x*, and it constantly works to get the decision reversed in the future. In other words, a significant number of the members of the decision-making group refuse to accept the epistemic authority of a procedure that is supposed to be almost infallible. In light of the Jury Theorem, this is clearly irrational. But if almost half of the decision-makers are irrational, is the Theorem really applicable? The very existence of a significant post-decisional opposition seems to be evidence against supposition (5) that the average competence of the total group is over the required .5! These oddities indicate that the epistemic argument for democracy proves 'too much'. The problem shared by all versions of the epistemic view of decision-making is that, according to them, persistent opposition is unreasonable.

However, we usually think that not only is opposition often reasonable but it actually plays a vital role in the continuous functioning of democracy. In other words, it seems perfectly reasonable to think that *x* is the policy that – given the democratic verdict – should be implemented, but non-*x* is nevertheless the best policy. In a sense, the task of a normative theory of democracy is not only to justify the power of majorities; *it is equally important to justify minorities* – most importantly their right to dissent even after the decisions have been made.[6] Epistemic theories are unable to perform the latter task. One possible way out of this problem is to distinguish between different decisions. In some cases post-decisional opposition is reasonable, in other cases it is not. If values, unlike factual issues, are inherently controversial and if democratic decisions invariably have a value aspect, persistent opposition may be justified, even in the best of all worlds, when the issue at

hand is a value issue. Robert Goodin uses this strategy in his recent book, according to which, democratic processes possess an epistemic authority in factual but not in evaluative questions. He writes:

> The epistemic power of majorities, when dealing with intersubjectively shared facts, is what underwrites the rationality of majority rule. Their lack of any epistemic authority, when it comes to matters of evaluations, is what underwrites the rationality of persisting opposition. (Goodin, 2003: 145)

But if the authority of majorities on value-issue decisions is not based on epistemic considerations, what is its source? The supposed epistemic authority of majorities over factual issues does not explain this; indeed, given that most important issues dealt with in democratic decision-making are value issues, the achievements of the epistemic theory of democracy are radically diminished. Goodin's distinction between factual issues and value issues moves us back to square one. The authority of democratic processes cannot be explained in epistemic terms. If we have to comply for Hobbesian reasons (in order to avoid permanent disagreements and to get things done), there is still no explanation as to why we have to comply with the value judgements of the *maior pars* rather than those of the *sanior pars* when these happen to be different groups.

Consensus as an ideal

Discussion was not a part of Rousseau's epistemic conception. By contrast, the mainstream from Aristotle to Lawson emphasized the aspect of collective deliberation in decision-making. The wisdom of the Many was based on their ability to put together their individual pieces of knowledge and experience in common discussions. The Aristotelian deliberative ideal was predominant in the medieval theories of collective decision-making, and it was still visible in the early-modern republican traditions. But the theorists of monarchy, too, reserved some room for deliberation. Handbooks for princes and legal treatises emphasized the need for 'counsel' and 'advice'. Even the absolutist rulers were not free to make decisions alone. They should govern wisely, with the help of the King's Council and of similar bodies. The task of such bodies was to deliberate, discuss issues and to make recommendations. Thus, while the early-modern writers gave more and more space to the 'will' at the expense of 'reason', collective deliberation did not disappear from the picture. Hence its important role in the political theories of the Enlightenment, for example those of Kant and Condorcet, was a continuation of a long tradition rather than a new turn. Although the late-18th- and early-19th-century liberal

tradition partially adopted the language of 'interests', and saw collective decision-making in more adversarial terms, it still preserved something of the old conception. The ideal accepted by liberals like Benjamin Constant or J. S. Mill – and criticized by the self-proclaimed 'realists' of the Right and of the Left – was still 'government by discussion'. Before the recent resurrection of the deliberative ideal, the last generation of the Anglo-Idealists (Sir Ernest Barker and A. D. Lindsay) emphasized the role of discussion in democratic decision-making. But they were swimming against the tide of political theory.

Again, while the deliberative view stressed the collective nature of decision-making, there was nothing *inherently* democratic in it. While all significant viewpoints should be heard, the power of decision was a different matter. Authoritative participation was justified only and insofar as it improved deliberative performance. Aristotle was not, after all, an unqualified supporter of democracy, nor were the medieval conciliarists or the early liberal 'democrats', in the modern sense. Edmund Burke's famous speech to the electors of Bristol is certainly one of the most eloquent defences of deliberative decision-making ever made; but Burke would never have called himself a 'democrat'.

The recent resurrection of the deliberative ideal in democratic theory could be seen partly as a reaction against the interest-based conceptions of democracy that have flourished since the Second World War. The latter include the utilitarian conceptions, the Schumpeterian elitist-realist tradition, various versions of competitive pluralism and the theory of public choice. Thus, the distinction between *aggregative* and *deliberative* conceptions of democracy is a common starting-point for most deliberative theorists (Elster, 1986; Miller, 1992: 55; Benhabib, 1994: 29; Gutmann & Thompson, 1999: 13–20, Ferejohn, 2000, 82–7). To quote Benhabib:

> A mere aggregation of majority preferences could not claim legitimacy because the basis on which the preferences of the minority were discounted could not be stated; neither could such a procedure claim rationality because no grounds could be given as to why the aggregation of majority preferences would result in a better and more enlightened decision than conclusions reached by some other procedure. (1994: 29)

The supposed contrast prevails between rational deliberation and aggregation of majority preferences; as we have seen, a similar contrast was already present in medieval and early-modern political theory, exemplified by the quotation from Lawson. For Habermas and for those relying on his ideas, the notion of ideal communication is central. In an ideal communication community, all the members would discuss freely until a rational consensus was reached. This could be characterized in the following rules: each subject is allowed (1) to participate in discourse; (2) to call into question any proposal; (3) to introduce any proposal; (4) to express attitudes, wishes and needs.

Moreover, (5) no speaker is to be hindered by compulsion; (6) the acceptance of a proposal is based only on the force of the best argument; and (7) the outcomes, as well as reasons supporting them, are universally agreed. Other deliberative theorists suggest similar lists (Cohen, 1989: 22–3; Benhabib, 1994: 31; Postema, 1995: 356–60).

What is common to all these views is that an ideal discussion, conducted according to the rules, is supposed to lead to a substantive consensus on decisions and on reasons behind the decisions. As in the medieval and early-modern views on collective decision-making, in this view the majority decisions are basically seen as imperfections of the decision process. To quote Barber: 'majoritarianism is a tribute to the failure of democracy: to our inability to create a politics of mutualism that can overcome private interests' (1984: 198). Elster concludes that, in a Habermasian ideal community, 'there would not be any need for an aggregating mechanism, since a rational discussion would tend to produce unanimous preferences' (1986: 112). However, most theorists of deliberation do not see consensus or unanimity as a real alternative to voting. Rather, it is seen as a regulative ideal in the Kantian sense of the term. A regulative ideal has two functions. First, it guides practical action: the procedures and practices governing real discussion may approximate the ideally rational procedures more or less closely (Postema, 1995: 360; Freeman, 2000: 379). As Cohen says, 'the ideal deliberative procedure provides a model for institutions, a model that they should mirror, so far as possible' (1989: 26). Second, a regulative ideal provides a standard for the criticism of actual practices; according to Dryzek, 'any individual communication, collective decision, or social practice that could only be justified by diverging from the precepts of ideal speech is indefensible' (1990: 57).

The fundamental question is not whether the conditions of the ideal communication can be realized (they cannot) but whether they can meaningfully be approximated. The idea of an 'approximation' of an unattainable but multidimensional ideal creates problems of its own. It presupposes a measure of closeness; otherwise it would be impossible to judge whether one institution or decision lies closer to the ideal than another. Because the ideal is a multidimensional one, the dimensions have somehow to be weighed. And, in some cases, the attainable 'second best' may turn out to be quite unlike the unrealizable ideal.

Before confronting these difficulties, however, it is necessary to say a bit more about the justificatory role of consensus in the theory. Most deliberative theories are versions of the epistemic view (Freeman, 2000: 384–9). In ideal conditions, agreement can be taken as a reliable sign of truth. This kind of theory has its obvious appeals. It possesses the charming simplicity of all great rationalistic programs. However, its implications for democratic theory

are far from clear. Is the consensus or convergence of opinions supposed to have an indicative or a constitutive role? Is the truth or validity of norms we are deliberating on an independent 'thing', as it is for Rousseau and in versions based on the Jury Theorem? Or is it instead constructed in the very process of deliberation? Some theorists of deliberative democracy have opted for the latter solution. According to the latter, the basis of the validity of norms is not found in the external world; it is a product of the consensus-oriented deliberative process itself (Cohen, 1989: 29; for critical comments, see Christiano, 1997: 35; Gaus, 1997; Freeman, 2000: 391–3). However, the constitutive interpretation seems to be circular. Suppose that we all become supporters of the above-described view. Then, we will believe that a norm or a sentence is true or valid if and only if we can reach a rational consensus, based on common argumentation and deliberation, that it is true or valid. What, then, are we supposed to argue and deliberate about? What claims or statements may we rationally bring into the process if we are already aware that we have no rational reason to accept a claim or statement unless it is a product of the very process? How can I sincerely claim (and defend my claim) that x is required by the common good if I know that its being required by the common good is not independent of the general acceptance of my claim?

No similar problem arises if a reasoned agreement is regarded as a fallible indicator of an independent truth rather than as a criterion of truth. However, the problems that troubled other versions of epistemic populism (for example those of Rousseau and Condorcet) raise their heads. But the epistemic version of the deliberative theory also has problems of its own, and these additional problems are related to the strongly idealized nature of the Habermasian model. An agreement can be taken as a reliable indication of truth, at least in the ideal conditions if, and only if, ideally rational reasoners are bound to reach an agreement, sooner or later. (This kind of view is shared by people as diverse as Habermas, Rawls – when discussing the Original Position in *A theory of justice* – and the game theorists.) But if we accept this view, it is not clear why the consensual ideal community could not be replaced by the ideal of a single super-rational reasoner. Why could not the supposed convergence towards the truth take place in a single ideal mind? Is the model still 'non-monological' in some deeper sense? Of course, the idea of such a supermind is incompatible with our finite nature – but so is the idea of a community of ideally rational reasoners. Our separateness, the fact that we are different individuals, makes it possible for us to acquire differing perspectives, and therefore to contribute to the common discussion. This was the fundamental point made by Aristotle in his defence of the wisdom of the Many. But the same separateness may also make disagreements unavoidable. Disagreements are as much a part of the human condition as our shared rationality.

Nicholas Rescher (1993: 11) gives an illuminative list of the possible sources of disagreement among rational persons: the diversity in experiences and epistemic situations, the variation of 'available data', an under-determination of facts by data, the variability of such cognitive values as security, simplicity, etc., and variation in cognitive methodologies. Can 'rational discourse' iron out all aspects of our separateness? Of course, all depends on the description of the ideal situation. A sufficiently idealized description of discourse abstracts away most aspects of our separate existence. For example, Robert Alexy characterizes 'ideal discourse' as a dialogue conducted 'under the conditions of *infinite time*, unlimited participation and complete absence of coercion..., full empirical information, perfect ability and willingness to switch roles as well as complete absence of prejudice' (1995: 113). According to Carlos Santiago Nino, 'democracy can be defined as a process of moral discussion with a *time limit*' (1996: 118).

An idealization is, by definition, a counter-factual description. In other words, it is necessarily untrue. Nevertheless, it is possible to distinguish between better and worse idealizations; some idealizations are not only untrue but also implausible and unworkable. In the last quotations, taken from Alexy and Nino, I have emphasized the phrases 'infinite time' and 'time limit'. We may concede that our disagreements are, indeed, irrelevant if there is literally no time limit for deliberation. Although the Habermasian consensus model is very unlike the Paretian unanimity models formulated by constitutional economists like James Buchanan and Gordon Tullock (1962), these models have at least one thing in common. In the Paretian models, consensus or unanimity is the ideal when transaction costs can be ignored. Only the 'friction', the costs related to the negotiations needed to reach unanimous decisions, makes closure rules such as the majority principle rational. In the ideal worlds of constitutional economists, as well as in those imagined by deliberative theorists, there are no urgent needs to be satisfied, no threatening prospects which require immediate action, no dangerous ongoing processes to be controlled. In such a world, the temporal dimension can be ignored; discussion and negotiation have no costs. But then, the situation in which the reasoners find themselves is not really a practical decision situation. *If there is no time limit for deliberations, there is no real need to make any binding decisions at all*. This supposition makes the models a-political: if there is no need to make binding decisions, there is no politics.

In real-life political decision-making we might, perhaps, try to approximate a situation where participation is literally universal or from which all forms of manipulation have been abolished. But we cannot meaningfully approximate a practical decision-making situation in which there is no time aspect,

for it is not a practical decision situation. The timeless model reflects the nature of theoretical rather than of practical discussion. In politics, there is always the Hobbesian necessity of having a final and supreme way of making binding decisions within a limited (sometimes very limited!) time period. There is no analogous need in other truth-seeking communities. Yet another way of putting the same issue is this: under the unanimity or consensus rule there must be at least one outcome that can be imposed non-unanimously. As long as there is no consensus, the status quo ante or some other privileged state of affairs must prevail, even when opposed by almost all decision-makers (Rae, 1975). It is a mistake to characterize consensual decision-making as inherently less coercive than majoritarian decision-making.

Deliberative defences of the majority principle

Most deliberative theorists accept the practical need for a closure rule. But a problem remains. In practical contexts, the existence of a time limit forces a closure, but it does not force us to accept any particular rule of closure. Now, the problem of the multidimensional nature of the deliberative ideal becomes relevant. If decision-making is modeled as a truth-seeking process, why should we suppose that, in the absence of a rational and universal consensus, a less than fully rational majority consensus is the best 'approximation' of a rational agreement in practical issues? Why is the closest approximation of the ideal not, for example, a rational consensus among only those who are wise and well informed? As Benhabib (1994: 29) said, some ground has to be given to explain why 'the aggregation of majority preferences would result in a better and more enlightened decision than conclusions reached by some other procedure'.

Cristina Lafont admits that providing a deliberative interpretation of majority rule is perhaps the hardest task of a defence of the deliberative ideal. According to Lafont, an adequate defence has to be given in epistemic terms: if a minority gives its assent to majoritarian outcomes 'for procedural reasons *that are unrelated to any epistemic features of the democratic process*, the deliberative model makes no essential contribution to a theory of democracy' (Lafont, 2006: 18; original emphasis). This is not a minor issue. Consider the following theses: (1) consensus is the ideal form of decision-making, (2) it is ideal specifically for epistemic reasons, but (3) in practice it is unattainable and has to be replaced by the (simple or qualified) majority principle, while (4) the adopted rule is purely a convenient device, without any special epistemic virtues. Thesis (4) simply cuts off the fundamental connection between epistemic reasons and decision-making.

Consequently, many deliberative democrats have tried also to defend majority decisions in epistemic terms. In other words, they have argued that, although majority decisions fall short of full consensus, they tend to be better and more enlightened than conclusions reached by other procedures (including an agreement among the wise). This provides reasons for minorities to accept the legitimacy of majority rule. According to Seyla Benhabib:

> [I]n many instances the majority rule is a fair and rational decision procedure, not because legitimacy resides in numbers but because if a majority of people are convinced at one point on the basis of reasons formulated as closely as possible as a result of a process of discursive deliberation that conclusion A is the right thing to do, then this conclusion remains valid until challenged by good reasons by some other group. It is not the sheer numbers that support the rationality of the conclusion, but the presumption that if a large number of people see certain matters in a certain way as a result of following certain kinds of rational procedures of deliberation and decision-making, then such a conclusion has a presumptive claim to being rational until shown to be otherwise. (Benhabib, 1994, 33)

Similarly, Habermas defends the presumptive acceptability of majority decisions for epistemic reasons:

> Majority rule retains an internal relation to the search for truth inasmuch as the decision reached by a majority only represents a caesura in an ongoing discussion; the decision records, so to speak, the interim result of a discursive opinion-forming process. To be sure, in this case the majority decision must be premised on a competent discussion of the disputed issues, that is, a discussion conducted according to the communicative presuppositions of a corresponding discourse. (Habermas, 1996: 179)

Thus, Benhabib and Habermas acknowledge the Hobbesian necessity to make a binding decision within a limited time period. They defend majority decisions as the epistemically second-best alternative when a full consensus is not attainable. This is coupled with the idea that, because majority decisions are less than fully rational, their validity is also a limited one. Both Benhabib and Habermas emphasize the provisional nature of majority decisions (cf. also Postema, 1995: 271–2; Gutmann & Thompson, 2004: 6–7, 110–19).[7]

What do Benhabib and Habermas actually claim? Under one reading, they seem to argue that a majority decision somehow predicts the likely result of a reasoned consensus. Now, we saw that the relation between a reasoned consensus and the validity of a decision might be understood in two different ways. If the validity of the decision is constituted by a unanimous agreement, a majority decision cannot be said to have any 'presumptive' validity that binds those who have not yet agreed. If, more plausibly, the validity of a decision or a norm is an independent fact and the agreement is only an indication of this validity, a separate argument is needed to show that, wanting a full consensus, a majority decision is the next-best indicator of validity. Here the deliberative formula remains ambiguous in the same way as the old

maior et sanior pars formula. If there is no consensus, somebody has to submit. Why should it be the *minor* rather than, say, the less reasonable part? Does the voting result provide the minority with an additional reason to believe that its view is not the correct one? Why does it not provide a similar reason for the majority to doubt its own opinion? Benhabib claims that 'sheer numbers' do not 'support the rationality of the conclusion'. But the very meaning of the majority rule is that 'sheer numbers' do matter: '*solum numeri ad numerum fiat collatio'*. It is not enough to say that 'a large number of people see certain matters in a certain way', as Benhabib puts it; the necessary and sufficient condition is that it is strictly the largest number.

Cristina Lafont provides a slightly different interpretation for the 'presumptive validity' of majority decisions (2006: 18–20). According to her, majoritarian decisions can be interpreted as indicators of where the *onus of argument* lies at the particular moment of the deliberative process. Now, the notion of the onus of proof is a complex one. In theoretical discussion, the onus of proof is determined by the dialectical situation: for example, a participant who brings new claims to the discussion is said to have the onus of proof. She has the burden of showing that the claims she makes are supported by reasons. After that, the burden lies on those who want to challenge her claim. By contrast, in many practical contexts the onus of proof is partly determined by normative reasons unrelated to the task of searching for the truth. In a court trial, for example, the prosecuting side has the onus of proof: they have to show that the accused is guilty. (In the American jury system, the prosecutor has to convince all the members of the jury.) Or, when new drugs or chemical products are accepted for sale, their manufacturer has the onus of proof of showing that they are not dangerous. In these cases, the burden is not dependent on epistemic reasons, but on norms which prescribe that it is morally better to err in one direction than in another. If, as Lafont claims, majority rule can be interpreted as an onus-of-proof rule, this role of the rule may still be explained by non-epistemic normative considerations, as in the trial case.

The justification of the majority principle provided by Carlos Santiago Nino (1991, 1996) is similar to although more detailed than those given by Benhabib and Habermas. Nino argues that moral discussion is not only a method of acquiring moral knowledge but also a practical procedure for resolving conflicts; it is a social practice oriented to achieve unanimous consensus on principles. Thus, in the practice of moral discussion, we try to reproduce the conditions for reaching an ideal consensus (Nino, 1991: 43). However, if a unanimous consensus is not achieved, but nevertheless a decision has to be made, the simple-majority principle is to be preferred because it is 'the decision procedure which is closest to unanimous consensus' (1991: 44). Nino argues that majoritarian decision-making 'has greater epistemic power

for providing access to morally correct decisions than any other collective decision-making procedure' (1996: 119). According to him, this solves the problem of legitimacy, for democratically enacted laws provide epistemic reasons for believing that there are moral reasons for acting as the laws prescribe (1996: 135). But why does Nino think that, when unanimity fails, the simple majority rule is closest to unanimity? Why is it closer than, for example, a supermajority rule or a consensus (or majority) among the enlightened? Nino combines his defence of deliberative practices with an appeal to Condorcet's Jury Theorem (1991: 46; 1996: 127).[8] But, as we have seen, the applicability of the Theorem in the conditions of modern democracies is troubled by several problems.

Using an argument somewhat analogous to that put forth by Buchanan & Tullock (1962), Gerald Gaus (2008) claims that many theories of deliberative democracy actually support the use of qualified-majority rules rather than the simple-majority principle. Suppose that the task of voting is, in a sense, to predict what would be accepted unanimously in a discussion that had no time limit. Gaus argues that there are two desiderata for a voting rule. It should avoid false positives, that is, rules which have gained some support but cannot be rationally endorsed by all citizens. It should also avoid false negatives; it should not reject rules that could, at the end of the day, be acceptable to all, but which are, at the moment of voting, erroneously rejected by some citizens. According to Gaus, the first risk diminishes when the decision rule becomes more inclusive, but, at the same time, the second risk increases. Gaus argues that the choice of the decision rule should be based on the evaluation of risks. The optimal point is likely to be beyond the midpoint (N/2), say, two-thirds or three-fourths. However, qualified-majority rules are either non-neutral (favoring the status quo) or non-decisive (they may fail to make any choice, like the two-thirds rule used in the cardinals' conclave). Unlike free-market liberals (for example, Buchanan & Tullock), the deliberative democrats cannot accept non-neutral rules. For rules that favor the status quo are built on the presupposition that some moral conclusions (say, on individual rights) have already been settled before the deliberation process. Thus, if the deliberative democrats are committed to both qualified majority rules and neutrality, they have to accept non-decisive rules: sometimes, no alternative wins the support of a qualified majority. Actually, this is a plausible conclusion. Even if a temporarily unlimited process of deliberation would always lead to one single solution, there is no reason to suppose that, when the process is halted at some point, there must be one single alternative vindicated by the process (Gaus, 2008: 29–30). But then the theorists of deliberation are back to square one. The deliberative process itself does not tell us how to choose when time runs out but the disagreement still persists.

Simone Chambers is probably the most convincing of all democratic theorists of the Habermasian persuasion (1995, 1996). She admits, quite openly, that there exists a strong tension between the model of ideal consensus and the realities of political decision-making. Habermas's ideal discourse is constraint free: no one has a right to force closure, and the conversation goes on until there is a full consensus. As Chambers says, the larger and more diverse the group, the more difficult it is to achieve this aim (1995: 248). Moreover, 'the more the parties of a discourse are constrained by the need to make a concrete decision, the less motivated they will be to act discursively and the more motivated to act strategically'. The important fact, recognized by Chambers, is that both the need to make binding decisions in finite time and the nature of the closure rule cast their shadows over preceding deliberations. If people are aware of the time limit and of the necessity to close the discussion by taking a vote, this awareness is likely to affect the deliberative process. 'Moral discussion with a time limit' (Nino) is not simply a sequence of an unlimited moral discussion. Hence, Chambers admits the existence of a general trade-off: 'the closer our conversations come to embodying the ideal, the more inefficient they are' (1995: 250). This means simply that the ideal cannot work as a regulative ideal: it is not true that the real world becomes better when it approximates to the ideal. Chambers acknowledges the fundamental fact:

> [D]iscourse is a long-term consensus-forming process and not a decision procedure … Discourses potentially underpin and justify institutional democratic arrangements; they are not an alternative to such arrangements. (1995: 250)

All contemporary deliberative theorists are convinced democrats. Benhabib, Habermas, Nino, Lafont and Chambers firmly accept the two components of democratic equality: the principle of *maximal inclusion* and the principle of *equal participation*. My only point is that these components do not themselves follow from the epistemic deliberative ideal. Rather, the supporters of deliberative democracy are forced to appeal directly to the procedural fairness or egalitarian nature of democratic institutions (Ingram, 1993: 302; Postema, 1995: 372; Christiano, 1997: 274). But fairness or equality has nothing as such to do with the epistemic value of results. Deliberative democrats may agree that majority decisions are more legitimate than consensual decisions made by the *sanior pars*, not because all citizens are equally wise, but because there is no independent way to define the wiser part that could be justified for all reasonable members of the community. Even if an elite of moral experts existed, their power would be legitimate only if even the less-sophisticated citizens could accept it (Estlund, 1993). But, by making such a requirement of general justification conclusive, the deliberative theorists

have already presupposed one version of the principle of (formal) political equalities. Only a supporter of political equality would require that power inequalities should be acceptable to all. If we want our decision rule to give determinate answers, to be responsive to individual opinions and to treat all participants as well as decision alternatives in an equal way, there is no alternative to the simple-majority rule. But, then, 'numbers' are decisive, after all. Here is a dilemma for the deliberative theorist. On the one hand, if political equality is accepted as fundamental, epistemic considerations have no role in the justification of the decision principle. Then, according to Lafont, deliberative theories do not actually make a contribution to democratic theory. On the other hand, if deliberative democrats take the epistemic requirement as basic, the use of majority rule (or of any non-unanimous rule) remains unjustified. Ultimately, all these versions of the deliberative theory are struggling with the medieval problem discussed in the first part of this paper. They are reluctant to accept the purely quantitative and mechanical nature of majority rule, but there seems to be no determinate and non-arbitrary way to build the qualitative considerations into the decision rule itself.

Conclusion: the problem of collective reason

There is a lot to be said for the traditional epistemic conception of decision-making. Of course, we want those decisions that bind us to be based on the best possible information and the most careful weighing of evidence. In individual decision-making, these requirements, rather than the use of some mechanically applicable rule, are the constitutive conditions of rationality. It is not difficult to understand why people are constantly looking for some collective version of individual rationality. The problem is that qualitative requirements cannot be institutionalized in collective decision-making. They cannot be incorporated into a decision rule. If, after the weighing of the arguments, a disagreement still prevails, the alternatives are the authoritative fiat of some higher instance (which, unless it is a dictatorship of one person, is bound to face the same problem), or some purely mechanical rule of aggregation. Various 'impossibility theorems' revealed by the formal study of collective-choice processes seem to show that collective choices are not simply individual choices writ large. The first and perhaps the most important of all impossibility results related to collective choice appears in the narrative told above. From the early days of the Church to the 17th-century Estates, unanimity or consensus

was the prevailing ideal. But because it was not always attainable, an additional principle was needed – a principle that would simulate individual human reasoning by being regular and ordered while still allowing a role for qualitative considerations. Yet, no such principle was found. Unanimity had a tendency to lead to deadlocks, to chaos and sometimes to outside interventions, while all attempts to build the requirement of greater wisdom into the decision principles led to endless disputes of interpretation. As Sir Robert Filmer commented: 'If the "sounder, the better, and the uprighter" part have the power of the people, how shall we know, or who shall judge, who they are?' (Filmer, [1652]1991: 199). In practice, all attempts to institutionalize the qualitative principle only enforced the existing inequalities and created new ones. The modern attempts to justify majority rule – or unanimity, for that matter – by appealing to epistemic considerations can be seen to be continuations of this old theme. Ultimately, they are doomed to face the same difficulty. This does not mean that deliberation and considered judgement are irrelevant for democracy, only that they have more to do with political culture than with institutional decision rules.

In a sense, the principle formulated by Pope Gregory X – 'only numbers with numbers are to be compared' – reflects one of the most important revolutions in Western political thought. People had to admit that collective rationality did not work like individual rationality. In order to be regular, collective choices had to be based on mechanically applicable procedures. In this sense they had to be 'arbitrary'; they had to be based on the respective support of alternatives or candidates, not on any substantive considerations. In the words of Jeremy Waldron, 'a society needs a mechanical procedure because recourse to a substantive procedure would reproduce, not resolve, the decision problem in front of us' (1999: 117). The problem is not that there is no truth in political issues. The problem is that the role of politics is precisely to handle situations in which the agreement on the content of this truth breaks down, but some decision still has to be made. The majority principle, once accepted as a default rule for exceptional situations, has provided a lasting solution.

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Notes

1. Moulin ascribes this phrase first to Gregory X (Moulin, 1953: 127) and then to Boniface VIII (Moulin, 1958: 514).

2. One of the institutions the Bolsheviks adopted from the czarist government was the totally arbitrary division of electoral constituencies and the attached system of indirect elections; both were in use in the first elections of the national Soviets.

3. In his work *Some thoughts concerning education* (1693), Locke recommended Pufendorf's works; when Thomas Jefferson drew up a reading list for his nephew a hundred years later, they were still included.

4. As late as the early 17th century, a majority election of a member of the English House of Commons could be confirmed by a second, unanimous election, in order to assure that the choice was made in '*unanimis assensibus et consensis*' (Hirst, 1975: 75).

5. To quote Hayek again: 'Only a complete misapprehension of the process by which opinion progresses would lead one to argue that in the sphere of opinion he ought to submit to majority views. To treat existing majority opinion as the standard for what majority opinion ought to be would make the whole process circular and stationary' (Hayek, 1960: 115).

6. Hans Kelsen (1929) understood this. In his 'dialectical' argument for majority rule, he emphasized that the legitimacy of the power of majorities is conceptually dependent on the existence – or at least on the possibility – of dissenting minorities

7. The difference between Hobbesian 'finality' and the 'provisionality' emphasized by the deliberative theorists is partly a matter of perspective. *Within a given time period*, political decisions are 'final'; within some longer period, they may be 'provisional'. 'Irreversible' decisions cause a special problem for Habermas; he tends to think that they should be decided by special majorities. The difficulty is that, in some cases, *all* decision alternatives (including doing nothing) may have irreversible effects. Consider global warming. If nothing is done, this inaction is likely to have irreversible effects. Insufficient measures may allow the irreversible process to continue. But all sufficiently radical measures may *also* have some irreversible consequences.

8. Similarly, Martí (2006) argues that deliberation is likely to increase the applicability of Condorcet's Jury Theorem by eliminating systematic biases that would affect their epistemic competence.

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