

Three Conceptions of the Electoral Moment*

ANDREW GEDDIS*

In the legal ordering of contemporary liberal societies, the democratic pedigree of a legal rule represents the supreme rule of recognition – whether in the classic, Diceyan form of Parliamentary sovereignty,¹ or sporting other, more complex colours.² However, no society ever experiences ‘democracy’ in a pure, unmediated form. Democratic decision-making rather occurs through a particular set of institutions, practices, and procedures; which in turn are set up and controlled by legal regulation.³ So a circularity lies at the very heart of the relationship between law and democracy: a legal system heavily relies on its democratic genesis for its legitimacy; yet democracy only ever exists in a procedural form created and controlled by the law.⁴ The subject matter for such legal rules is diverse: who should vote (mandatory voting? prisoner voting?); how should votes be cast and counted (internet voting? proportional representation?); and in what manner may participants take part in the election process (campaign

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* Senior Lecturer, Faculty of Law, University of Otago, New Zealand. This essay is excerpted from the first chapter of my SJD thesis, being completed at Harvard Law School. My thanks to Jim Allan and an anonymous reviewer for their comments. The usual disclaimer applies to the final product.

¹ Albert Venn Dicey, *Introduction To The Study of The Law of The Constitution* (10th ed, 1959) 88

² See, eg, Ronald Dworkin, *Law's Empire* (1986) 373-379.

³ Samuel Issacharoff, Pamela Karlan, and Richard Pildes, *The Law of Democracy* (1998) 1-3.

⁴ A point spelt out by the Supreme Court of Canada in *Reference re Secession of Quebec*, (1998) 161 DLR (4th) 385, 416-17 (‘The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. ... Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people.’)

spending limits? restrictions on broadcasting political messages?) are but a few of the issues that require some sort of legal resolution.

What is more, significant disputes may occur within a society over what are the appropriate answers to these questions. This disagreement arises because rules to govern these topics must not only be *conclusive*, they must also ensure that the outcome of the election procedure constituted by these rules then serves as a *legitimate* basis for apportioning public rule-making power. Therefore, the problem posed by electoral regulation is not simply one of coordination, resolved whenever the law provides the electoral participants with a set – any set – of common electoral ground rules to govern their behaviour. The ground rules governing a society's election process rather ought to be structured in a manner that provides the best – in the sense of the most justifiable – answer for the members of that society to the issues involved, given their need to establish commonly acceptable terms of cooperation within their necessarily shared social space.⁵ This essay investigates the problematic question of how the law can accomplish this task, and illuminates the source of ongoing dispute amongst members of a given society over the rules that ought to govern their electoral processes. It does so by first outlining some of the issues raised by the vexed link between majority decision-making and the concept of legitimacy. The essay then sources the legitimacy of majority rule in the 'electoral moment' – in the entire set of practices, institutions, and procedures that constitute an electoral process. Three contrasting normative models, or 'visions', of how the electoral moment can confer legitimacy on majority decision-making are then outlined.

The main contention of this essay is that the surface debate over the legal rules to be adopted and applied in order to regulate the electoral moment will inevitably implicate deeper visions of the fundamental nature and purposes of democracy. In making this claim I do not attempt to endorse any one of these visions. Instead, I seek to develop a framework for the better understanding of the kinds of arguments that members of society engage in when discussing the proper legal rules that ought to be applied to their electoral processes. This essay should thus be regarded as an exercise in legal architectonics, aimed at examining the conceptual issues underpinning the developing field of election law. That being said, the essay does conclude with two comments on what is involved when a society

⁵ Here Habermas' concept of 'constitutional patriotism' is useful; Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in Jürgen Habermas, *The Inclusion Of The Other: Studies In Political Theory* (1998) 225-26; Frank I Michelman, 'Morality, Identity and 'Constitutional Patriotism'' (1999) 76 *Denver University Law Review* 1009, 1024-27.

makes a choice between these three normative visions of the electoral moment.

Democracy and Legitimacy: a vexed link

In these early days of the twenty-first century it seems virtually everybody likes democracy, or at least engages in a pretence that they like it.⁶ This is a shorthand way of saying a widely-shared, publicly-espoused understanding exists that voting is the best available way for a society to choose between at least some kinds of contested social goals. Such a generally acknowledged understanding seems particularly prevalent in what I shall call the Anglo-American societies (the United States, the United Kingdom, and its colonial offshoots such as Australia, Canada, and New Zealand), with their comparatively lengthy, if not entirely spotless, history of liberal-representative democratic institutions and practices. Exactly why this is so is a matter of no small historio-cultural interest, with a large body of scholarly work devoted to answering the riddle.⁷ There is not space here to retrace all of these claims, and fortunately it is unnecessary to do so. It is instead enough for present purposes to point out that this development occurred within the context of what Jeremy Waldron evocatively calls 'the circumstances of politics'.⁸

Waldron outlines these circumstances as follows. Any society requires some set of collectively binding rules (or laws) in order to allow the 'action-in-common' necessary for it to function, let alone prosper. However, in deciding what these rules will be – or, who should be empowered to decide these rules – members of the Anglo-American societies are forced to confront the existence of a plurality of 'conceptions of the good'. This diversity of opinion about the ends towards which each individual should orient his or her life has undermined traditional (or conventional) forms of authority within these societies.⁹ Alongside this breakdown of conventional forms of social authority comes an

⁶ United Nations Development Programme, *Human Development Report 2002* (2002) 14-16 (outlining trends in political participation and democracy around the world).

⁷ The *locus classicus* remains Alexis de Tocqueville, *Democracy in America* (1831; 1969). For more contemporary treatments see G Bingham Powell, Jr, *Contemporary Democracies: Participation, Stability, and Violence* (1982) 1, n1; Bhikhu Parekh, 'The Cultural Particularity of Liberal Democracy' in David Held (ed), *Prospects for Democracy* (1993) 156-75.

⁸ Jeremy Waldron, *Law and Disagreement* (1999) 102-106. Compare with John Rawls, *A Theory of Justice* (rev ed, 1999) 109-12.

⁹ Jürgen Habermas, 'Conceptions of Modernity: A Look Back at Two Traditions', in Jürgen Habermas, *The Postnational Constellation* (2001) 130, 134.

understanding of the social costs incurred when one group seeks to force others to accept their particular conception of the good.¹⁰ A combination of these three insights – the need for collectively binding rules, the awareness that a range of different opinions will exist on what those rules should be, and a recognition of the costs of forcibly imposing one's opinion on reluctant others – provides a basis for the broad consensus within the Anglo-American societies that a democratic form of governance is, in some loose sense, 'the best way to resolve our differences'.

However, the evolution of this consensus is not as complete, or as firmly grounded, as may first appear. For the disagreement that leads to a democratic solution to the problem of who decides what rules a society should abide by continues even once a general agreement on the overall desirability of democracy has been established. If we ask members of these societies today why they believe that such a method of governance is preferable, we will find a great deal of division over the answers that we get. To begin with, there is the problem of the *scope* of majoritarian decision-making: when is a vote the preferable means of resolving some divisive issue rather than getting a court to settle a controversy; and when should we allow each individual to choose her preferred outcome? While we may all be democrats now, it remains a live issue as to whether any particular issue that divides us is of a kind that should be settled by majority rule, or through some other social practice.¹¹

Any attempt to define the appropriate scope of democratic decision-making also requires an explanation of the *authority* of majority rule. To say that a particular issue falls within the proper scope for democratic resolution is to accept that the view of the majority should determine the outcome. But why should I feel bound by the majority's judgment on some matter if that decision happens to conflict with my own personal views or beliefs about how the issue should have been resolved? Furthermore, it is not enough to give an account of our own, subjective reasons for granting the majority's decision authority over us as an individual. The outcome of a vote must create a resolution that *every* member of society can be expected to abide by. That is the whole point of Waldron's first circumstance of politics: action-in-common requires that every member of society follow a single set of binding rules, even if these contradict her own personal preferences. Identifying why we can generally expect every member of society to accept the outcome of some vote involves grappling with the *legitimacy* of majoritarian decision-making. It is this third problem with the general consensus that democracy is the best available way to resolve our differences that I concentrate on below.

¹⁰ See, eg, John Locke, *A Letter Concerning Toleration* (1689; 1993) 27.

¹¹ Jon Elster, 'Introduction', in Jon Elster (ed), *Deliberative Democracy* (1998) 5-8.

Majority rule and legitimacy

The basic question members of the Anglo-American democracies have to answer is this: what is it about the voting procedure as it operates in our society that gives us confidence in regarding the outcome of this particular procedure as being the best available – the most legitimate – basis for deciding how, and by whom, public power will be used?¹² The simplest response to this might be that elections are desirable because they allow each person a vote, and voting is the best method of decision-making because it identifies the outcome that the majority wants. As the second of Waldron's conditions reminds us, it will be impossible to reach a consensus on a particular outcome for every particular issue – impossible, at least, within the constraints that time, inadequate information and imperfect communication place upon us.¹³ As unanimity is unavailable, it is therefore better for the majority to get what they want rather than the minority.

Of course, further reasons are then needed as to why doing what the majority wants constitutes a 'better' decision-making process than any other. Merging Rawls and Churchill, we might begin to defend this position by arguing that voting produces socially binding outcomes on a 'maximin' basis:¹⁴ it provides the least-worst way of making joint, binding decisions.¹⁵ If we cannot collectively hope to agree on the particular policies, rules, or persons that society should be governed by, then the least objectionable default position is to let the majority decide the issue, as any other decision process would allow a minority to dictate to the majority.¹⁶ But while it is true that any justificatory account of democracy must rest (in the final analysis) upon its role in apportioning public rule-making power in line with the majority's preferences, it may still be asked why a given member of society should subordinate her views to the majority's conclusion on the matter – especially if that conclusion is one he or she happens to strongly

¹² Thomas Christiano, *The Rule of the Many: Fundamental Issues In Democratic Theory* (1996) 178-180.

¹³ What John Rawls describes as 'the burdens of judgment'; John Rawls, 'The Domain of the Political and Overlapping Consensus', 64 *New York University Law Review* (1989) 233, 235-8.

¹⁴ Rawls, above n 8, 133. As Sir Winston Churchill expressed the matter: 'No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.' *Hansard (UK)*, Nov 11, 1947.

¹⁵ Bruce A Ackerman, *Social Justice in the Liberal State* (1980) 282-83. See also Jeremy Waldron, 'Legislation, Authority, and Voting' (1996) 84 *Georgetown Law Journal* 2185; Jeremy Waldron, 'Legislation by Assembly', in Tom Campbell (ed), *Judicial Power, Democracy and Legal Positivism* (2000) 264-68.

¹⁶ Jack Lively, *Democracy* (1975) 9-29; Robert Dahl, *Democracy and Its Critics* (1989) 168.

disagree with, and may even regard as being morally abhorrent. Simply put, if someone believes that the majority's choice is wrong, why should the rest of us expect him or her to feel bound by the fact that more people want this 'wrong' outcome than want the 'right' one?¹⁷

Waldron's account of the circumstances of politics goes some way to providing an answer to this query, but on its face it only presents an instrumental reason for abiding by the majority's decision.¹⁸ Let us accept that members of a society need to have common rules in order to advance their individual life-goals in a collective fashion, even though they will disagree over what those rules should be. Clearly this then requires a trade-off: in order to gain the benefits of action-in-common, each member must be prepared to refrain from acting in accordance with her own deeply held views on how a matter should be resolved. But it may transpire that some members of a society are not prepared to strike this pragmatic bargain. They may judge that the benefits gained through engaging in action-in-common under rules they deeply disagree with are insufficient to justify subordinating their beliefs to the (wrong-for-them) decision of some majority.

There are then two possible responses to such a dissenting challenge. One is simply to assert the priority of the many over the few, treat the dissenter as an obstacle to the majority's will, and seek to nullify this threat through coercive force. We might see this initial response as stemming from a crude reading of Hobbes: if members of a society are to avoid the perils of the state of nature, then they require a sovereign to lay down rules that all must then follow.¹⁹ Once this sovereign – in the form of the majority will – has revealed its preference, then a minority must obey that decision, or suffer the consequences of opposing it. But it is questionable whether this response really will generate the kinds of finality and stability prized by the Hobbesian approach. An approach which can only tell a dissenter 'we, the majority, want this – do as we say, or we will use force against you' does not seem well suited to guarantee the action-in-concert necessary to achieve desirable social ends. It rather issues a constant invitation to a minority to

¹⁷ R P Wolff, 'The Conflict between Authority and Autonomy', in Joseph Raz (ed), *Authority* (1990) 20.

¹⁸ Although Waldron does go on to develop a principled argument for the legitimacy of democratic decision-making, based on its respecting 'differences of opinion about justice and the common good: it does not require anyone's sincerely held view to be played down or hushed up because of the fancied importance of consensus'; and its 'embod[y]ing a principle of respect for each person in the processes by which we settle on a view to be adopted as ours even in the face of disagreement'. Waldron, above n 8, at 109.

¹⁹ Thomas Hobbes, *Leviathan* (1651; 1987) 146-52.

try and test the majority's strength, and therefore forms a recipe for ongoing social conflict.

Additionally, even if this 'might-makes-right' approach can, as a *factual* matter, produce a settled social order, it may be asked if it provides a *normatively* satisfactory basis for labelling voting a *legitimate* way of settling divisive social issues. Particularly in the liberal Anglo-American societies, the threat 'do it, or else' is not considered to be an adequate account of what binding legal rules are.²⁰ Whilst coercive sanctions remain an undoubted feature of any legal system,²¹ those subject to binding legal rules also are considered to be under a *duty* to obey the legal rules voluntarily.²² In the words of Joseph Raz, rule-makers 'have legitimate authority only if and to the extent that their claim is justified and they are owed a duty of obedience.'²³ Therefore, the second option where some members of society dissent from an outcome preferred by the majority is to try and provide these dissenters with some extra set of reasons – reasons above and beyond an appeal to social peace and cooperation – for why, as a normative matter, they *ought* to allow the majority's view of the issue to 'trump' their own.²⁴ Of course, it may still be that a dissenting minority refuses to accept these reasons, and instead pursues their own goals in a manner that prevents the majority from achieving its preferred ends. In such a case the majority may then use coercive force to require obedience. But it is doing so not simply because it is in a position to use force to get what it wants. Rather, the majority is justified in its use of force because the minority has no reasonable grounds for continuing to block or thwart the majority's preferred course of action.

Sourcing legitimacy in the 'electoral moment'

Legions of trees and barrels of ink have been devoted to a search for reasons that can legitimate the democratic process in the above manner. In spite of this toil, it remains a fertile area for debate. For present purposes, we can begin by accepting that any account of how voting can legitimately produce binding collective decisions must necessarily incorporate a position that the preferences of the majority ought to be treated as decisive. But, as we have seen, the fact that the majority prefers some outcome is insufficient

²⁰ H L A Hart, *The Concept of Law* (2nd ed, 1994) chs 2-4. See also Ronald Dworkin, 'The Model of Rules', in J. Feinburg and H. Gross (eds), *Philosophy of Law* (1975) 74.

²¹ See Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35.

²² H L A Hart, 'Commands and Authoritative Legal Reasons', in H L A Hart, *Essays on Bentham* (1982).

²³ Joseph Raz, 'Authority and Justification', in Raz, above n 17, 117.

²⁴ John Rawls, *Political Liberalism* (1993) 217.

reason in itself for a minority to accept the outcome as authoritative-for-them. In light of this objection, we again are faced with two options. One is simply to accept that voting does not legitimately create valid social rules in any deeper sense than that in the Anglo-American societies, at this time, and for whatever reason, most people are prepared to grant *de facto* authority to the majority's preference.²⁵ While not universally true, we can confidently still assume that where there is disagreement in these societies over how public power should be exercised, members will in general be more likely to abide by a collective decision that is made through a vote than they are by a decision made through any other means.²⁶

However, this position cannot explain why members of the Anglo-American societies argue about how the particular voting process used in their particular society ought to be structured. If the most we can say about democracy is that it forms a legitimate decision-making process because the bulk of the people will accept and abide by the majority outcome of a vote, then what more can be said when the members of a society argue about which legal rules and practices should apply to this voting process itself? On the view of the matter just outlined, it is hard to see what it is that they are disputing. Therefore, the answer must be that they are arguing about the conditions under which they will be prepared to accept and abide by – to regard as legitimate – the outcome of the particular voting procedure. If this is the case, then it is necessary to look to a 'voting-plus' account of why an election is considered to form a legitimate means of allocating public power. Such an account requires that we broaden our concept of an election to encompass more than an opportunity to cast a ballot for or against some particular individual or issue. Instead, on a voting-plus account, casting a ballot is only one part – albeit a particularly important part – of a wider process of public decision-making, comprised of its own particular set of rules, institutions, and practices. These rules, institutions, and practices are in turn embedded in, and informed by, a broader 'vision' of democracy. It is this combination that forms the distinct institutional moment we experience as an election.²⁷ And it is the

²⁵ As is claimed, for example, by Richard Rorty; see Richard Rorty, *Objectivism, Relativism, and Truth: Philosophical Papers Vol. One* (1991) 211; *ibid* 192 ('When the two come into conflict, democracy takes precedence over philosophy.'). For a critique of this view see Katherine Welton, 'Richard Rorty: Postmodernism and a Pragmatic Defence of Democracy', in April Carter and Geoffrey Stokes (eds), *Liberal Democracy and its Critics* (1998) 99, 110-13.

²⁶ We might say, following Max Weber, that democracy has shown a greater capacity to inculcate a *belief in legitimacy* as compared with other forms of governance. Max Weber, *Economy and Society* (1968) 213; see also David Beetham, *The Legitimation of Power* (1991) 6.

²⁷ C Edwin Baker, 'Campaign Expenditures and Free Speech' (1998) 33

functioning of the entire *electoral moment* leading up to and including the actual casting of ballots that is claimed to legitimate the majority's final choice.

Therefore, answering the question of why a voting process provides a legitimate basis for deciding how, and by whom, public power will be exercised demands that we first explore what we mean by our 'vision' of democracy. Such an exercise necessitates imagining the necessary preconditions that can legitimate social decisions reached through this means, giving inter-subjective reasons to justify and defend these preconditions, and specifying the institutions and rules required to actualise these commitments.²⁸ As these inquiries demand that we adopt a contestable position in relation to matters on which a variety of reasonable views exist, it will be hardly surprising that we find a range of disagreement over the social meaning and function of elections.²⁹ In turn, adopting a stance on the meaning of democracy, and thus on the way that the electoral moment must be structured in order to produce legitimate and binding social decisions, has implications for the way in which actual, real-world election practices should reflect these ideals. It involves making a commitment to an interlocking set of 'argument clusters' – interdependent claims about the world that both support and rely on each other for their validity – relating to the function of political speech in a democracy, the appropriate part the government should play in setting up the rules of electoral debate, and the role of voters and candidates in the democratic process. These arguments in turn inform the legal rules that are applied to regulate the activity of different actors in the election contest. Therefore, we will find that any surface debate over how the electoral moment should be constructed – over the legal rules to be adopted and applied in order to regulate the entire process of determining the majority will – inevitably involves having to

Harvard Civil Rights-Civil Liberties Law Review 1; Burt Neuborne, 'The Supreme Court and Free Speech: Love and a Question' (1998) 42 *St Louis University Law Journal* 789; Ronald Dworkin, 'The Curse of American Politics', *New York Review of Books*, 17 Oct, 1996, 19; Frederick Schauer and Richard H Pildes, 'Electoral Exceptionalism and the First Amendment' (1999) 77 *Texas Law Review* 1803; Richard Briffault, 'Issue Advocacy: Redrawing the Elections/Politics Line' (1999) 77 *Texas Law Review* 1751, 1753.

²⁸ See Frank I Michelman, 'Brennan And Democracy: The 1996-97 Brennan Center Symposium Lecture' (1998) 86 *California Law Review* 399, 419.

²⁹ William E Connolly, *The Terms of Political Discourse* (3rd ed, 1993) 29-35; Selya Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy', in Selya Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 97, 109-10.

engage in deeper disputes over the fundamental nature and purposes of democracy.³⁰

Obviously there are a host of issues raised in this brief discussion, but given the breadth of ground covered it is beyond the scope of the present essay to do much more than acknowledge their existence. Instead, I wish to proceed by outlining three contrasting normative visions of the institutional moment of an election. Each of these visions requires that a particular set of electoral rules, institutions, and practices be in place before a majority decision can be considered to produce legitimate, collectively binding outcomes. They therefore form ideal types, in that the legal rules governing the electoral moment in any particular society may not conform in their entirety to one of the following visions. But those who subscribe to a particular vision of the electoral moment which is not fully realised in the actually existing electoral process may still have grounds to accept the outcome the process produces as being legitimate, even if only imperfectly so. They may, however, complain that in failing to meet the conditions demanded by their vision of democracy, the electoral moment is failing to fulfil its full democratic potential, and is producing outcomes that are not as fully justifiable as they otherwise could, and should, be. With these preliminary observations in place, it is possible to distinguish between three distinct visions of the necessary conditions required before the electoral moment can provide a means of settling social disputes in a way that allows all the participants to regard the outcome as legitimate.

The Liberation Vision

The first conceptual vision holds that the electoral moment is a legitimate way of allocating public power if it allows anyone motivated enough to participate in the political system to appeal freely to the heightened political consciousness of the voters, and then allows the voters to select freely between all the differing values, policies, and claims offered by those competing for votes. I term this vision of the electoral moment one of *liberation*, as it identifies the chief value of democracy as allowing all members of society to participate in the resolution of the tensions, disputes, and conflicts generated by the spontaneous nature of social life. This vision sees human beings as having an innate capacity for creativity and sudden inspiration, so the individuals who constitute a given society will come to acquire their opinions, beliefs, and preferences in unanticipated and unpredictable ways.³¹ Thus, there will always be a degree of antagonism

³⁰ Samuel Issacharoff and Richard H Pildes, 'Not By "Election" Alone', (1999) 32 *Loyola Los Angeles Law Review* 1173, 1183.

³¹ Although he displayed an ambivalent attitude towards majority rule, the works of Friedrich Hayek evoke the conception of politics and society

between the members of a given society as the inescapable plurality of individual interests cannot fully be satisfied under any one form of social ordering. Some matters of common concern, however, will still require that those members be bound by common rules, even if the matters that should be subject to such rules are given a minimal definition.³² The liberation vision posits a solution to these various discords, and a basis for necessary collective action, through granting rule-making power to the electoral contestant supported by the greatest number of participants, under conditions which assure all who participate that they can have some say in what the final decision *should* be – even if a minority will have no say in what that outcome actually *is*.

Therefore, the freedom of each individual to take part in shaping the outcome of the electoral moment plays the major role in legitimising the resultant decision.³³ The legitimising value of freedom of participation may be argued to stem from either *a priori* grounds, or from consequentialist grounds, or from a mixture of both. A guarantee of participation in the electoral moment may be said to validate the outcome of the process as it shows the proper respect for the individual autonomy of each participant.³⁴ Alternatively, such a guarantee may be argued to be the best practicable way of ensuring that public power is exercised in line with the preferences of the majority of participants, thereby maximising the overall satisfaction of those subject to it.³⁵ Therefore, the liberation vision does not only view the electoral moment as an instrumentally useful social arrangement: settling otherwise irreconcilable differences in a relatively orderly and peaceful manner is a good, but not the only good, served by the electoral moment. The fact that no-one can complain that they were prevented from taking some part in the discourse regarding the best way to resolve these

underlying the liberation vision; see Friedrich Hayek, *The Road to Serfdom* (1976); Friedrich Hayek, *The Constitution of Liberty* (1976); John Gray, *Hayek on Liberty* (3rd ed, 1998) 27-55. For a discussion of Hayek's ambiguous attitude to democracy see Chandran Kukathas, 'Friedrich Hayek: Elitism and Democracy', in Stokes, above n 25, 21-38; Andrew Gamble, *Hayek: The Iron Cage of Liberty* (1996) 91-97.

³² Robert Nozick, *Anarchy, State and Utopia* (1974).

³³ Randy E Barnett, 'Constitutional Legitimacy' (2002) 103 *Columbia Law Review* 111, 142; Robert C Post, 'Reconciling Theory and Doctrine in First Amendment Jurisprudence' (2000) 88 *California Law Review* 2353, 2368.

³⁴ Robert C Post, *Constitutional Domains: Democracy, Community, Management* (1995) 179-96.

³⁵ The 'economic democracy' of Anthony Downs, *An Economic Theory of Democracy* (1957) and the 'logrolling' model proposed by James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962) provide examples of this type of justification.

conflicts means that the decision reached through the electoral moment has a valid, presumptive authority for all members of the society.

In order to retain this claim to legitimacy, the liberation vision therefore requires that certain individual rights be guaranteed to participants.³⁶ These guarantees are patterned on formal (or negative) rights preventing enforced exclusion from the political process, rather than providing a substantive (or positive) assurance of some measure of effective participation.³⁷ These negative rights are both a necessary and sufficient legitimating condition for the liberation vision, as it identifies the concentrated power possessed by the state as the chief danger to the validity of the electoral moment.³⁸ There is reason to be suspicious that those wielding public power will act in a way that is either mercenary,³⁹ or protective of the interests of a 'faction' rather than the majority of society.⁴⁰ According to the liberation vision, the guaranteed freedom to participate in the electoral moment 'curbs the ambition' of those wielding public power:⁴¹ the ability to 'throw the bums out' helps ensure their actions will remain broadly in line with the interests and desires of the majority of the voting public.⁴²

Allowing each individual a free vote at election time, while avoiding restrictions on what she may say, see, or hear in the run-up to the vote, thereby fulfils the promise and potential of democracy for both society and each individual voter. By giving priority to freedom of participation as the major condition for the legitimacy of the electoral moment, the liberation vision also gives a concrete meaning to other democratic values. Equality becomes a matter of leaving each participant equally free to have his or her

³⁶ John Hart Ely, *Democracy and Distrust* (1980) chs 1-4; Peter Railton, 'Judicial Review, Elites, and Liberal Democracy', in J Ronald Pennock and John W Chapman (eds), *Nomos XXV: Liberal Democracy* (1983) 159.

³⁷ Jesse Choper, *Judicial Review and the National Political Process* (1980) 2.

³⁸ F A Hayek, *Individualism and Economic Order* (1948) 22.

³⁹ Lillian R BeVier, 'Campaign Finance Reform: Specious Arguments, Intractable Dilemmas' (1994) 94 *Columbia Law Review* 1258, 1279.

⁴⁰ See the collected contributions in G Brennan and L Lomarskey (eds), *Politics and Process: New Essays in Democratic Thought* (1989); J Ferejohn and J Kuklinski (eds), *Information and Democratic Processes* (1991). See also William C Mitchell, 'Efficiency, Responsibility, and Democratic Politics', in Pennock and Chapman (eds) above n 36, 353-58.

⁴¹ David Hume, 'Of the Liberty of the Press', in David Hume, *Essays, Moral, Political and Literary* (1985) 12.

⁴² Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (3rd ed, 1975) 269. This may be the extent of the role that the voters can play in the public decision-making process. See Giovanni Sartori, *Democratic Theory* (1962); see also Robert Michels, *Political Parties* (1915; 1948). See generally Peter Bachrach, *The Theory of Democratic Elitism* (1967).

say,⁴³ while the ‘one-person, one-vote’ mechanism for tallying preferences guarantees that the desires of each participant will be equally weighed in the polling booth.⁴⁴ Giving any stronger meaning to the requirement of equality between participants in the electoral moment would infringe on the freedom of all participants to engage in the democratic process to whatever degree they would otherwise choose. In turn, ensuring each and every participant is at liberty to contribute to the electoral process means that participants will be exposed to a wide range of information, argument, and opinion, thereby giving them the tools for making an informed decision as to what position to support.⁴⁵ The reasonableness of each participant’s final choice is thereby established, for whatever argument or claim convinces a participant to put his or her support behind a particular point of view is, *ipso facto*, a good reason for his or her decision. With these minimal background conditions in place, it is then enough that a particular outcome receives the majority of votes for that decision to be legitimate and authoritative social decision. To a disgruntled minority who find themselves outvoted, the majority may say: ‘the procedure was fair because no-one stopped you from having your say on what the outcome should be; so you were free to try and convince everyone else that you were right; and you got to vote along with everyone else – but because more of us want our preferred outcome than want yours, you now ought to accept the outcome.’

With its depiction of democratic politics as being a rough-and-ready competition between different actors seeking to win control of public political power, the liberation vision engenders a cluster of commitments to a ‘marketplace of ideas’ conception of electoral speech,⁴⁶ a minimal role for the government in refereeing the electoral process,⁴⁷ and a view of citizens and legislators as holding widely divergent and basically self-interested

⁴³ Hayek, *The Constitution of Liberty*, above n 31, 109; *ibid* at 85. See also Amartya Sen, *Inequality Reexamined* (1992) 3.

⁴⁴ Charles Beitz, *Political Equality* (1989) 109-10, 133.

⁴⁵ John Stuart Mill, *On Liberty* (1861; 1993) ch 2.

⁴⁶ Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948). Another defence of a marketplace of ideas approach to freedom of expression – that it respects and guarantees the individual autonomy of both speakers and listeners alike – also holds that given the pluralism of ideas and beliefs held by individuals, there is no legitimate way to determine a societal ‘common good’ that would justify imposing limits on expressive rights. See Robert C Post, ‘Equality and Autonomy in First Amendment Jurisprudence’ (1997) 95 *Michigan Law Review* 1517; David A Strauss, ‘Persuasion, Autonomy, and Freedom of Expression’ (1991) 91 *Columbia Law Review* 334.

⁴⁷ Post, above n 34, 277. However, the liberation view does not completely reject a role for government in regulating the electoral process – for instance laws against bribing public officials are compatible with it.

preferences which they wish to maximise.⁴⁸ As the electoral moment is seen as a battleground for different, irreconcilable social interests seeking to gain public power, the concept of a marketplace of ideas is necessary to ensure that no sets of interests are prevented from taking part in the process by which public power is allocated.⁴⁹ According to the liberation vision, placing such restrictions on speech has two consequences. It limits the amount of information available to voters, thus restricting their ability to choose the social outcome that best matches their own preferences. Additionally, given the liberation vision's emphasis on the plurality of ideas about what constitutes the 'common good', it views speech limits as the product of one set of interests using regulation to protect itself at the expense of others.⁵⁰ For this reason the government should remain largely outside of the election process, enforcing only such minimal rules as are required to ensure that public power is apportioned to representatives in line with the aggregate preferences of those who are entitled to vote in the election.

The Egalitarian Vision

The second vision of the electoral moment shares with the liberation vision a description of the electoral moment as the epicentre of the often bitter and intractable political disputes over the common, compulsory rules that will govern society. Distributing public power according to the majority of the voters' expressed preferences, as revealed through the electoral moment, is therefore the best outcome that we can hope for from democracy. However, unlike the liberation vision, this second approach does not see the electoral moment as a legitimate means of establishing communally binding rules because it leaves social actors at liberty to pursue their own individual preferences. It rather stresses that participants in the electoral moment must join together in taking initiatives that require the cooperation of others, and in making proposals that seek to enlist as equals each member of society in the pursuit of some designated aim requiring common action.⁵¹ Creating a

⁴⁸ David Gauthier, *Morals By Agreement* (1986); Jerry L Mashaw, *Greed, Chaos, and Governance* (1997) 11. See also C B McPherson, *The Life and Times of Liberal Democracy* (1977) 43; Benhabib, above n 29, 71.

⁴⁹ See above n 46; Rodney A Smolla, *Freedom of Speech in an Open Society* (1992) 221.

⁵⁰ Bradley A Smith, 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform' (1996) 105 *Yale Law Journal* 1049, 1077-81; Kathleen Sullivan, 'Against Campaign Reform' (1998) *Utah Law Review* 311, 321-24; see also Post, above n 34, 185-86, 304.

⁵¹ Hannah Arendt describes the image of society and politics that underpins this vision in Hannah Arendt, *The Human Condition* (1958). However, it should be noted that her own idealised model of a 'council system' of

basis for such collective action, through the allocation of public power, therefore, requires that the preferences of each member of society be accorded equal weight.⁵² I term this vision *egalitarian* as it demands that the electoral moment give equal consideration to the interests of every participant – as defined and understood by each participant – if it is to be a legitimate method of allocating public power.

This principle that the interests of the participants in the electoral moment are to be given equal consideration requires more than that every participant is formally free to take part in the democratic contest, or that the ballot of each individual voter counts for as much as the ballot of any other voter. The egalitarian vision instead requires that each participant in the electoral moment has an *effective* opportunity to take part in, and attempt to influence, the entire process leading up to the casting of votes.⁵³ To deny any participant the ability to effectively participate in the electoral moment – in the whole procedure of public will formation culminating in the actual balloting – means that the participant's preferences will be unequally accounted for. This in turn will mean that the collective rules that result from the apportionment of public power will fail to incorporate equally the interests and preferences of all participants. Therefore, if the terrain on which the participants in the electoral moment compete is configured in a way that means some individual, or class of individuals, cannot exert any effective influence on the outcome of the electoral moment, then the legitimacy of the decision reached through this procedure is threatened.⁵⁴

The egalitarian vision's requirement that the majority decision reached through the electoral moment must respect the principle of equal consideration of interests may be justified on either *a priori* grounds, or on consequentialist grounds, or on some mix of both.⁵⁵ Ensuring that each individual's interests have an opportunity to be put forward in the process of democratic decision-making may be claimed to manifest a proper commitment to, and respect for, the intrinsic equality of persons.⁵⁶ If people are presumptively equal moral agents, then their interests and preferences should be given the greatest weight possible in determining the outcome of

governance does involve a degree of elitism; Hannah Arendt, *On Revolution* (1963) 283-84.

⁵² Lani Guinier, *The Tyranny of the Majority* (1994) 124; John Keane, 'Democracy and the Media – Without Foundations', in Held, above n 7, 249.

⁵³ Rawls, above n 24, 327.

⁵⁴ Dahl, above n 25, 115.

⁵⁵ See, eg. Sen, above n 43, 144.

⁵⁶ Dahl, above n 25, 84-88; Ronald Dworkin, *Taking Rights Seriously* (1978) 227-228; Christiano, above n 12, ch 2; Thomas Christiano, 'The Significance of Public Deliberation', in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason And Politics* (1997) 258-62.

any collective decision-making process, compatible always with giving an equal weight to the views of all other participants. It might likewise be argued that a process which ensures an equal consideration of interests will best guarantee that the majority of individuals in society will get the outcome that they really want, thereby satisfying the preferences of society to the maximum extent possible.⁵⁷

Because the egalitarian vision sources the legitimacy of the electoral moment in its providing a process that allows participants an effective chance to have their interests and preferences registered, it accepts that some individual rights must be guaranteed to ensure that no participant, or class of participants, are excluded from the electoral moment. The egalitarian vision can thereby sustain some level of commitment to traditional, 'negative' political liberties such as free speech, freedom of association, and the like.⁵⁸ However, the guarantee of these negative rights is viewed in a relational context, and judged against a stronger commitment to a process that provides each individual a 'positive' guarantee of effective participation. The extent to which a guarantee of participation in the electoral moment protects individual behaviour will therefore depend on the consequences that this behaviour has on the ability of other participants to play an effective part in determining the final outcome of the voting procedure.

In this way, the privileging of equality as the chief legitimising condition of the electoral moment gives concrete meaning to other democratic values. 'Freedom' is defined as the right to engage in activity designed to influence the electoral moment, but only to a degree that is compatible with a like amount of liberty for all other participants.⁵⁹ If a particular form of participation has the effect of practically excluding other participants from exercising effective influence over the outcome of the electoral moment, then the ability of members to engage in that form of participation must be restricted. Defining the limits of individual participation in the electoral moment in this way will necessarily involve an exercise of state power, an exercise which is justified by the state's wider role in ordering the social structure within which political activity occurs.⁶⁰

⁵⁷ See, eg. John Stuart Mill, *Considerations on Representative Government* (1861; 1993) 224. Mill actually identifies two beneficial outcomes resulting from equal participation in the democratic process; *self-protection* (each individual is thereby able to assert his or her own preferences and interests) and *self-dependence* (society as a whole benefits when all members are involved in searching for solutions to common problems).

⁵⁸ Thomas Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law & Philosophy* 513, 542.

⁵⁹ Amy Gutman, *Liberal Equality* (1980); Ronald Dworkin, 'What is Equality? Part 3: The Place of Liberty' (1987) 73 *Iowa Law Review* 1.

⁶⁰ Owen M Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa Law*

However, under the egalitarian vision, the state may only establish rules for the electoral moment that ensure each participant's interests are able to be effectively represented in the decision-making process. Were the state to go further and attempt to regulate the way in which these interests are expressed – the type of discourse that occurs within the electoral moment – then it would be unacceptably privileging some points of view over others.⁶¹ Once a base-line guarantee of equal recognition of interests is in place, the 'reasonableness' of any judgment made by the participants as to how those preferences and interests will be best served lies in the hands of each individual citizen.⁶² To a disgruntled minority who find themselves outvoted, the majority may say: 'the procedure was fair because you got to have your say; you had an effective chance to convince us of your position; and so you have had an equal opportunity to have your interests recognised – but because more of us want our preferred outcome than want yours, you now ought to accept this outcome.'

By making the condition of effective participation in all facets of the electoral moment central to the legitimacy of its outcome, the egalitarian vision lends support to a cluster of arguments holding that some limits should be placed on the ability of participants to speak,⁶³ which requires a more assertive role for the government as a referee of the electoral system,⁶⁴ along with a view of citizens that respects their basic equal worth, while recognising the unequal power some may enjoy because of socially conferred advantages.⁶⁵ The argument for limiting the ability of some participants to speak at election time stems from a claim that the social circumstances in which individuals seek to have their preferences recognised and supported is not neutral. Instead, all speech acts occur in a context which can influence each act's effectiveness in transmitting information and influencing people's decisions. However attractive the idea of a marketplace of ideas may appear to be, in reality this context is susceptible to domination and distortion resulting from inequalities in the

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⁶¹ JM Balkin, 'Populism and Progressivism as Constitutional Categories' (1995) 104 *Yale Law Journal* 1935, 1946; Richard D Parker, 'Taking Politics Personally' (2000) 12 *Cardozo Studies in Law & Literature* 103, 112-13.

⁶² Keane, above n 52, 251.

⁶³ Owen M Fiss, *The Irony of Free Speech* (1996) 16-18; Cass Sunstein, *Democracy and the Problem of Free Speech* (1993) 98.

⁶⁴ Owen M Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (1996) 35, 43; Burt Neuborne, 'Toward A Democracy-Centered Reading of the First Amendment' (1999) 93 *North Western University Law Review* 1055, 1071-73; Neuborne, above n 7, 792-93, 797-800.

⁶⁵ Christiano, above n 12, ch 5.

power of social actors.⁶⁶ One of the major (and least justifiable) sources of such inequality and consequent domination is the greater wealth of some participants compared with others.⁶⁷ If the wealthy enjoy a primacy with regards to expressing their interests at election time, then this harms the equal recognition of interests that is integral to a legitimate democratic process by excluding many citizens from having any effective opportunity to influence how public power will be allocated.⁶⁸ Under the egalitarian vision, therefore, the government is not only entitled to level the political playing field, it is actually required to do so. Unless the government ensures that no individual or group enjoys a dominant degree of influence, then it is failing properly to implement the very procedure through which it derives its own legitimacy.

The Deliberative Vision

The third vision of the electoral moment accepts that given the intractability of political disagreement between individuals and the constraints on real-world decision-making, a system of majority rule is the best practical way to allocate public power. In contrast to the previous two visions, however, the electoral moment is not perceived as being solely a site of conflict between competing, incompatible interests. The possibility of agreement amongst all participants instead remains at the core of this third vision.⁶⁹ Voting only acts as a 'contingent vicissitude',⁷⁰ to be used where some decision is practically required, but members of a society find they cannot come to a consensual solution. Even though this (regrettable)

⁶⁶ Stanley Ingbar, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke Law Journal* 1; see also Frederick Schauer, 'Discourse and its Discontents' (1997) 72 *Notre Dame Law Review* 1309.

⁶⁷ Burt Neuborne, 'Is Money Different?' (1999) 77 *Texas Law Review* 1609, 1622. See also J M Balkin, 'Some Realism About Pluralism: Legal Realist Approaches to the First Amendment' (1990) *Duke Law Journal* 375; Fiss, above n 64, 39-42.

⁶⁸ Owen Fiss, 'Money and Politics' (1997) 97 *Columbia Law Review* 2470, 2480. See also Cass R Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 *Columbia Law Review* 1390, 1391-93.

⁶⁹ Jean Jacques Rousseau, *The Social Contract* (1968) 60-61; but also see *ibid* 153. Although they take Kant rather than Rousseau as being their guiding light, John Rawls and Jurgen Habermas provide the best modern restatements of this position; see Rawls, above n 24, 13, 43; John Rawls, 'Justice as Fairness: Political Not Metaphysical' (1985) 14 *Philosophy & Public Affairs* 231; Jurgen Habermas, 'Popular Sovereignty as Procedure', in Bohman and Rehg (eds), above n 56, 57-60; J Habermas, *Between Facts and Norms* (1996) 33, 121. See generally Simone Chambers, *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse* (1996) 155-72.

⁷⁰ Waldron, above n 15, 2188.

necessity of voting recognises that the participants will continue to differ in their beliefs about the preferable outcome, this third vision still holds out the possibility that a non-coerced, consensual agreement to the solution can be achieved by generating a general assent to the process by which the decision is made.

The need, under this vision, for such a general agreement arises from the fact that the electoral moment will result in communally binding rules being created, requiring the obedience of those who do not agree with the substance of these rule. However, it is an article of liberal faith, and a commitment that lies at the centre of this third vision, that individuals should be bound in their actions only by those rules – by that version of ‘the good life’ – they autonomously choose for themselves.⁷¹ This poses the dilemma for liberal-representative democratic theory outlined earlier in this paper: how can a society justify coercing those who dissent from a collectively chosen social rule into obeying it, whilst also respecting each individual’s ability to choose their own version of the good life? In order to close this gap between the necessity for social rules and the commitment to the self-government of each individual member of society, the third vision of the electoral moment demands that all participants in the electoral moment be able to affirm through reason the means by which these social rules are created – even if each participant cannot agree with every outcome that this process generates.⁷² I term this vision of the electoral moment *deliberative* as before the majority’s decision can be regarded as a legitimate, communally binding settlement of any given dispute, it requires that the electoral moment form a process of reasoned deliberation amongst participants committed to justifying their favoured solution to some common problem through public argument.⁷³

Under the deliberative vision, therefore, those who disagree with the specific outcome of a vote ought to accept the result as legitimate, and thus authoritative for them, because they cannot *reasonably* disagree with the way in which the majority reached the decision.⁷⁴ In order to be able to

⁷¹ Immanuel Kant, *Grounding for the Metaphysics of Morals* (1993) 38-39. The same concern applies to external legal sanctions, see Habermas, *Between Facts and Norms*, above n 69, 28-34; Chambers, above n 69, 1-11; Joshua Cohen, ‘Autonomy and Democracy: Reflections on Rousseau’ (1986) 15 *Philosophy & Public Affairs* 15.

⁷² Frank Michelman describes claims of this sort as forming a “‘constitutional contractarian” justification of politics.’ Frank I Michelman, ‘W(h)ither the Constitution?’ (2000) 21 *Cardozo Law Review* 1063, 1066-70.

⁷³ See, eg, Joshua Cohen, ‘Deliberation and Democratic Legitimacy’ in Bohman and Rehg (eds), above n 56, 72-73; Ronald Dworkin, *Laws Empire* (1986) 76-86.

⁷⁴ Thomas Scanlon, ‘Contractualism and Utilitarianism’, in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (1982) 103-28, 111.

reasonably affirm the process, participants need to have a guaranteed opportunity to take an effective part in the electoral moment. However, the deliberative vision then goes beyond the egalitarian vision's requirement of equal consideration of each person's interests by placing substantive restrictions on the way in which participants express their interests and preferences. It seeks to constrain the hurly-burly of politics within a procedural framework of discourse that ensures each participant is exposed to, considers, and makes decisions based upon information and argument that appeals to her best considered judgments about the common rules under which society ought to live together. Underlying this vision is a view of politics where citizens involve themselves in the electoral moment as equal and active participants, by engaging in reasoned and respectful dialogue with each other, as well as with those seeking to wield public power. In other words, for each participant to be able to reasonably affirm the outcome of the electoral moment, it must be more than a forum in which participants pursue their individual interests and preferences with the sole aim of winning over the majority to support them, thereby gaining control over the institutions of public power so as to impose their favoured outcome on the rest of society.

Where this dialogue fails to produce a consensual outcome, processes of bargaining – as well as voting – will be required in order to seek a fair compromise of interests between participants. Nevertheless, even here a procedural framework of discourse is necessary in order to specify the conditions under which such a fair compromise of interests can be reached. For in order to specify the very basis upon which the members of society will consider a particular strategic compromise to be 'fair', an open and reasoned debate is required amongst those members on the terms of social cooperation that will bind them. Collective decisions are therefore only to be made by majority vote after participants argue with each other in good faith, and attempt to convince each other of the fairness and justness of their preferred outcome through appeals to the reason of each participant. It is this process of reason giving carried out in the public eye, exposing participants to arguments that respect the 'criteria of publicity',⁷⁵ that is claimed to enable each participant to affirm as reasonable the outcome produced by the electoral moment.

As with the other two visions of the electoral moment, the deliberative vision may rest its claims on *a priori* grounds, or consequentialist grounds, or some mix of both. The *a priori* basis for the deliberative vision of the electoral moment is that by giving every

⁷⁵ John Rawls, 'The Idea of Public Reason' in Bohman and Rehg (eds), above n 56, 93-141; Rawls, above n 24, 231, 254. See also Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16 *Philosophy & Public Affairs* 215, 231-34.

participant good reasons to abide by the outcome of any choice between the different persons, policies, or values in conflict, the vision recognises, affirms, and respects the participant's basic capacity for self-government.⁷⁶ A failure to abide by these standards has implications for the legitimacy of the system as it implies that the process by which people come to be governed by social rules is failing at its core to recognise the inherent worth of the participants as autonomous persons.⁷⁷ On a consequentialist, or epistemic,⁷⁸ defence of the deliberative vision, any process of public reasoning is more likely to fully inform voters of the likely outcome of any choice they may make, and will thus enable them to compare and choose the alternative which best accords with, and brings about, their particular conception of the good. In other words, decisions taken after considering arguments that respect the criteria of publicity are more likely to deliver the participants what they want than are decisions taken after being exposed to other forms of argument.

By making the reasonableness of the electoral moment the chief basis for the legitimacy of any outcome that it may produce, the deliberative vision also gives a particular content to other democratic values. Equality of participation is still recognised as an important part of the deliberative vision, for without such a guarantee the members of the polity could reasonably complain that the decision-making process has allowed some set of interests or viewpoints to unfairly dominate others.⁷⁹ The freedom of members of the polity to participate in the electoral moment must also be guaranteed – insofar as such a right is compatible with an equal degree of engagement by all other members. However, the means by which participants in the electoral moment try to convince others to support some particular outcome may also be regulated by the government so as to protect the integrity – the quality, tone, and content – of the discourse that occurs within the electoral moment. If participants are to be able to accept the outcome of the electoral moment, then they must as far as possible be assured that each voter has made their decision based upon arguments and reasons that can be publicly justified to all other participants. Of course, even under the deliberative vision some participants may not, as a matter of

⁷⁶ Benhabib, above n 29, 78.

⁷⁷ See Onora O'Neill, 'The Public Use of Reason' (1986) 14 *Political Theory* 523.

⁷⁸ Jules Coleman and Jon Ferejohn, 'Democracy and Social Choice' (1986-87) 97 *Ethics* 6; David Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Accountability, in Bohman and Rehg (eds), above n 56, 173-204. See also David Miller, *Deliberative Democracy and Social Choice*, in Held, above n 7, at 81.

⁷⁹ Rawls, above n 8, 194-200; J. Rawls, above n 24, 360-61; Ronald Dworkin, *Freedom's Law: The Moral Reading of The American Constitution* (1996) 25.

fact, accept the outcome of the electoral moment as binding upon them.⁸⁰ To a minority who continue to dissent, the majority may respond: 'we had to adopt some set of common rules; to do so we all took part in a process of public decision-making that gave each and every one of us open and public access to the best arguments and reasons on which to base our joint decision; and so you have no good reason to object to the way we reached our conclusion on the matter – but because more of us want our preferred outcome than want yours, you now ought to accept this outcome.'

In order to ensure that the electoral moment meets the conditions of being a reasonable process of public decision-making, the deliberative vision supports arguments that limits should not only be placed on how much each participant can speak, but also on the form that their electoral discourse takes. This requires that the government be deeply immersed in regulating the manner in which participants involve themselves in the election process, and maintains a view of citizens and representatives that recognises both their 'other regarding' nature, and their ability to alter their preferences as a result of reasoned deliberation and participation in a democratic discourse.⁸¹ The argument for regulating the form or content of a participant's electoral discourse arises from the matching of the electoral moment to an idealised process of reasoned, public decision-making. If this process is to be acceptable to all reasonable participants, then those who take part in it should not simply go about strategically advancing their own preferences or interests in whatever manner best gains majority support for their point of view. Instead, the fashion in which the various outcomes are debated ought to give to each participant good reasons, ones that are open to public challenge and criticism, as to why that particular outcome should be the one that is collectively imposed on all members of the society. If the government does not regulate the discourse surrounding the electoral moment so as to ensure that this type of rational, public debate occurs, then the grounds on which the participants can accept as legitimate the process by which common societal rules are created will be undermined. These rules may take the shape of direct limits on what can or cannot be said by participants in the electoral moment – content-based restrictions on political speech. Or, they may be form-based restrictions which demand that electoral discourse be presented in a particular way to the electorate, thereby forcing those who speak to frame their arguments and claims in a particular way.

⁸⁰ Michelman, above n 5, 1019.

⁸¹ Amy Gutman and Dennis Thompson, *Democracy and Disagreement* (1996) 79. See also Chambers, above n 69, 104; Benhabib, above n 29, 71-72.

In Conclusion ... a couple of further questions

The introduction to this essay labelled it as ‘an exercise in legal architectonics’. The use of this term was intended to eschew any outright evaluation as to which of the three visions of the electoral moment is descriptively or normatively the better one to take, and instead focus attention on the underlying structural issue of how ascribing to one normative vision or the other will result in the adoption of a particular set of rules to govern that society’s electoral moment. The general point the essay seeks to make is that some electoral practices and consequences that are unacceptable under one normative vision of the voting process will be considered not only tolerable, but even necessary, under another. It then follows that when we consider the various disputes that exist within a given society over which particular legal rules ought to govern its electoral institutions and procedures, we must also consider these underlying normative commitments to the purpose that the electoral moment should serve within a larger regime of democratic self-government.⁸² Therefore, the (perhaps rather simple) payoff to the foregoing is to lay clear how this fundamental clash of normative visions underpins the surface disputes over how the electoral institutions and processes of a given society should be regulated.

That being said, a couple of further issues arise when it comes to choosing between the three visions outlined above. To begin with, such a choice does not occur in a vacuum. The effect of a given set of legal rules on institutions of participation and deliberation will in turn impact upon a society’s common experience, and thus understanding, of the process of democracy.⁸³ So there will be something of a feedback loop at work in this area: a society’s concept of democracy will, to some extent, come from the participant’s experience of democracy at work in that society; even as the rules under which that society’s elections occur will stem from its interpretation of what the normative concept of democracy requires. But the existence of this feedback loop does not necessarily imply we are trapped in a relativist morass; a situation in which all we can say is that ‘democracy’ means one thing given the experiences and history of one country, and something different in another. For by critically examining the normative underpinnings of not only their own, but also other systems of electoral

⁸² See Andrew Geddis, ‘Democratic Visions and Third-Party Independent Expenditures: A Comparative View’ (2001) 9 *Tulane Journal International & Comparative Law* 5.

⁸³ Samuel Issacharoff and Pamela S Karlan, ‘The Hydraulics of Campaign Finance Reform’ (1999) 77 *Texas Law Review* 1705, 1734 (‘... our conception of what politics is shapes our views of how politics should be regulated, but how politics has been regulated shapes our conception of what politics can be.’)

regulation, the members of a society may get some insight into where their system of electoral regulation fails to instantiate their self-understanding as a nation committed to a government of the people, for the people, by the people.⁸⁴ Such a process of comparative self-examination – or reflective equilibrium, if you will – allows for a broadening of perspective, a deepening of insight, and (possibly) a greater confidence that the rules that a given society has adopted are indeed the rules it ought to have in place.

Nevertheless, even after conducting such a process of comparative self-examination, it remains virtually inconceivable (as a matter of fact) that *all* the members of a given society will agree upon which underlying normative vision of democracy is the most appropriate for their particular social ordering. Even once we identify what it is that the participants in the debate are really arguing about, it is unlikely that the discussion will result in a universally satisfactory solution to the question of how the various legal ground rules required to control a society's election process ought to be structured, so as to best guarantee that the outcome of that procedure will be regarded within that society as a legitimate means of apportioning political and legal rule-making power. And because the best – in the sense of the most justifiable – answer to this question will continue to be a matter of dispute within a society, and given the existence of three possible, reasonably defensible alternative visions of how electoral ground rules ought to be structured, a second order question must be confronted: namely, *who* should get to decide which one will be adopted by a given society?⁸⁵ This is in itself a large and vexed topic, implicating as it does a debate over the various merits of decision-making by majority legislatures, versus the judicial 'protection' of individual rights under a written, bill of rights-type instrument.⁸⁶ The scope of this article does not allow for any attempt to

⁸⁴ I would (again) point to Habermas' notion of 'constitutional patriotism' to illustrate my meaning here; see above n 5. The role of an 'expressivist' comparative constitutionalism is also relevant; see Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1269-74.

⁸⁵ Andrew Geddis, 'Confronting the "problem" of third party expenditures in United Kingdom election law' (2001) 27 *Brooklyn Journal of International Law* 103, 108.

⁸⁶ The 'pro-legislature' position is well represented by the various contributions contained in Tom Campbell, K D Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001). In my opinion, the strongest argument for judicial intervention in the electoral process remains that advanced by John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); see also Samuel Issacharoff and Richard H Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643. For a synopsis of the current status of the debate between these two positions (albeit in the US context) see Richard Posner, *Frontiers of Legal Theory* (2001) 15-27.

resolve, or even fully elucidate, this controversy. However, given the inescapable, and ongoing, nature of the disagreement over which vision of the electoral moment is most appropriate for a given society, the identity of the institution that gets to resolve this issue is a further, and important, question that cannot be avoided.

