Economic theories of democratic legitimacy and the normative role of an ideal consensus

Christopher S. King
Lake Forest College, USA

Abstract

Economic theories of democratic legitimacy (discussed here as minimalist theories) have criticized deliberative accounts of democratic legitimacy on the grounds that they do not represent a practical possibility and that they create conditions that make actual democracies worse. It is not simply that they represent the wrong ideal. Rather, they are too idealistic – failing to show proper regard for the cognitive and moral limitations of persons and the depth of disagreement in democratic society. This article aims to show (1) that the minimalist criterion of democratic legitimacy is self-defeating and (2) that even if there are minimal cognitive, moral, and social requirements for the possibility of practicable deliberative democracy, these limitations do not necessarily impose insuperable barriers for democratic deliberation as the normative basis of democratic legitimacy. Thus, the limiting facts do not dictate the structure of appropriate normative models of democracy in the way minimalists have supposed.

1. Introduction

At least since the work of Joseph Schumpeter, there has been an experiment among some political philosophers, legal theorists, and economists to determine the extent to which

Corresponding author:

Christopher S. King, 849 N. Damen Ave. Apt 1, Chicago, IL 60622, USA.
Email: chris.stewart.king@gmail.com

the adoption of democracy can be justified in economic terms (for example, according to its efficiency in generating widely accepted outcomes).[1] An economic theory of democracy, Jon Elster (1999: 26) writes, 'rests on the idea that the form [of democracy] should be like the market in its purpose as well as in its mode of functioning'.[2] Markets efficiently aggregate individual decisions with generally beneficial results and, some believe, correct themselves when things go wrong. Why not leverage these advantages on behalf of democratic politics? By comparison, alternate normative models like deliberative democracy seem onerous and pernicious. Good deliberation requires specialized and not widely distributed abilities and circumstances. Facts about persons (for example, political ignorance and irrationality) and society (for example, moral and religious pluralism) undermine the conditions for its possibility.[3] Markets, on the other hand, can benefit the most foolhardy among us under a wide range of social conditions.

Though the experiment has found intelligent contemporary articulation in the works of Judge Richard Posner (2004a, 2004b), Ilya Somin (1998, 2004), and Bryan Caplan,[4] it remains unclear how successful it has been or how widely its principles are accepted. Yet, according to Judge Posner, the economic theory also promises to produce a criterion of democratic *legitimacy* – hence, a standard for judgments about when outcomes are legitimate and when they are not.[5] Since the economic model makes no appeal to standards independent of citizens' voluntary acceptance, we may call it a 'minimalist' theory of democratic legitimacy and formulate its view of legitimacy in the following way.[6]

> *Minimalist Legitimacy Principle (MLP)*: Political institutions, practices, and outcomes are legitimate if people widely and voluntarily accept social undertakings rather than submit to coerced obedience.[7]

If the MLP is true, then an economic model of democracy would be able not only to give reasons for adopting democracy (for example, efficiency). It would also provide a standard for judgments about the propriety of some citizens in a democracy coercing others.

This article argues, first, that as a theory of legitimacy minimalism is self-defeating. Second, it suggests that the minimalist view of normative political theories and the constraints they must observe is misguided. There are deliberative theories of democratic legitimacy that both appeal to ideal conditions as a proposed basis for legitimacy and could count as practically possible given persons as they are in a pluralist democratic society. In Sections 2 and 3, I define the problem of democratic legitimacy. I then show both why minimalism cannot avoid addressing this problem and why its consequent response is self-defeating. The self-defeat of minimalist legitimacy does not alone show how a deliberative ideal of democracy could accommodate the relevant facts about persons and society. In particular, it does not show how deliberative democracy handles the plurality of 'ultimate values' that create deep and irreconcilable disputes in democratic societies. Sections 4, 5, and 6 collectively show that political reasoning grounded in a normative consensus does not require an appeal to 'ultimate values' in the first place. Deliberative democracy is a practicable possibility even if there is a plurality of ultimate values. Section 7 then offers some remarks about norms for normative theories of democratic legitimacy and judgments about permissible coercion. Methodologically,

I suggest, we are not bound to *begin* with the aforementioned facts about persons and society, even if a theory should show proper respect for them in the end.

2. The hard problem of democracy legitimacy

The following entailment of the idea of political legitimacy seems fairly uncontroversial.

> *Political Legitimacy Entailment (PLE)*: If X is a legitimate political authority, political legitimacy entails that X has a moral right to coerce Y in enforcing whatever duties it imposes, for example obedience to law Z, even if Y does not believe Z is good or correct, and in some cases actively resists it.

The hard problem of political legitimacy, then, is a problem of justification – of determining what constitutes legitimate authority. The PLE says little or nothing about what makes a proposed political authority legitimate, hence what these sufficient reasons might be. Listed below are a few possible (but not exhaustive) ways to give this explanation that may be correlated with various types of political authority.

1. *Strong Epistemic Legitimacy*. Legitimacy is caused by a fact about the relation of X to outcome Z, for example that X knows that outcome Z is correct.
2. *Weak Epistemic Legitimacy*. Legitimacy is caused by a fact about X as such, for example that X is generally an expert about Z matters, even if outcome Z, in this case, is incorrect.
3. *Substantive Legitimacy*. Legitimacy is caused by a fact about outcome Z (for example that it is good or correct) independent of who knows whether it is good or correct or affirms it.
4. *Procedural Legitimacy*. Legitimacy is caused by a fact about outcome Z, in particular that Z is the product of a particular kind of procedure, for example one that is acceptable to citizens X and Y, reliable at producing outcomes beneficial to both X and Y, fair, or some such.[8]

In this context, the question of legitimacy has to do with when the PLE is in force. But whatever is true of political legitimacy in general, the explanation of democratic legitimacy brings special problems. This is due, in part, to the idea of the nature of the entities (X and Y *qua* persons or citizens) that are the subjects of a democratic political state. In the liberal democratic tradition, the category of 'citizen' is often circumscribed by the broader category of 'person'.[9] So the rights that citizens possess belong to them as free and equal persons.

However, even if we have settled upon a way of specifying the entities in question, a puzzle (often discussed as the problem of the minority voter[10]) arises for democracy. Democracy could refer in a very broad way to the substantive values of freedom and equality or it could be considered more narrowly in terms of specific rules and procedures (for example, rule of the majority). Indeed, many problems in the theory of democracy seem to arise from the effort to reconcile the demands of the broader, substantive account with facts about the narrow, procedural one – to show, for instance, how specific democratic procedures manifest proper regard for citizens by being equality-recognizing or freedom-preserving. Certainly, when Rousseau asks how it is possible for one to be

free *and* to obey a law not chosen by one's self, he is asking how it is possible for the freedom of the minority voter (Y) (the broad, substantive view) to be preserved under conditions in which the majority (X) determine the legitimate outcome (the narrow, procedural view).[11] The hard problem for democratic legitimacy, then, is not precisely how to *cause* the voluntary acceptance of citizens, particularly those in the minority. Rather, the hard problem is exemplified in explaining how to *justify* the outcome of a democratic procedure to the minority when the minority regards it as morally bad or incorrect. To the extent that we take the autonomy of citizens seriously, we also must understand the hard problem to be a problem of justification. Citizens (qualified ones at any rate) are *owed* reasons that they can all accept. Only then can the outcome be regarded as legitimate.

From this perspective, items 1, 2, and 3 above do not appear to suggest workable models of *democratic* legitimacy. Alternative 1 seems inadequate for democratic legitimacy since it entails that the majority has the right to coerce the minority because the majority is correct. That the majority *qua* majority is correct seems intuitively implausible. Moreover, it would be hard to reconcile this view with the freedom of the minority. In item 2, the problem is much the same. Indeed, it suggests that in cases in which the majority is incorrect, the minority cannot be coerced. Such circumstances invite instability. In item 3, the correctness of outcomes according to some standard or other is commonly in dispute. The mere fact it is correct, however, is not decisive with respect to its legitimacy. Some articulation of item 4, on the other hand, suggests a view that, in general, tracks with liberal theories of democracy. In this case, the procedure itself (given its recognition of the freedom and equality of citizens) is at least in part responsible for the legitimacy of the outcome.

Each citizen, then, has a reason consistent with her character as a democratic citizen to accept an outcome even though she believes it to be incorrect. In this light, the PLE can be reformulated more specifically as a Democratic Legitimacy Entailment (DLE).

> *Democratic Legitimacy Entailment (DLE)*: Democratic legitimacy entails the right of the majority to coerce the minority given proper procedural requirements and equal recognition of the substantive rights and liberties of citizens or persons.

While this view establishes grounds for the permissibility of coercion given democratic outcomes, it also establishes moral limits on the legitimacy of democratic outcomes – hence outcomes for which coercion can be rightly exercised. In addition, it establishes not simply the requirement that the minority voluntarily accepts, or be caused to accept, the outcomes. Rather, it supposes a requirement that the outcome be *justified* (or be justifiable) to the minority as it would be to any citizen – even if those in the minority dispute its value or correctness.[12] At the very least, then, non-minimalist liberalism entails a unanimity requirement – specifically, the requirement that all citizens (appropriately qualified) have reasons for coercion that they can accept. This is normally considered to mean that the basis of liberal democratic legitimacy is the rational, unanimous consent of the governed. Such consent is not necessarily observed in actuality, so non-minimalist liberal theory appeals to an ideal condition as a basis for democratic legitimacy.

It is worth noting that minimalism also fits, to some extent, the pattern of item 4 above. However, minimalism tends to understand the limits on, say, state power in terms

of organizationally and constitutionally specified powers and roles; and the limits of democracy as established by the restrictive facts about persons and society. Indeed, the MLP suggests that minimalism rejects the formulation of the hard problem of legitimacy as a problem for actual democracies at all because it rejects the notion that persons or citizens are 'rational', 'free', or 'equal' as illusory.[13] In this way, the MLP does not understand citizens or persons as being *owed* reasons for accepting outcomes even when they are incorrect, though it may be useful to give reasons if it creates or sustains voluntary acceptance.[14] Indeed, minimalism does not regard an ideal consensus as available to us as a political norm. Either there are no reasons that all citizens accept or no objects upon which they will all converge. Legitimacy is brought about in the degree that citizens can be caused voluntarily to accept political authority, not the degree to which the use of power has been publicly justified. Causing citizens voluntarily to accept political authority, however, *is* a use of power. Thus, the use of power in minimalism seems to be justified only by itself.

Yet, minimalism might respond that even if a citizen disputes the correctness of an outcome, she may still voluntarily accept it, and only her voluntary acceptance (without further specification) is relevant to its legitimacy. The status of the outcome independent of her acceptance is not relevant to legitimacy. Voluntary acceptance (hence legitimacy) can be produced independent of whether an outcome is good or correct according to an independent standard. Provided it is not generally the result of coercion, the form of acceptance does not much matter. In this way, minimalism requires no appeal to reasons that all citizens can accept as a basis for legitimacy – hence for the permissibility of coercion. So, a political outcome or authority that is not widely accepted would not be legitimate *no matter its moral or epistemic credentials*.

Minimalism suggests that democratic outcomes are legitimate (or not) independent of what one might say about their correspondence with values such as freedom or equality. Indeed, the hard problem of democratic legitimacy seems to arise *only if* we take seriously the idea that persons have a unique moral status either as persons or as democratic citizens, and that this status is the ultimate source of democratic value. Thus, minimalism attributes little importance to the idea that persons or citizens have this moral status in democracy or that the moral and epistemic value of outcomes and authority is not a primary consideration in problems of political legitimacy. Justified coercion requires only the discovery of the efficient means by which to produce voluntary acceptance – a task for which the natural and human sciences, or perhaps the rhetorical arts, are equipped, but for which philosophy generally speaking is not.

The MLP, while compelling on these counts, fails. In the following sections, I will demonstrate that it does and explain why. I begin by explaining the difference between a justification of democracy and democratic legitimacy.[15]

3. The justification of democracy versus democratic legitimacy

Let us assume there is a *justification* for adopting a political procedure if there is a reason to do so. The adoption of some procedure, then, is *justified* (or at least justifiable) when the reasons for doing so are good ones. So if a group of citizens is justified in adopting democratic procedures, their reasons for doing so are good ones.[16] Evidently, there could

be many good reasons to adopt democracy, so a variety of grounds upon which it could be justified. A moral justification holds that democracy ought to be adopted because only democratic procedures are just or because humans (*qua* humans) have a basic right to it.[17] An epistemic justification, on the other hand, argues on behalf of the merits of democracy in making wise decisions according to some non-procedural standard.[18]

As a justification of democracy, minimalism holds that democracy is an *efficient* way to install acceptable candidates into specified political offices regardless of the moral or epistemic quality of its results. Indeed, it emphasizes the pointlessness of moral and epistemic justifications of democracy given the deep and presumably irreconcilable moral or religious disagreements among citizens and facts about the political knowledge or rationality of voters. So, minimalism recommends restricting the use of democracy to a role as an electoral procedure, not one that governs complex political affairs for which the knowledge and experience of a specialist is irreplaceable. Democracy practiced minimally is 'rule by officials who are … chosen by the people and who if they don't perform to expectations are fired by the people at the end of a short fixed or limited term of office' (Posner, 2003: 183). As a justification of democracy, then, minimalism focuses on electoral aspects of actual political arrangements rather than on the making of law or policy, which it believes should not be turned over to democracy (in any direct way at least). Moreover, as a normative and interpretive model, it holds that we should view these aspects in market terms. Yet, the justification of a political method *vis a vis* good reasons to adopt it does not show why coercion by a particular state or its agents is legitimate.

The minimalist view of democratic legitimacy, on the other hand, holds that the voluntary acceptance of outcomes or institutions by citizens is sufficient for their legitimacy (Posner, 2003: 207).[19] So for the minimalist, coercion in enforcing outcomes, *even if they are only electoral outcomes*, is permissible on that basis, whether or not the procedure expresses justice, consistently produces good outcomes according to a procedure-independent standard, or reflects any kind of unanimous acceptance among citizens.

The hard problem of democratic legitimacy has to do with the conditions under which coercion is permissible though citizens dispute the correctness of outcomes or even the presence of political authority. While it is true, of course, that citizens might accept outcomes despite the fact that they are good or correct, minimalism establishes no moral requirement that they do so. It only suggests the means by which they will tend to do so. But if this is the case, citizens might as easily have good reasons not to accept outcomes or to acquiesce. Consequently, minimalism does not really solve the hard problem of legitimacy. It simply eliminates the substantive (and moral) concerns as being a concern. There is no dilemma if one horn of it has been cut off.

In this case, however, it is not clear how minimalism could establish the PLE. It could not appeal to a broad moral or epistemic justification. Moreover, the attitude that would permit coercion (namely, voluntary acceptance) is the same attitude that obviates its necessity. Why coerce those who already voluntarily accept the outcome? Consequently, as a criterion of democratic legitimacy, the MLP is self-defeating. It counts as cases of permissible coercion only those cases for which coercion would not generally be required. Thus, minimalism sidesteps the hard problem of democratic legitimacy. Moreover, it does so illegitimately. This is because the problem of legitimacy is about

the permissibility of coercion under conditions of reasonable disagreement and even reasonable nonacceptance, not under conditions of widespread voluntary acceptance. At best, then, minimalism counts as a theory showing how to minimize coercion in the service of political stability – not surprisingly, by creating the conditions for widespread, voluntary acceptance. But it does not show what would justify coercion in cases of deep moral disagreement. It is not, in this sense, a theory of legitimacy at all.

The failure of the minimalist criterion of legitimacy seems like a reason to provisionally reinstate moral and epistemic constraints on voluntary acceptance as part of a correct account of democratic legitimacy. But facts about political ignorance and moral and religious pluralism are compelling as limitations on philosophical theories of politics.[20] It is hard to imagine, for example, how there could be a consensus upon 'ultimate values' given these facts. If there really is disagreement about 'ultimate values', what is the object of deliberation? Why should citizens deliberate? Even if minimalism is self-defeating as a proposed criterion of democratic legitimacy, alternative theories should be able to defend their accounts of the norms for the justification of coercion on other grounds. In the following sections, I examine the possibility of a normative consensus as a basis of deliberative democratic legitimacy given the compelling facts about persons and the moral and religious pluralism that prevails in actual modern democracies.

4. Deliberative theories of democracy in a minimalist world

No one, perhaps, would dispute the claim that political *stability* arises if citizens in sufficient numbers voluntarily accept political outcomes. At any rate, I will assume it is true. As discussed, political theorists divide over whether voluntary acceptance is also sufficient for political legitimacy. For deliberative democrats, in general, it is not. This is because voluntary acceptance alone does not satisfy other moral or epistemic norms; or at least, the idea of 'voluntariness' can seem objectionably ambiguous unless clarified along these lines. So, deliberative theories of democracy constitute one of the alternatives to which the theorist might turn once convinced that the MLP fails to explain democratic legitimacy.

In contrast to minimalism, the following items typify deliberative theories of democratic legitimacy:

(a)   insistence that legitimacy requires at least the opportunity for citizens generally to participate in public affairs,
(b)   an acknowledgement that participation requires some command of reason-giving and argumentation, and
(c)   the claim that participation should extend beyond electoral politics to address other matters of politics and policy (Gutmann and Thompson, 2004).[21]

For these purposes, we might also assume that political participation, its wide distribution, and political argument aims at the determination of what should be done within the framework afforded by a procedure-independent standard about which there is a normative, if not actual, consensus. This consensus model of deliberative democracy suggests that outcomes are legitimate only if they are the objects of reasoned consent by qualified

citizens.[22] Furthermore, reasoned consent as a normative ideal is possible only in light of the aforementioned consensus. Since reasons and arguments, for deliberative democracy, serve as the 'currency' of deliberation, the conditions for democratic legitimacy imposed by deliberative theories are more epistemically and morally robust than those proposed in minimalism.

> *Deliberative Legitimacy Principle (DLP)*: Democratic outcomes are legitimate only if the acceptance of citizens is a product of their reasoned deliberation about the matter at hand.

Since it appeals to standards of reason, the DLP charges citizens with the task of evaluating political institutions, practices, outcomes, and their relation to them according to standards independent of the fact of voluntary acceptance itself. Their acceptance does not create legitimacy, for instance, if it is caused by political institutions or practices that stymie political deliberation or nullify its conditions. However, since deliberation does not always lead to the same conclusion by the participants, disputes inevitably arise. Obviously, disputes may stem from deep-seated disagreements about values and proper ways of life about which no resolution is evident. Deliberative theories of democracy must offer plausible means of handling them.

One way to regulate such disagreements would be by appealing to a consensus on 'ultimate values'. Minimalism suggests that appealing to a consensus of this sort is objectionable for at least three reasons:

1. Citizens, in general, are gravely limited in moral and cognitive capabilities (Posner, 2003: 113).
2. There are no commonly accepted moral objects or guidelines for public deliberation.[23]
3. Modern democratic societies reflect a plurality of moral and religious opinion based upon incompatible accounts of final goods (Posner, 2003: 135).[24]

The result, Posner (2003: 166) writes, is that

> conflicts of ideas often cannot be resolved by rational discussion, especially (but not only) those conflicts rooted in religiously grounded disagreements over ultimate values – and people cannot be prevented from deriving their political views from their religious beliefs.

The implication is that pluralism along with the limitations of reason makes a normative consensus on ultimate values impossible.[25] Even if there were a body of 'ultimate values', the moral and cognitive capabilities of citizens would prevent them from discovering what they are. If some citizens were capable of discovering them, the plurality of opinion would incline others to dispute their findings. So, there is no 'shared set' of values that could create moral or epistemic obligations independent of the acceptance of citizens. A rational consensus on ultimate values could not count as a suitable norm for democratic deliberation because it is too demanding of actual citizens in actual democracies.

The minimalist argument can be framed the following way:

1. For any deliberative theory of democracy, legitimacy requires 'rational agreement about ultimate values'.
2. Rational agreement about ultimate values is not possible.
3. Therefore, democratic legitimacy cannot practically be realized on this basis.

However, given the constraints suggested earlier, a theory of *democratic* legitimacy depends upon a normative consensus of some sort. Thus, I will first distinguish between kinds of consensus in order to identify one that does not have the shortcomings of a consensus on ultimate values. Then, I will outline a type of practical reason that meets these challenges within a deliberative framework of democracy. The point, however, is not to give a full-throated defense of deliberative democracy, or even to identify the most plausible type of deliberative democracy. Rather, the point is to show how it might be defended against the minimalist claim that it is too demanding by specifying the normative role that an idealized standard of unanimous consent can play in it.

5. Objects of consensus and their relations

The first task will be to elaborate various possible objects of consensus and their relations. We can assume that a failure to achieve consensus in each case represents a disagreement of one sort or another. But we need not assume that 'rational consensus about ultimate values' refers to just any sort of political agreement. Rather, this sort of agreement is about the standards that would adjudicate between positions in various first-order disputes. Call it 'second-order agreement'. So, disagreements about this standard would be second-order disagreements. Here are several alternative objects of unanimous rational consent:

1. *Consensus 1 (C1)*: A consensus that there is a single good that is the object of politics.[26]
2. *Consensus 2 (C2)*: A consensus about the substance of the good that is the object of politics.
3. *Consensus 3 (C3)*: A consensus about the correct outcome of a political procedure in its particular application.
4. *Consensus 4 (C4)*: A constitutional consensus, for example about which procedure(s) should be used for the purposes of making political decisions binding on citizens generally.

Now, here are some inferences that may be drawn about the relations between these types of consensus. C2 entails C1: if there is a consensus about the substance of the good that is the object of politics, there is a consensus that there is a single good that is the object of politics. However, C1 does not entail C2. There can be a consensus *that* there is a single good that is the object of politics without there being an actual consensus about *what* that good is.

   Minimalism reasonably denies that C3 ever actually occurs in democracy about complex matters of law or policy. Consequent disputes likely have underlying sources in moral and religious disagreement of the type endemic to pluralist, constitutional democracy. Because of this conflict, it is not hard to see why traditional democratic

theory might appeal to a consensus of types C1 or C2 to justify or regulate it. If there is a rational consensus about ultimate values, rational agreement *and rational disagreement* about political outcomes seems possible. So, for instance, if there is a consensus of type C2 specifying freedom as the good of politics and unanimous rational consent about ultimate values is required for legitimacy, legitimate political outcomes will be those that preserve or promote freedom. Likewise, if that good is equality, legitimate outcomes will in some way be equality-recognizing. Disagreements are about whether outcomes appropriately manifest freedom, equality, or whatever ultimate value is in question, not whether a given value is ultimately valuable. Among the possible kinds of consensus noted, then, C1 and C2 seem to be the most obvious types explaining the meaning of the phrase 'rational agreement over ultimate values'. So, minimalism claims that either C1 or C2, or both, are not possible given the moral and epistemic capacity of citizens.

Thus, minimalism does not simply deny there is a consensus of type C3. It denies that there could be a rational consensus of types C1 or C2 – second-order rational agreement and disagreement. Consequently, political disputes could not be precisely rational so long as they appeal to these possible types of consensus. These disputes are particularly menacing for large, deeply pluralistic democracies in which disagreement about ultimate values may be widespread and entrenched. Moreover, as Posner suggests, citizens cannot be prevented from drawing their political conclusions from such values. What minimalism clearly rejects is the idea that political conflict involving such values can be regulated by appealing to a consensus of types C1 or C2 – to what it regards as 'ultimate values'.[27] So in denying the possibility of C1 and C2, minimalism denies there could be a *normative* consensus fashioned from a *reason-independent* moral or religious standard. Any effort to formulate one represents an idealization of an undesirable kind – an illusion of sorts.

Consequently, the classical project of justifying democratic authority and rationalizing political disagreement may seem to be dead in the water. If there is no way to reconcile or to commensurate value to constitute a class of 'ultimate value', the more specific disagreements of democratic citizens cannot be resolved through the ongoing deliberation of those same citizens. Minimalism does not propose to reinvigorate this type of theorizing. Rather, it proposes to abandon it altogether. Instead, theorists should aspire to specify ways of *containing* unavoidable disagreements that result from disputes arising from the failure of C3. Since acceptance of complex matters of law and policy cannot be induced by rational means, given disagreement about ultimate values and the cognitive and moral limitations that may lead to it, democracy should be applied only as an electoral procedure. Disputes that cannot be adjudicated, and hence threaten legitimacy and stability, will at least be less frequent if they are not given the opportunity to occur.

However, this does not yet say how to treat C4 as a possible type of consensus. In this case, the 'object' of the rational consensus is 'constitutional essentials', not ultimate values unavailable to the reason of all citizens. We might imagine that among these essentials is a democratic procedure as the means by which political outcomes (for example, laws) will be determined. A consensus of this sort is validated not simply because citizens voluntarily accept a democratic procedure or its outcomes.

According to John Rawls, it is valid as long as the procedure is, among other things, consistent with 'common human reason'. Rawls (2005: 137) writes:

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.[28]

In Rawls's *Political Liberalism* (2005), this statement represents the liberal legitimacy principle. Initially, one might regard it as simply illustrating the minimalist point about the demandingness of an idealized consensus. Indeed, the conditions that the principle places upon *full* legitimacy are both stringent and idealized. On this view, neither a democratic constitution nor its general acceptance by citizens alone is sufficient for full legitimacy. For full legitimacy the unanimous consent of citizens (conceived as free, equal, reasonable, and rational) would also be necessary.[29]

The entailments of C4 in relation to other forms of consensus can now be explained. Since the 'object' of C4 is a constitutional essential (in this case, a particular *procedure* for decision-making), it would be more difficult to regard it as a reason-independent 'ultimate value'. Democratic procedures do not constitute the end of politics so much as they offer means to these ends.[30] So, C4 does not entail C1. Additionally, since a plurality of values (for example, freedom *and* equality) may be consistent with the reason of all citizens, it does not require a consensus of type C2 – a consensus about the substance of the good. Finally, C4 is not a consensus about the specific outcomes of a democratic procedure. So, it does not entail C3. In these respects, C4 is autonomous with respect to other types of consensus discussed. It can exist whether they do or not. Thus, even in minimalist terms, the sort of consensus specified in C4 would be practically possible. It would not, at least, count as a consensus upon 'ultimate values'.

Of course, even if there is a constitutional consensus upon democratic procedures, disputes about the correctness of outcomes are liable to ensue. C4 is not productive of C3, though it may condition the possibility of rational disagreement. In the following section, then, I will examine whether or not this sort of consensus could provide a workable normative basis for legitimate outcomes that are both deliberative and democratic given the fact of moral disagreement. The point is not to defend deliberative democracy comprehensively or to lay bare its entire normative structure. The point is to see how a kind of idealized unanimous consent that does not appeal to reason-independent ultimate values could legitimately regulate deliberation and its results. In the course of this discussion, at least a couple of important questions will have to be addressed, however briefly. First, in what way are values such as 'freedom' and 'equality' determinant of legitimate democratic outcomes? Second, why (and how) could other values (for example, religious ones such as 'salvation') be legitimately excluded from democratic deliberation?

6. Two models of practical reason

In general, the theory of practical reason concerns determinations about what should be done along with general problems of value and what is good. Practical judgments, then, are claims about what should be done and what is good or of value. A practical judgment could serve in an argument as practical evidence or as a practical conclusion.[31]

Let PJ_e stand for a practical judgment that is evidence or a source of evidence in a political argument. In addition, let PJ_c stand for a practical judgment that is the conclusion of a political argument. Some believe that the objective evaluation of practical judgments as the conclusions of practical arguments depends on there being a known good accessible by perception or intuition antecedent to and independent of that judgment. Since the goodness of any particular item, X, depends on whether or not it instantiates the independently known good, the correctness of the judgment about particular items would be determined in part by a reason-independent standard. So, 'heroin is good' (PJ_c) (for example, instrumentally) if it is true that (a) pleasure is good (PJ_e) and (b) heroin produces pleasure.[32]

In this case, the judgment 'pleasure is good' serves as practical evidence in the argument. Thus, some of the evidence for the conclusion appeals to a reason-independent value (that is, pleasure). What reasons one has to use heroin, then, are determined in part by the judgment that pleasure is good. So the fact that heroin is good is a reason (though not in the calculus of pleasure necessarily decisive) to choose it. The determination of what is good *ultimately* in cases like this does not depend upon any property or quality of reason, even if the determination of particular instances of goodness does. Thus, achieving objectively valid results in practical reasoning, on this view, requires a *reason-independent* ultimate standard as a source of practical evidence. Consider this view to outline a nonconstructivist theory of practical reason.

It is not difficult to see what this view means if we conceive of the vital democratic values of 'freedom' and 'equality' as reason-independent *and* 'ultimate'. In this case, the judgment that freedom is the ultimate political good operates as practical evidence. A practical argument could be constructed in this way by Citizen A (a libertarian).

1. Freedom is the end of politics (because it is of ultimate value).
2. Relatively low taxes are consistent with freedom and high taxes are not.
3. Therefore, taxes should be relatively low.

However, Citizen B (an egalitarian) holds that equality is the ultimate political good.

1. Equality is the end of politics (because it is of ultimate value).
2. Low taxes are inconsistent with equality, but relatively high taxes are consistent with it.
3. Therefore, taxes should be relatively high.

It is not, of course, that the representative citizens in each case disagree only about the practical judgment that is the outcome (PJ_c). They take different reason-independent standards (and this is the case being taken as typical in democracy by the minimalist among others) as sources of ultimate value, hence as sources of practical evidence. Disputes about ultimate values, then, can be partially reduced to disputes about the goodness or badness of particular items for which, according to minimalism, there is no rational agreement achievable through more (or better) deliberation. Citizens do not only fail to reach rational agreement in making particular judgments. More importantly, they fail to reach rational *disagreement*. Disputes about ultimate values unavailable to reason

would not be resolvable or moderated by reason alone. Nonrational second-order disagreement leads to nonrational first-order disputes.

These conclusions appear to be correct as long as we are viewing matters through the lens of a nonconstructivist account of practical reason. Indeed, matters are complicated if citizens introduce values (for example, religious values such as 'salvation') into practical evidence in the course of making public political arguments. According to Posner, nothing prevents them from doing so. Consequently, under conditions of nonrational disagreement, it would be pragmatically sensible to restrict the political role of democracy so that nonrational moral disagreement and the political disputes that arise from it may at least be contained.

Posner (and minimalists in general, I assume) means that citizens derive particular practical judgments (PJ_c) about what should be done politically from different and incompatible premises (PJ_e) about reason-independent ultimate values. Yet, not all accounts of practical reason are in accord with this view. Consequently, we may suspect that some deliberative theories of democracy will be insulated from the minimalist criticism about the 'rational consensus about ultimate values' given their view of practical reason. This can be made clear if we show how rational disagreement is possible under the same conditions minimalism claims make rational agreement impossible – disagreement about ultimate values given facts about persons and society. Consider a view of practical reason supporting this possibility to be 'constructivist'.

The view of practical reason set out in political liberalism appears to be constructivist in these ways. Rawls writes:

> political constructivism ... may see correct judgments as reasonable: that is, *as supported by the preponderance of reasons* specified by the principles of right and justice issuing from a procedure that correctly formulates the principles of practical reason in union with appropriate conceptions of society and person. (2005: 111, emphasis added)[33]

This account is complex to be sure. Only a few of its features in relation to practical reason will be highlighted here. First, political constructivism is, in one way at least, pluralistic. A preponderance of reasons may yield a number of reasonable conclusions. Second, constructivism is not exceedingly demanding of citizens. It requires neither assertion of nor knowledge of ultimate goods in order to reach 'correct' outcomes. Third, constructivism constrains reasons as inputs according to a schedule of substantive rights itself determined by a particular sort of procedure. Finally, this procedure is formulated in terms of 'appropriate conceptions of society and person'. I assume this refers, in part, to the *attributes of citizens* as free, equal, rational, and reasonable.[34] In this respect, freedom and equality are not 'ultimate' in the sense of being the abstract, reason-independent objects of political activity or even attributes of persons independent of their status as citizens. It refers to a conception of citizens as belonging to a particular kind of society as a fundamental (*not* to say the only) determinant of legitimacy.

The constructivist model makes no appeal to a consensus about reason-independent ultimate values as a condition for democratic legitimacy. Consequently, the determination of 'correct' outcomes is not modeled precisely as it might be in rational choice theory. The legitimacy of outcomes (*qua* reasonable) does not depend upon the possibility

of being able to commensurate values such as freedom, equality, or whatever else is introduced as ends of democracy. So, the determination of 'correct' outcomes does not require the identification of a final end that would serve as evidence in the premise of a practical argument. Indeed, the effort rationally to commensurate values would not make sense in this case. Since freedom and equality are both regarded as attributes of democratic *citizens*, to assign ordinal or cardinal priority to freedom or equality would make freedom and equality unworkable as the basis of legitimacy – pitting each citizen against herself. Practical arguments that treat freedom and equality as abstract and prior consensual objects of politics, then, invariably fail to regard democratic citizens with the appropriate respect that is due to persons as citizens.[35] Thus, salvation (among other possible ends) does not count as a political value in this way because political judgments (PJ_c) made upon its basis alone are not consistent with the freedom and equality of all citizens qualified to make such judgments.

The underpinning of a deliberative (*qua* constructivist) view of democracy, then, is not a particular metaphysics of the person. Instead, it is an appeal to the status of persons as democratic citizens as free and equal. The problem of a theory of political justice is the problem of identifying a conception of justice capable of reconciling the freedom of one citizen with the freedom of others. In any case, the basis of legitimacy is not an 'ultimate value' *qua* reason-independent standard. Freedom and equality do not function in this conception as sources of ultimate value; thus, they could not count in practical arguments as a PJ_e. The freedom and equality of democratic citizens function in political constructivism as epistemic *constraints* – as constraints upon valid practical evidence, not as sources of practical evidence themselves. Yet, this does not necessarily mean that constructivism regards practical judgments about ultimate values such as salvation as false. The constraint means either that certain claims cannot be entered into evidence for the sake of public argument or, to the extent they can be entered, that arguments that depend upon them cannot make legitimate claims to the use of coercive public power. Either way, the legitimacy of deliberative outcomes would not depend upon unanimous rational consensus focused upon 'ultimate values'.

Deliberative democracy conceived in this way, then, does not require citizens to possess rarified moral characters or epistemic talents. It does not wait for a political expert. It allows for a plurality of value, but it does not require unanimous rational consensus about 'ultimate values' in order legitimately to determine outcomes. Indeed, practical reason retains its flexibility because reasonable judgments do not wait upon a final determination of the correct order of reason-independent value. It says more modestly that legitimate political outcomes are those that can be justified to all qualified citizens (for example, as rational or as reasonable) even when they dispute the correctness of outcomes according to an independent moral or religious standard. Moral disagreements and political disputes are not necessarily irrational. This is because they do not necessarily appeal to an unavailable 'rational consensus about ultimate values' in the first place. They are the products of 'common human reason' exercised under various constraints.

Consequently, the minimalist theory of democracy as a sort of economic theory cannot rule out the *possibility* of a unanimous rational consensus about constitutional essentials (C4) based only upon its skepticism about the possibility of C1, C2, or C3. We can avoid the results of irrational first-order disputes in regarding the freedom and

equality of *citizens* as basic to democracy.[36] Though this standard is idealized in certain respects, it is not an ideal that holds out for the possibility of a rational commensuration of value under conditions of reasonable pluralism. With respect to democratic deliberation, it functions more modestly as a constraint upon practical evidence (that is, an epistemic constraint). This should be enough to show at least that there is a normative consensus capable of regulating deliberative democratic practices without resulting necessarily in irrational and unresolvable political disputation.

7. Normative implications for normative theories of democratic legitimacy

One lesson that can be drawn from the foregoing discussion is this: the kinds of facts about human nature and society introduced as restrictions on the possibility of an ideal normative theory are not themselves sufficient to show that deliberative theories of legitimacy that appeal to an ideal normative consensus are incoherent or practically impossible. It depends upon the nature and function of the consensus. In this section, I will expand upon this point in order to consider norms for normative theory itself. Because minimalism is motivated in part by a concern with the supposedly pernicious effects of ideal theories on actual democratic practices, the particular interest is the way in which the relation between normative theories and actual practices should be understood.

Minimalism does not simply reflect a standard liberal skepticism about democracy *qua* populism.[37] It is more broadly skeptical of a number of theoretical enterprises (both historical and contemporary) and their *usefulness* to actual, modern democratic societies. In this respect, minimalism may be understood as a type of pragmatist response to idealist theoretical agendas. It regards itself as superior to deliberative theories of democracy, for instance, because it does not 'regard democracy as a creation of political theory and so as an apt candidate for improvement by it' (Posner, 2003: 144). This outlook suggests that if actual democracies were to be improved, it would not be by philosophical theories of democracy, but perhaps by the panoply of empirical disciplines along with effective rhetorical practices. So, the constraints imposed by the supposed realities about persons and democratic societies represent constraints upon theories and the degree or sort of idealization in which they can sensibly indulge.

This view indicates a couple of assumptions about the relation of philosophical theories (understood here as ideal theories) to actual practices (in this case, democratic ones).

1. *Assumption 1 (a_1)*. The object of (unconstrained) ideal theory is a mere creation of that theory.
2. *Assumption 2 (a_2)*. The goal of ideal theory is to improve its object (for example, a practice).

Now, if both of these assumptions were true, we could see why the minimalist would find ideal theory so objectionable. Ideal theory not properly constrained aims not at the improvement of the thing it is ostensibly a theory about, but at its own improvement

whatever the *actual* conditions of that thing. It does not, in some sense, refer to the actual thing about which it claims to offer standards of improvement. Consequently, an illicitly ideal normative theory of democracy (which Posner understands deliberative democracy to be) results in no valid normative claim about actual democratic practices or its agents – much less does it improve them. In fact, it may make them worse, for example by engendering non-compromising attitudes among citizens. The question, then, is about norms for theories – in this case, the norms for theories of democracy, including the theory of democratic legitimacy. What counts as a good theory? One that is likely to improve the practice in question or some other sort? To what should theorists aspire? Briefly, I would like to challenge the assumption that the goal of ideal theory is to improve its object (in this case, democratic practices) directly. Instead, I claim, the goal is to improve understanding so as to create the possibility for better judgments about the object.

In general, a normative theory aims to justify the *claim* that, for example, a practice or an agent should be or should function in a certain way, whatever it actually does. If the claim were justified, it would be possible to understand when, for example, a practice has broken down, to explain why this is so, and perhaps to improve it. There is little disagreement that political agents should be legitimate even if there is disagreement about what makes them so. A legitimacy claim, in general, is a claim that authority X has a right to employ power coercively when it does so. So, normative theories of democratic legitimacy aim to identify for a democracy those conditions under which the use of coercive power would be permissible – if there are any and whether they are actually observed or not. Coercion is justified if the conditions identified are satisfied, provided those conditions are correct and sufficient.

The minimalist objection to deliberative norms of democratic legitimacy is centrally that democracy conceived in deliberative terms would not be a practical possibility (not one at least that counts as an improvement of democratic practices) given facts about persons and society.[38] There could be no valid normative consensus since a consensus on ultimate values is practically impossible in democracy. The minimalist ideal is not one that depends upon the widespread distribution of whatever capacities or objects are required in order to deliberate well. So it is developed within a framework that makes no such demands. What makes a theory practically possible for the minimalist, then, depends upon whether or not it is developed within this framework – presumably one with a proper regard for human and social limitations. However, as discussed earlier, deliberative democracy asserts more robust moral and epistemic principles of legitimacy, and it too seemed a practical possibility under the very same proposed limitations.

As discussed, the criterion of legitimacy specified in minimalism does not actually show us what the conditions for the possibility of justified coercion are, or even that there are not any. In this respect, it does not help us to understand how coercive practices in democracy ought to be understood, even if it describes how they often are.[39] So, it does not enable the possibility of making good judgments about when coercion is permissible and when it is not in particular cases.

This result suggests at least a modest constraint on normative theories of democratic practices. They ought to aim first at improving our understanding of how, for example, a practice ought to be, not to improve it directly. How a practice might be improved is an

entirely different matter. No doubt, it could include all kinds of empirical (and nonidea-lized) inputs about the thing in question. This suggests that the minimalist criticism of the idealistic elements of deliberative democracy is misguided. The fact that a deliberative ideal of legitimacy idealizes its agents to some extent is not (at least within certain limits) a fault of the theory. This is shown by the fact that an ideal deliberative theory, under-stood simply as the determination of its basic principles, can accommodate the limiting facts about persons and society. Nor is it a fault that its idea of legitimacy would not directly improve democratic practices. In this light, how would an ideal condition once determined serve as a norm for actual practices?

Consider the appeal to ideal conditions in another, perhaps more familiar, circum-stance: the determination of the standards of evidence for jury trials. Eyewitness testimony is often, and sometimes controversially, used as evidence in making a case. However, the ideal conditions (given circumstances) under which testimony could carry considerable weight in establishing the facts of a case are fairly well understood – unobstructed perceptions, no deviant or self-interested motivations, and the like. More-over, the ideal conditions in this case reveal a specific regulative function. The ideal enables us to *discount* the epistemic value of testimony in specific cases. For instance, the value of testimony is discounted if the witness reveals a pattern of lying, has a special interest in the outcome, was inebriated at the time of the witnessed event, or witnessed it under other obscured perceptual conditions. The assigned discount value of the actual testimony is the value of the testimony given a determination of how far it deviates from the ideal.

This means that the fact there may be a set of ideal conditions under which the witness could have countenanced what happened does not mean that testimony under less than ideal conditions is not valuable, or that it is illegitimate and groundless in establishing matters of fact. The ideal condition does not offer a standard for *eliminating* the value of testimony that is less than ideal. It is simply a standard according to which actual con-ditions and results can be evaluated and appropriately discounted within a 'total system of evidence'. So, the fact that the ideal condition (for example, an ideal consensus of cit-izens who are free and equal) is not achievable is not an effective argument against the ideal case as a political norm. In sum, the fact an ideal condition has not been achieved in any given practice at a given time is not a reason to refrain from formulating the ideal condition in theory or from appealing to it in practice. Whether or not the ideal condi-tion is ever actualized it can have specific *regulative* functions, as in this case, regulat-ing the evidential value of testimony. In short, there is little reason to think that an ideal normative consensus is inefficacious or useless in practice given its ideal status. Indeed, its efficacy as a norm seems to depend upon its not having been achieved.

To reject the normative role of unanimous rational consent in the theory of legitimacy is to reject the fundamental status of citizens in democracy as free and equal as having a proper role in how we understand and evaluate actual cases. While it is not clear that a political theory directly improves a practice, one theory can improve upon another theory simply by correctly identifying what the proper ideal is, or if there is one at all. To this extent, the primary function of ideal theory is to improve the understanding of the proper norms of a practice, whether or not it improves the actual practice itself. Improvement of actual practices is a more complicated matter in many respects. In the case of the

minimalist theory of democratic legitimacy, the mere widespread, voluntary acceptance of citizens could not count as a norm for democratic legitimacy even if it is a norm for stability of some sort. It would not, in any case, represent an appropriate ideal for democracy.

8. Conclusion

The argument has shown *not* that an idea of deliberative democratic legitimacy defeats the minimalist theory of democratic legitimacy, but that the minimalist theory defeats itself. The self-defeat of minimalism does not relieve deliberative democrats from the task of justifying its claim about its ideals (and idealization) given the facts about citizens and society. But as long as it makes no appeal to 'ultimate values' as the basis for legitimacy in the sense attributed by minimalism, there is no reason to think it will fail to produce at least an appropriately aspirational theory of democratic legitimacy. In theorizing about democratic legitimacy, we might keep the following items in mind.

1. The primary point of ideal theory is to enhance the understanding of correct principles for the purposes of sound judgment, not to improve the object of the theory directly (which is a separate and complex task involving many nonideal determinations).
2. An idealized standard of democratic legitimacy is available as a normative idea if it represents a practicable possibility whether or not the ideal state of affairs is ever achieved.
3. Whether or not a deliberative ideal of democracy is a practicable possibility is not necessarily determined by limiting facts about persons and society. It is not, in any case, methodologically necessary to begin with these facts practically to determine possibility even if the issue must be addressed in some way.
4. The relation between normative ideals and actual practices is not necessarily or precisely asymptotic. It is not as though the point of an ideal consensus is to *replace* actual practices with ideal ones. The point is to govern them. So, the role of theory in the development of judgment is vital.
5. The specific time at which a given government has satisfied all the conditions of full legitimacy may be a matter of perpetual indeterminacy even if having achieved a measure of legitimacy is determinate.

Even on the ideal grounds suggested there remain good reasons to embrace the constitutional principles and many tendencies of advanced actual democracies in Europe, Australia, and parts of the Americas.[40] Theories, even theories that assert conditions of legitimacy that are counter to fact, are not philosophical or psychological barriers to that. Posner might be right that deliberative theories of democratic legitimacy cannot improve coercive practices in actual democracy. But this is only because improvement understood in this way is not the first order of business in ideal theory. As long as theorists recognize this limitation on what an ideal theory can do, however, there is no reason to think that deliberative democracy cannot improve judgments about democratic practices (including coercive ones) by improving the understanding of what legitimate coercion requires. This,

however, is something that minimalism cannot do. It is not a sensible theory of democratic legitimacy in the first place.

Notes

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1. See Joseph Schumpeter (1976), Richard Posner (2003), and Bryan Caplan (2007). Gerald Gaus may offer a kind of hybrid between economic theories and the sort to which I lend plausibility here. See Gerald Gaus and Kevin Vallier (2009).
2. More recently, Caplan (2007) has redescribed the project of economic theory in relation to democracy. The point is not to identify democratic practices such as voting with market activities such as shopping. The point is to minimize democracy (since democratic voters *qua* democratic voters are *irrational*) so that the markets can function more effectively and broadly in politics. At least this view seems more consistent (in contrast to Posner's) with the idea of a market whose efficient functioning seems to require widespread, informed participation.
3. The supposed condition discussed most extensively in this article is a consensus on 'ultimate values'.
4. Evidence that Posner defends this view is readily discovered in the following passage, in which he writes that democracy is 'a kind of market', 'a competitive power struggle among members of the political elite … for the electoral support of the masses' (2003: 166). A great part of the same work, *Law, Pragmatism, and Democracy*, deals with adjudication from the legal pragmatist's perspective. In order to focus upon the application of an economic model to democracy, I will not discuss the related issues of adjudication. Posner defends 'legal pragmatism' directly both in *Metaphilosophy* (2004a) and in the *University of Chicago Law Review* (2004b).
5. The three basic conditions for creating voluntary acceptance outlined by Posner are 'that the government conform to basic norms of legality, that the people adversely affected by government measures have an opportunity to protest, and that government deliver a certain range of services at an acceptable cost in the tax and other burdens that government places on the population' (2003: 207). The final condition already presupposes a rather high degree of stability.
6. Minimalism specifically refers to the narrow role afforded democracy in the overall scope of political and adjudicative activities. Other early iterations include Anthony Downs (1997), which was originally published in 1957. Other sources of support for a minimal democracy can be discovered in the fields of rational choice theory and psychology. To exemplify the former, see William Riker (1982). Posner's case is unique since the view may find its way into his distinctive and distinguished professional practice, and so into public life in ways not available to most of us. I have not attempted to examine how well these variations on the theme cohere with each other.
7. I take this account from Posner's own statement that 'a regime is legitimate if people comply with its laws and cooperate in social undertakings as a matter of acceptance rather than just of coerced obedience' (2003: 207).
8. These accounts are not understood here as exhaustive. I assume, moreover, that actual theories will combine them in various ways.

9. I take the political philosophies of Locke and Kant to be standard, albeit nonequivalent, examples of this approach. However, a more recent effort to define and resolve these issues considers 'persons as citizens' to be the basic unit considered by democratic theory.

10. Historically, the problem of the minority voter is well-tilled soil, with some (direct or indirect) discussion of it discoverable in Condorcet, Hodgson (aka Lewis Carroll), Richard Wollheim, and more recently, David Estlund.

11. Rousseau's answer is in certain important respects a reliabilist one. Democracy, at least under certain conditions, tracks (or represents, depending on one's interpretation) the General Will. Thus, to obey democratic outcomes is, in effect, to obey what one has willed one's self. Democracy does not compromise autonomy. Indeed, it expresses it.

12. This, I believe, is an approach emphasized in Rawls's political liberalism. See John Rawls (2005).

13. Illusions (as Freud, Nietzsche, and many others have pointed out) can have very real (and bad) consequences. One indication of the delusional nature of deliberative theories of democracy is discovered in the counter-intentional results of deliberation. 'And so,' Posner writes, 'we have the culminating paradox that in practice and tendency, deliberative democracy often turns antidemocratic' (2003: 157).

14. Minimalism has little to say about the epistemic value of the reasons that might be given.

15. I follow A. John Simmons (1999) in drawing this distinction, and am certain that I cannot improve on it.

16. There are, of course, a number of accounts of the contents of 'good'. I make no specific claim about that here. Additionally, the nature of the theory will vary according to the role assigned theoretical and practical reason. I assume that both minimalism and most contemporary deliberative theories assign priority to practical reasons. The former, however, does not hold that there are practical reasons that are categorical (that is, moral).

17. Thomas Christiano's view (1996, 1999, 2004), like that of Henry Richardson (2002), could be considered 'mixed' about democratic justification and legitimacy. Moreover, each of these works is concerned not simply with justification in the sense specified above, but also with the degree to which the products of these procedures defended are legitimate.

18. See David Estlund (1999, 2008). There is no supposition here that these forms of justification are incompatible with each other, and could not be discovered together in a unified theory of democracy. Richardson's account of democracy (2002) may be described as 'mixed', though it is oddly ambivalent about the epistemic foundations of democracy.

19. I should emphasize that the idea of 'generality' is not the same as the idea of 'unanimity' and that the idea of 'voluntary' is not the same as the idea of 'consensual' in the sense intended by philosophers and theorists writing in a Rousseauan or Kantian tradition.

20. Caplan (2007) inflects the central economic issue as one about voter 'irrationality'. This claim is notably stronger than the claim that citizens are merely ignorant about political matters. Ignorance appears corrigible. Irrationality is less likely to be so.

21. There are numerous accounts of deliberative democracy. I make no effort to determine how well they cohere with each other.

22. Gerald Gaus (1999) has referred to this conception of deliberative democracy as the 'Regulative Ideal of Real Political Consensus'. While I will agree with his claim that we should be doubtful about its adequacy as a normative theory of democracy, it will be for different reasons.

23. See Schumpeter (1976: 271). Schumpeter's skeptical view is somewhat more comprehensive than Posner's, whose stance seems more epistemological. Posner's skepticism defends an account of 'everyday pragmatism' as opposed to one of its epistemic variants, such as Deweyan pragmatism.

24. The general practical point is that deliberation under such conditions leads to group polarization and instability.

25. One concern is the problem of group polarization. As Posner considers it, group polarization is not mitigated by deliberation. Given his skeptical view, it is its reliable result. For challenges to this view of group polarization relative to deliberation, see Talisse and Sunstein (2003).

26. Both Aristotle and Mill could be said to have held this view.

27. These considerations help to explain why Schumpeter and Posner consign 'values' such as freedom and equality to the rhetorical toolkit used to achieve various ends.

28. In this passage, Rawls does not claim that arrangements not manifesting these characteristics are *entirely* illegitimate. I will return to this passage at the end of the article and speculate as to why. However, I make no comprehensive defense of this view.

29. It is worth pointing out that in the Rousseau–Kant social contract tradition, the claim is that consent is foundational *only if it does not occur*. See Kant (1991).

30. This point is disputed. Philosophers such as Thomas Christiano have suggested that the value of democracy should not be defined instrumentally. Rather, as the political expression of justice, it is valuable as an end.

31. The foregoing account is hopelessly brief. The argument does not mean to imply that *only* practical judgments could count as evidence in a practical argument. Additionally, a more complete picture would explain how practical judgments are related to desires. I will forego a discussion of this matter here in order to avoid complexities that detract from seeing the overall point – namely, that nonconstructive practical reason includes sources of practical evidence that can be considered reason-independent.

32. The point is not to say that 'heroin is good' without qualification, which seems false. It is just to say that if pleasure is good and heroin is pleasurable, then heroine is good *in some respect*.

33. It should be kept firmly in mind that I am characterizing political liberalism only as a type of deliberative view of democracy. I am not doing much to specify the role(s) that deliberation could or should take in political liberalism. So, the best approach may indeed be the one suggested by Gaus and Vallier (2009) in which democratic deliberation is only of marginal significance to liberal democratic legitimacy. But these matters are not discussed here.

34. I do not aim directly and completely to validate this idea here. However, it seems reasonable to think that a conception of democracy that does not begin with something like this idea is bound to give political favor to some citizens over others.

35. Thus, political liberalism is not, as is sometimes suggested, trying to solve a commensurability problem at all. For an example of someone who suggests it fails at doing just this, see David Reidy (2000).

36. This is not to say that deliberative democracy could not presuppose deep, substantive moral agreement either. It means only that this supposition is not required for it to be deliberative.

37. The more standard argument for liberals is that liberal ideals place limits on democratic (specifically populist) ones. For one explanation of this construction, see Riker (1982).

38. Now, it may be possible to reconcile aspects of economic theory with those of idealized, liberal democratic theory. The cost to economic theory will be giving up on the proposed

criterion of legitimacy. The cost for democratic theory will be giving up on the deliberative ideal. For an idea about how this may be accomplished, see Gaus and Vallier (2009).

39. The theoretical dispute that seems to exist between deliberative and economic accounts of democratic legitimacy may be likened to the one we might imagine between Rousseau and Hugo Grotius. Rousseau introduces *The Social Contract* (1962) with a statement of two supposed facts. The first is the fact that persons were born free. Call this the 'fact of freedom'. The second is that, after having been born free, they find themselves everywhere in chains. Call this the 'fact of bondage'. Rousseau does not attempt to explain how it came about that the latter state of affairs supplanted the former. By asking instead how it can be made legitimate, he implies not that the theoretical problem is to show how bondage is legitimate after all. Rather, he implies that the supplanting of the fact of freedom by the fact of bondage has *not* been made legitimate. Thus, he distinguishes his approach from that of Grotius, whose 'characteristic method of reasoning', he complains, 'is always to offer fact as a proof of right' (Rousseau, 1962: 51).

40. Elsewhere, Posner has characterized deliberative political ideology as inspiring 'anti-Americanism' among American intellectuals. Some 'anti-Americanism' may exist, but the deliberative ideal hardly seems to be the culprit – at least as long as the proper role of theory in relation to actual political practice is understood.

References

Caplan B (2007) *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton, NJ: Princeton University Press.

Christiano T (1996) *The Rule of the Many*. Boulder, CO: Westview Press.

Christiano T (1999) The significance of public deliberation. In: Bohman J and Rehg W (eds) *Deliberative Democracy*. Cambridge, MA: MIT Press.

Christiano T (2004) Authority. In: Zalta EN (ed.) *Stanford Encyclopedia of Philosophy*, Section 7, Fall edn. Available at: http://plato.stanford.edu/archives/fall2004/entries/authority/#7.

Downs A (1997 [1957]) *An Economic Theory of Democracy*. Boston, MA: Addison Wesley.

Elster J (1999) The market and the forum. In: Bohman J and Rehg W (eds) *Deliberative Democracy*. Cambridge, MA: MIT Press.

Estlund D (1999) Beyond fairness and deliberation. In: Bohman J and Rehg W (eds) *Deliberative Democracy*. Cambridge, MA: MIT Press.

Estlund D (2008) *Democratic Authority*. Princeton, NJ: Princeton University Press.

Gaus G and Vallier K (2009) The roles of religious conviction in a publicly justified polity: The implications of convergence, asymmetry, and political institutions. *Philosophy and Social Criticism* 35(1–2): 51–76.

Gaus, Gerald (1999) Reason, Justification, and Consensus: Why Democracy Can't Have It All. In: Bohman J and Rehg W (eds) Deliberative Democracy. Cambridge, MA: MIT Press.

Gutmann A and Thompson D (2004) *Why Deliberative Democracy?* Princeton, NJ: Princeton University Press.

Kant I (1991 [1793]) Theory and practice. In: Reiss H (ed.) *Kant: Political Writings*. Cambridge: Cambridge University Press.

Posner R (2003) *Law, Pragmatism, and Democracy*. Cambridge, MA: Harvard University Press.

Posner R (2004a) Legal pragmatism. *Metaphilosophy* 35(1–2): 147–59.

Posner R (2004b) Legal pragmatism defended. *University of Chicago Law Review* 71(2): 683–90.

Rawls J (2005) *Political Liberalism*. Cambridge, MA: Harvard University Press.

Reidy D (2000) Rawls's wide view of public reason: Not wide enough. *Res Publica* 6: 49–72.

Richardson H (2002) *Democratic Autonomy*. New York: Oxford University Press.

Riker W (1982) *Liberalism Against Populism*. San Francisco, CA: WH Freeman Press.

Rousseau J-J (1962 [1762]) *The Social Contract*. Cranston M (trans.). London: Penguin Books.

Schumpeter J (1976) *Capitalism, Socialism, and Democracy*. New York: Harper and Row.

Simmons AJ (1999) Justification and legitimacy. *Ethics* 109(4): 739–71.

Somin I (1998) Voter ignorance and the democratic ideal. *Critical Review* (12)4: 413–58.

Somin I (2004) Richard Posner's democratic pragmatism: The problem of public ignorance. *Critical Review* 16(1): 1–22.

Sunstein C (2003) *Why Societies Need Dissent*. Cambridge, MA: Harvard University Press.

Talisse, Robert (2005) *Democracy After Liberalism: Pragmatism and Deliberative Politics*. New York: Routledge Press.

About the Author

Christopher King teaches philosophy in Chicago, IL. He is the author of 'Problems in the Theory of Democratic Authority', *Ethical Theory and Moral Practice* (forthcoming) and 'Wisdom, Moderation and Elenchus', *Metaphilosophy* (2008).