

# Referendum vs. Institutionalized Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision

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*Abstract:* This essay proceeds in three steps. First, it will briefly outline the often invoked “crisis” of representative democracy and its major symptoms. Second, it will discuss a popular yet, as I shall argue, worryingly misguided response to that crisis: namely, the switch to plebiscitarian methods of “direct” democracy, as advocated, for example, by rightist populist forces in many European Union member states. The United Kingdom’s Brexit referendum of June 2016 illuminates the weaknesses of this approach. Third, it will suggest a rough design for enriching representative electoral democracy with nonelectoral (but “aleatory,” or randomized) and nonmajoritarian (but deliberative and consultative) bodies and their peculiar methods of political will formation (as opposed to the expression of a popular will already formed).

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One core question of political theory is how best to make collectively binding decisions: who should make those decisions, and by what rules and procedures? The modalities of decision-making are not just something to be determined at the founding, or “constitutional” moment, of a political community once and for all times by some *pouvoir constituant* (constituent power). The question of whether our rules and procedures are still “good enough” or whether they are in need of amendments and adjustments is an ongoing challenge in the background of any political process, and certainly one that qualifies as democratic.

Yet how should we decide how to decide? The difficulty of any conceivable answer to this question derives from its tricky recursive logic. The answer, in order to be recognized as valid and binding, must itself be decided upon – but how and by whom? If we were able to deduce the “right” mode of decision-making from a robust theory of a divine order, as in an ideal-typical theocratic regime, the problem

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would go away. Conversely, if we had a scientific theory about whose decision-making competencies and methods would yield optimal policy results and rational problem solutions (as was the claim of “scientific” state socialism), the problem of deciding how to decide would also evaporate and the one best way of running a country and its economy would reveal itself beyond any doubt. Given the modern obsolescence of either of these certainties, we need to face the fact that neither constitutional methods of arriving at decisions nor the resulting decisions themselves (that is, policies) are capable of having unquestionable validity. At best, political procedures can be consistent with widely shared normative premises of fairness, and policy outcomes can be regrettable – or not.

Any account of what we mean by liberal representative democracy will, rather uncontroversially, include the following features: Liberal democracy is a political system applying (at least, so far) only to nation-states and their subnational territorial components. The right to rule derives, directly or indirectly, from periodic and contested elections through which the composition of legislative assemblies and governments is determined. It is premised upon the dichotomy between rulers and ruled, or (elected) elites and (voting) nonelites. Citizens, regardless of other resources they control, enjoy equal political rights and freedoms (voting, communication, association) as a matter of constitutional guarantee. Rule of law and division of powers constrain the use of state power and its monopolistic exercise, thus making its use at least minimally accountable. As an empirical generalization, we can add that democracies are constantly challenged and self-scrutinizing political systems that face on-going controversial demands for their own revision, development, and improvement. Democracies are continuously being renegotiated. They

are quintessential political systems “on the move,” driven by the legitimacy of rule and its effectiveness. Claus  
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In the course of the last forty years of theoretical self-reflection and empirical observation of the stability, modes of operation, and trajectories of change of liberal representative democracies, many propositions have been advanced that converge on the diagnosis of a “crisis,” or the creeping deformation, of liberal representative democracy. This multifaceted crisis exists in the absence of explicitly *nondemocratic* (totalitarian, theocratic, or otherwise authoritarian) countermodels and theoretical doctrines of how political rule should be conducted. To oversimplify: The vast majority of contemporary mankind believes in and endorses (some version of the above) democratic principles and promises.<sup>1</sup> At the same time, large minorities and sometimes majorities of inhabitants of existing liberal democracies are dissatisfied with, and feel left out by or alienated from, the democratic routines and practices they experience. We may thus say that abstract liberal democracy is celebrating its near-global victory, while concrete and existing democracies are widely looked at with discontent and frustration over failures of both the legitimacy and effectiveness of democratic rule.

More specific, liberal democracies of the Organisation for Economic Co-operation and Development have experienced symptoms of stress and malfunctioning over the last generation that have activated a global discourse of political theorists and practitioners to suggest innovative remedies. What are the deficiencies or illnesses to which these remedies are targeted? To generalize, symptoms of this dissatisfaction include the following.

1) Apathy and other forms of nonparticipation and political alienation are on the rise and are undermining the increasingly nominal equality of political rights. The least advantaged strata of populations

(by education, economic, and class status, and also by age, gender, and minority status) show the strongest features of (self-) exclusion. As many people in these categories do not vote or participate through membership in parties and other formal organizations, a vicious cycle is set in motion by which elites of such organizations find little strategic incentive to respond to the interests and values of the marginalized groups. At the upper end of the socioeconomic hierarchy, investors, financial institutions, employers, and a host of organized interests enjoy de facto privileges of shaping political agendas and constraining the resources that elected governments have available for the conduct of policies.

2) Political parties and elites have suffered from a rapid loss of trust concerning both their willingness and ability to respond to nonelites and to promote desired kinds of social and economic change. The “monitoring” tactics of commercial and social media, with their “gotcha” incentives, further discredit elites. As major socioeconomic problems (such as low growth, precariousness of employment, widening inequality, social exclusion, and international conflicts) have come to be seen as beyond the reach of any conceivable government, the perceived political purchasing power of the ballot declines. In many cases, the parameters set by the political economy of capitalist democracies have enforced a convergence of major political parties that makes them virtually indistinguishable in terms of programs and ideology. The result tends to be restricting competition to the appeal of leading personalities.

3) If political mobilization and contestation occur at all, they do so, to a rapidly growing extent, in rightist populist ways: by appeals not to shared interests or some version of the common good, but to primordial and ethnonational identities and “moral majorities,” and in confrontational opposition to established elites, outside groups,

minorities, and everything “foreign,” including, in the EU context, Brussels as the location of its executive branch. The kind of social protection populists offer derives not from constituted state power to achieve collective goals through policies, but from territorial borders of nation-states. Populist movements and parties are, in many cases, not instrumentally focused on policy, but expressively focused on the politics of protest, obstruction, and the assertion of some kind of identity against a distrusted “establishment” and political class, as well as minorities and foreign or supranational powers. They also focus on “strong” leaders whose space of action must not be unduly constrained by liberal constitutional and other inhibitions, thus giving rise to the oxymoronic phenomenon of illiberal democracy and more-or-less soft forms of electoral authoritarianism. Its preferred form of legitimation (of both leaders and policies) is by reference to plebiscitarian acclamation and referenda, which allegedly are best suited to reveal the true, authentic, unified, and uncorrupted will of the people – a will that, in reality, is often but a mere artifact of media and party campaigns confronting the “establishment,” foreign forces, and minorities.

4) The space left to maneuver for governing elites, and hence the extent to which they can relate at all responsively to popular interests and demands, is increasingly limited by the international political economy (globalization) with its neoliberal imperatives of competitiveness, austerity, debt consolidation, and tax competition, giving rise to a condition now often described as “postdemocracy.” Parameters that determine peoples’ life chances and living conditions – whether in their roles as workers, consumers, savers, or citizens receiving state-provided services and transfers – are set by technocratic supranational elites at places and levels that have largely escaped the reach of national policy-making

and its democratic accountability, while nation-states suffer from a decline of their “governing capacity,” facing conditions in which they by themselves are unable to provide for their citizens’ socioeconomic, civil, and military security and the integrity of their physical environment.

The battle cry of rightist populism is: “Let us, the people decide” and take control out of the hands of untrustworthy national elites and illegitimate supranational forces. The arsenal of plebiscitarian methods (which, to be sure, are sometimes also advocated by some nonpopulist forces) includes referenda on policy issues, citizen initiatives to hold such referenda, and agenda initiatives to force legislatures to address certain policy issues. The use of survey research for identifying popular preferences and then elevating them to the status of policy priorities on leaders’ platforms can sometimes be seen as cases of social science–assisted populism. Thirty-six of the forty-seven member states of the Council of Europe have by now adopted one or all of these direct-democratic devices as part of their constitutional repertoire. In 2012, the EU itself introduced the European Citizen Initiative as a device of supranational direct democracy. In recent years, these instruments of direct democracy have been applied to policies as varied as whether to permit or ban the construction of minarets, restrictions on migration, the public use of a minority language, the acquisition of agricultural land by foreigners, same sex marriage, the (retroactive) imposition of inheritance taxes, and the introduction of a basic income. For example, in the context of the recent failed military coup in Turkey, President Erdoğan has gestured at holding a referendum on reintroducing the death penalty. The target groups of these referendum campaigns may be Muslims, migrants, sexual minorities, wealthy heirs, foreign real estate speculators, European institutions,

criminal enemies of the state, or ethno-linguistic minorities. Although Switzerland has the oldest and most famous tradition of direct democratic legislation in Europe (usually preceded in that country by extensive and reasonably balanced public debates on issues), these practices have spread in more limited forms to other countries in Europe, with hot spots in the rightist populist regimes that have emerged in many of the post-Communist polities. In Hungary, a national referendum on a mandatory EU migrant quota was held (and lost by the government due to insufficient turnout) in October of 2016. Yet probably the most consequential referendum held in Europe to date appeared in precisely the European country where parliamentary representative democracy was born: the United Kingdom.

The Brexit referendum of June 23, 2016, asked citizens to vote on whether the United Kingdom should leave the European Union or remain a member state. Note that this referendum was called for, but not initiated by, a rightist populist political party. To the contrary, it was politically designed by David Cameron, a Conservative yet pro-European prime minister, who intended to curb the growing political influence of the populist United Kingdom Independence Party (UKIP), thus turning, he hoped, the means of populists against their ends. To the surprise of most observers, that plan failed when a narrow majority of voters actually voted Leave. Was it a wise decision to let the question of Britain’s EU membership be decided by referendum? In addressing this question, I shall refrain from discussing the substantive political question of whether Brexit is a “good” move, confining myself to the issue of whether the method used in making the decision was an adequate one.

Here is a rough summary of the events. In the 2014 general elections to the European Parliament, UKIP, the British anti-EU political party, won a relative majority of 27.5

percent of the vote, with most of its votes taken from those defecting from the Conservative Party. Recognition of this growing threat prompted incumbent Conservative Prime Minister Cameron to commit himself in January 2013 to holding a referendum on the Brexit issue by the year 2017 if he were reelected in the national elections of May 2015. His decision was a concession to the rightist populist demand to let “the people” express its will directly, rather than being represented by distrusted elites suspected of being corrupted by their own or other special or “foreign” interests. Populists are to be classified as “rightist” when framing the people in terms of nativist ethnic belonging versus some strange, foreign, and (as such) threatening enemy. Cameron’s promise to hold a referendum was intended to serve the dual purpose of 1) increasing British bargaining power in ongoing negotiations with EU partners (who were seen as averse to further UKIP gains and the prospect of Brexit and hence ready to grant concessions to the British government on the key issues of Euro-mobility and “ever closer” integration) and 2) immunizing the Conservative electoral base against further defections of voters, as Eurosceptic Conservative voters were now offered the option of expressing their Leave preference without having to switch to supporting UKIP.

Both of these purposes were, to an extent, achieved, the second more fully than the first. The turn to plebiscitarian methods (which are foreign to the United Kingdom’s constitutional traditions) came at the price of undermining the authority of Parliament, the members of which opposed Brexit by a large majority. Having won the 2015 elections and being bound by his referendum promise, Cameron initiated the EU Referendum Act, which was passed by the House of Commons in December 2015. When the referendum was eventually held on June 23, 2016, the result

was 51.9 percent Leave versus 48.1 percent Remain, with the citizenry sharply divided along class, age, and regional lines, but not equally sharply along party lines. Given a turnout of 71.8 percent of all eligible voters, roughly 37.3 percent of the electorate will have caused (if it actually comes to that) Britain’s exit from the EU by a margin of just four percentage points.<sup>2</sup>

When making their decision on referendum day, citizens were largely left with their own individual means of will formation (their beliefs and preferences) and without much clear guidance from the political parties as to which of the alternatives, together with their entirely unknown implications, to choose. The two major parties were either openly divided (Conservatives) or deeply ambivalent (Labour) about what to recommend to their voters. Yet the only party that was clear and committed on the issue (UKIP) had no chance of achieving the parliamentary representation through majoritarian British electoral law to follow its option through. The division of pros and cons was almost orthogonal to the major party cleavage. Similarly divided were the media, with some of the tabloid press engaging in a vehement denunciation of the EU, often with little regard for the truth of their claims.<sup>3</sup> Moreover, both camps relied heavily on fear as a negative economic motivation: the Leavers feared losing control over the fates of “our” country to “Brussels” (or of having to compete with foreign migrant labor for jobs),<sup>4</sup> and the Remain camp feared the adverse economic consequences (jobs, trade, investment, exchange rates) of Brexit. Appeals to the advantages, political attractions, prior commitments, hopes, and promises of remaining were rarely advanced, implying that there were few. Left in a state of disorientation and anxiety, and being informed by the media and polling organizations that the contest would be a tight one (suggesting that every vote or abstention could make

a big difference), voters were left to rely on their gut feelings, rather than an informed judgment, on the merits of the two alternatives.<sup>5</sup> The dichotomy of a referendum further induced the voters to ignore the numerous intermediate solutions that might have been worked out through bargaining following the formal declaration of Brexit. One of the damages the reliance on the plebiscitarian method can do stems from its one-sided fixation on voting at the expense of the two other modes of democratic political communication: arguing and bargaining.<sup>6</sup> Plebiscitarian procedures thus impoverish the tool box of democratic politics by eliminating the space for postvoting reasoning and compromise-finding in the institutional framework of representative democracy. They privilege the fast, impulsive snapshot reaction generated by passions and visceral instincts over the more time-consuming balancing of interests and the typically lengthier process of persuasion through argument. As a consequence, consistency is not required: voters can simultaneously opt for lower taxes and greater expenditures, or for cheaper gas and stricter environmental standards.

Not only were the two major parties split in their preferences between Remain and Leave, but voters were also “cross-pressured” at the individual level. Many voters were motivated by the issues of immigration and “sovereignty,” with the support for the Leave alternative fueled by an identity-based opposition to having to adopt “foreign-made” EU laws (“let’s take back control of our country”). Yet, at the same time, many of the same voters “regarded the economic impact of leaving the EU negatively. ... No less than 40 [percent] reckoned that Britain would be worse off economically if it left the EU.... The two central issues of the campaign were seemingly pulling voters in opposite directions.”<sup>7</sup> Fears for the economy, based on socioeconomic interest, provided a reason for voting in favor of Remain.

In this implicit debate of identity versus interest, the elderly and the less-educated considered EU membership both a cultural and economic threat and hence gravitated toward the Leave option, while the best-educated, younger (below age forty-five) voters welcomed diversity within Britain because they could “compete with ease in an internationalised labour market.”<sup>8</sup>

How has the Brexit referendum performed in realizing the democratic principle of equality of political rights to make one’s voice heard? Good democrats know that those affected by the law must have a voice in making the law. Yet voting rights in the Brexit case became effective only by passing three filters: First, in the United Kingdom, you must be a citizen, not just a resident, to be eligible for voter registration in national elections/referenda. Millions of mainland EU citizens residing in the United Kingdom were thus not allowed to register and vote. That would be immaterial had the referendum been on a “purely British” issue. But here the category of people most directly affected by Brexit are exactly those migrant workers from member states residing in the United Kingdom. After Brexit, these migrant workers are likely to be deprived of some or all of their socioeconomic rights as EU citizens.<sup>9</sup>

Second, you must register in order to be admitted to the voting booth. “Many people chose not to register to vote because they feared the debt collection agencies that are allowed access to the electoral register.”<sup>10</sup> As many as seven million eligible adults were not registered to vote in the United Kingdom in 2016, perhaps in part due to that deterrence effect.

Third, you must vote. Thirteen million registered voters did not turn out. They were disproportionately young, renters, members of ethnic minorities, and recent movers. Older people voted in greater proportion. They generally voted for Leave, while among those aged eighteen to twenty-four,

73 percent voted (if they voted) for Remain. But the youngest age groups also had the largest share of abstainers. Again, a paradox shows up in that those affected by the outcome for the longest time span (the young) had the lowest impact on that outcome, and those least affected the greatest impact.

So much for the democratic egalitarianism of voting in referenda. In regular elections, contending political parties provide some guidance to voters and tend to make an effort to mobilize in demographically balanced ways. Now another problem of referenda is that there is no way to make sure that the answer voters give is actually their answer to the specific question they are asked: in this case the question of EU membership or not. Chances are that the answer the Leavers gave was the answer to an entirely different question, such as: “Do you want to seize the opportunity to send a hostile message and cause trouble to the hated political establishment – be it the national or the one in Brussels?”<sup>11</sup> If *this* is the question being actually answered (and answering “yes” is less inhibited because of a widespread belief that the Remain camp would win anyway), there is no reason for voters to stick to their answer for even a single day after the vote. When surveyed immediately after the referendum, “7 [percent] of those who voted Leave feel like they did not make the right choice,” while no less than 29 percent considered their vote instrumentally futile as the two goals of the Leave campaign could not, in fact, both be accomplished in the upcoming Brexit negotiations with the EU: namely, the interest-related goal to stay in the single market and enjoy its economic advantages and the identity-related goal to limit freedom of movement of EU citizens and to “take back control.”<sup>12</sup> Concerns of interest and those of identity seem to have pulled voters in different directions.

Given the vast and highly uncertain short-term as well as long-term repercus-

sions of the largely unanticipated referendum outcome (for Britain and for the geopolitical role of the EU and its prospects for further disintegration), over four million voters signed a petition in the days after the referendum that called for holding a second referendum, thus indicating a widespread sense of regret, as well as alarm, over the outcome. Yet such a repetition would seemingly have required another Referendum Act as its legal basis. It would have opened the horrifying perspective of an endless chain of further referenda on the outcomes of prior referenda: vote until the outcome seems right! If the first is seen by voters as ill-considered and in need of self-correction, why should the second fare better?<sup>13</sup>

How can the decision to let the relative majority of those participating in the referendum decide on a complex, highly consequential yet, at the same time, most unpredictable national issue be justified as the “right” procedural decision – rather than as the (eventually failed) opportunistic calculus of a leading politician to maintain his power over his party and the country? In other words: what is this outcome’s procedural source of validity and normative bindingness? The procedural design of the Referendum Act was ill-considered. It failed to make use of the several safety valves that can be applied in referenda in order to strengthen the normative bindingness, or legitimacy, of the outcome: that is, its prospects of being durably and universally recognized as reasonable and hence valid, rather than as a regrettable collective misstep. For one thing, a *quorum*, or minimally required turnout of voters, could have been stipulated, such as a 75 percent requirement. The stipulation of such a threshold, however, might have provided the opportunity for the Remain side to sabotage the referendum by launching an abstain campaign. Another possibility might be a *supermajority* requirement, such as a 60 percent threshold for the winner.<sup>14</sup> Adopting such a

supermajority rule would avoid deciding a matter of this magnitude by a slim and possibly even accidental and unstable majority. A third safety measure could have been the use of *federal* constraints. Given that the United Kingdom is a multinational political entity, one or more of its constituent nations – Northern Ireland, Wales, and in particular Scotland (where the Remain vote achieved a substantial majority) – could have been procedurally protected from defeat by a (narrow) overall *national* majority by granting Scotland autonomy rights concerning the issue of EU membership. In fact, the referendum result has strengthened Scotland’s claim for national autonomy, thus putting into political jeopardy the very unity of the United Kingdom. Finally, a *test vote* (as sometimes taken in party groups of legislative bodies) could have been provided, the result of which would have informed voters about dispositions of their fellow citizens and encourage them to revise or assert their own dispositions accordingly in the second (and only valid) round.

Applying some or all of these provisions could have been justified by the fact that the Brexit referendum was a one-shot and highly consequential decision, which will create consequences that are certain to be felt in the long term. In contrast, the “normal” democratic procedure of holding contested elections is defined by its periodicity, meaning that governing authority is granted *pro tempore* and that losers of an election will have another chance in four or five years’ time, with both competing parties and members of the general public given a learning opportunity to revise platforms and preferences during the interval. An election constitutes both a government and an opposition of losers, while a referendum constitutes a *fait accompli* that can no longer be challenged.<sup>15</sup> If after an ordinary legislative election, policies are considered to have gone wrong, there is someone to blame (and punish) in the next election,

whereas the voting public can only blame itself (that is, nobody in particular, since the vote is secret and nobody can be held accountable) in case the results of a referendum turn out to be widely seen as mistaken.

A further provision that *was*, in fact, deployed in the Brexit referendum was the procedural stipulation that the government is not strictly bound to implement the result, but can treat it as merely advisory. As sovereignty resides in Parliament, it is, arguably, that representative body that must eventually decide whether or not to endorse and implement, through its law-making, the referendum decision. In theory, the only thing that even the most sovereign body cannot do is abdicate its own law-making powers and transfer them to another body, such as the multitude of citizens voting in a referendum. It seems to follow that a prime minister cannot self-bindingly promise voters that he or she will follow their expressed preferences as if they constituted an act of legislation. Absent a parliamentary or at least executive ratification of the (presumed) popular will as expressed in a referendum, such a referendum cannot be binding. For example, the invocation of Article 50 of the Treaty on the European Union (TEU) – the article that prescribes the first step of the procedures of actually exiting the Union – must be an act of Parliament or at least, if “royal prerogative” were to apply (which is bitterly contested), a decision of the prime minister, who in turn might be seen as in need of winning the legitimacy of her or his decision through an endorsement through regular elections (rather than a nonelectoral accession to office, as in the case of Prime Minister Theresa May). These manifold ambiguities and disputes illustrate the extent to which the “will of the people” is a largely elusive substance contingent on the procedures by which it is being assessed. Holding a referendum has not been, in the instance of Brexit, a way to settle a question, but an in-

advertent move to open a constitutional Pandora's box. The attempt to fight populism by adopting its own plebiscitarian weapon has not only misfired, but has had a destructive impact upon the principle of representative government.

To be sure, a parliamentary validation of the referendum decision might well be the result of principled argument and proper deliberation, weighing the merits of the "advice" the voting public has offered against alternative policies. Yet the sovereignty of Parliament, in the sense of having the last and decisive word, has largely been rendered nominal by the referendum and the legislature's prior decision to hold that referendum. By adopting the EU Referendum Act, thereby (seemingly) passing its legislative responsibilities to the "people," the Parliament has virtually destroyed its recognition as a body to be credited with the capacity to form policy on the basis of informed, considered, and balanced argument. It has eschewed its responsibility to do so, thereby confirming, in a way, the caricature populists paint of members of the "political class." If Parliament abdicates its law-making authority on as weighty an issue as EU membership, what should prevent it from doing so on other issues in the future?<sup>16</sup>

Having unleashed the plebiscitarian forces voicing fear of foreign control and foreign migrants, neither the political parties nor the members of Parliament could henceforth afford to advocate any solutions to future UK-EU relations that could be denounced as defying the referendum's "advice." Politicians cannot be expected to commit electoral suicide by refusing to follow the "will of the people," the expression of which they themselves had allowed for, even if only as part of a power game. These problems (and *not* an electoral or parliamentary defeat) made the committed Remainer David Cameron disappear from the scene of UK national politics in a matter of

weeks, while the most prominent Leave protagonist, Boris Johnson, moved up to the position of Britain's Foreign Secretary. The new prime minister's signature tautology – "Brexit means Brexit," being void of any information about what Brexit means – ratifies the unconditional surrender of representative to plebiscitarian will formation. It also gives *carte blanche* to rulers to define the meaning *ex post*. As constitutional scholars Richard Gordon and Rowena Moffatt have stated with unfathomable yet inconclusive juridical wisdom: "In practice, the ... referendum outcome will bind the government. In theory it is advisory but in reality its result will be decisive for what happens next."<sup>17</sup> At the time of the submission of this essay in December 2016, the answer to this question is by no means settled by the referendum, but remains a pending case before the highest court of the country.

Given all these premises, dilemmas, and consequences, the Brexit referendum must be considered a clear and unambiguous lesson on what democracies ought *not* to do. Holding referenda with a 50 percent majority on important substantive policy issues with substantial yet unknown long-term results is a misguided remedy to the ills of liberal democracy. Referenda encourage the accountability-free expression of poorly considered mass preferences and de-emphasize requirements of consistency, compromise-building, and the reflection on consequences. By inviting citizens to leap into the dark, they create irrevocable facts and preclude learning. They often betray minimal standards of rational policy formation, traces of which are institutionalized in even the most corrupted practices of parliamentary debate, party competition, and mass media reporting. They anonymize the locus of accountability. If these critical generalizations are only partly right, the urgent question is: can we think of better and smarter – more reliably "regret-avoid-

ing” – modes of making highly salient decisions? Otherwise, we may regret decisions that fail to take sufficient account of the future, other people, and the facts.<sup>18</sup> How can we minimize these forms of rational regret while maintaining the basic tenets of liberal democratic theory: namely, equality of civil and political rights, freedom of opinion, and the division of state powers? The remainder of this essay will consist of a short and schematic account of what should be done instead on the basis of deliberative democratic theory.

Apart from large literatures on new social movements, civil society, and social capital, a major conceptual and theoretical innovation in democratic theory over the last generation has been the idea of deliberative democracy. Compared with conventional approaches in democratic political theory, deliberative theory performs a dual shift of emphasis. In one shift that has become increasingly popular among theorists, and even to some degree in practice, deliberation is brought to the public through a partial move from *territorial* representation to *aleatory*,<sup>19</sup> or randomized, representation – an analog to jury selection through sortition in the common law countries. This use of randomly selected citizens also serves to partially dissolve the conventional dichotomy of ruling elites representing voting yet ruled nonelites. Few suggest replacing current political institutions with such bodies; they are intended to complement existing institutions to help correct their known deficiencies.

The second shift moves from an ideal of maximizing the citizens’ expression of political preferences (in participatory democracy, as many people as possible should have a chance to voice their preferences on as many issues as possible and as directly as possible) to maximizing the citizens’ capacity to *form* preferences and judgments on public affairs they will not later regret. How

can preference formation be improved so as to make the citizen preferences that will later be translated into policies by governing elites more regret-proof?

The first of these two major reorientations of democratic innovation involves complementing the universe of the adult permanent legal residents of the territory of a state (or municipal entity or province), who are the ultimate source of popular sovereignty, with a small body (“mini-public” or “deliberative panel”) of persons that is (as accurately as possible) statistically representative of the whole. Constituting active citizenship by lot is an ancient idea, dating back to the times of Athenian democracy (and found, to some degree, in Renaissance Italian city republics), that fell into discredit in the course of the French and American revolutions with the crypto-aristocratic notion that the people can be represented only through elected bodies and leaders.<sup>20</sup> Lotteries as a procedure of recruiting people for public roles are typically regarded as risky because they rely on highly optimistic assumptions concerning both the readiness and the competence of those chosen by lot to perform the needed public roles. Yet both the readiness and competence objections can be dealt with through appropriate institutional precautions.

The readiness of randomly selected candidates to assume the tasks assigned to them by lot can be enhanced through a compensation that follows a rule of thumb such as “no loss, no gain,” with a cap of, say, 150 percent of the median income, depending on the complexity of the issue under consideration. To enhance that readiness, the duration of the time in “office” might also be limited to a maximum of six months, for example. Nevertheless, civic duty to participate in deliberative mini-publics will probably remain hard to enforce, and participants who see themselves as being coerced will likely not properly perform. Techniques of stratified sampling may offer a solution in

case the characteristics of the sample deviate far (by gender, age, socioeconomic, educational, and minority status) from those of the constituency as a whole. The logistical problems of organizing face-to-face deliberation sessions on national legislation in geographically large countries might be alleviated by first selecting (possibly, again, by lot) two municipal units from which the samples are to be drawn. Although in composing that sample a measure of self-selection cannot be avoided, the statistical representativeness of members of the mini-publics thus selected should be much superior to that of the composition of ordinary legislative bodies. The relatively small size of deliberative panels (probably fewer than one hundred candidates) must be big enough to allow for representativeness on all relevant variables, yet small enough to allow for serious and inclusive face-to-face arguing under the supervision of a trained facilitator. The virtue of lottery representation would consist not only in providing a political role to ordinary citizens, but in denying such a role to political parties and organized interests. Unlike the parties and interest groups, randomly selected citizens are unlikely to have the interest or the capacity to entrench themselves in their public role of deliberators.

Even thornier than the issue of readiness to participate is the issue of competence. Members of issue-specific deliberative panels need to acquire a measure of understanding and expertise, as do members of legislative bodies, in order to arrive at minimally reasoned conclusions. Such expertise can be provided by an adequate number and diversity of recognized experts made available to members of a mini-public as providers of information. Concerns about deficiencies in the knowledge and experience of members of deliberative mini-publics are further reduced by the fact that no political decision-making power is vested in them. Deliberative pan-

els would perform a purely consultative function,<sup>21</sup> helping citizens form preferences that they would then express in elections and possibly referenda. And citizens must be provided access to those recommendations through the reporting of print media, brochures, and (public) electronic media. The role of deliberative bodies should be strictly advisory, addressing both elites and voters. That role should also be limited to the specific issue of public policy about which a deliberative panel is commissioned to elaborate a recommendation. The lay policy-makers who jointly author such a recommendation may conclude with a consensual recommendation or with majority and minority positions. In the latter case, a second order consensus on what stood in the way of a consensual recommendation should be provided. The two panels may also disagree in their consensual recommendations. If the recommendation is both consensual within panels and identical between the two locations, this is likely to translate into the highest degree of persuasiveness and impact on electoral outcomes. This impact is due to the enlightened vicarious judgment that “people like us” have formed on the issue at hand. The more consensual the recommendation within and between panels, the stronger its influence ought to be and probably will be on the decisions that voters and elected representatives will make.

The premise from which theorists of deliberative democracy by sortition start is the assumption that citizens do not simply have political preferences and attitudes, including preferences and aversions to particular policies. Rather, they continuously form these preferences in a process of ongoing confirmation, revision, and learning. Most of the time and on most issues, most peoples’ preferences are incomplete, inconsistent, insufficiently informed, contingent, fluid, and subject to relations of trust, as when we adopt the point of view

of others because we happen to feel confident about the adequacy of their judgment. The capacity of forming thoroughly considered judgment can today no longer be vested in individual representatives (as Burke claimed), but must emerge from the discursive confrontation of diverse members of an organized body. The key democratic act of voting is about the expression of preferences, whereas the activity taking place in randomized deliberative panels (as well as, mostly implicitly, in many other theaters, such as peer groups, schools, religious communities, media, the arts, consumption, and not least the political process itself) is that of the formation and (de)consolidation of those preferences through learning. The presence of deliberative panels – and the public perception of the conclusions they arrive at – allows ordinary citizens to get an idea about what happens when “people like us” spend time and energy on refining their preferences, finding out for themselves and others what they hold to be the right position on particular policy issues. The role of the citizen deliberators will be strictly limited to that of an advisory agency assisting citizens (including elected and appointed officials) in the process of their will formation.

For such reflexive preference learning to take place at the level of mass constituencies, deliberative panels need to be institutionalized: that is, made part of the rules regulating the process of legislation. To illustrate, one conceivable institutional design would be the following. A deliberative panel would come into being at the initiative of at least 20 percent of the members of the state or federal legislature. These members would also define the policy issue on which the panel is commissioned to deliberate. The panel would deliberate one year prior to a decision to be taken by the legislature or executive branch on the policy. Such panels would always come in pairs, with both being active in two (according

to some “most different” design) selected subterritorial entities (counties or cities). A statute would regulate the size of the panel, the sampling method, the mode of operation (including a budget for expert assistance and compensation payments), the role of facilitators and moderators, and the scheduling of meetings. Their work of (at most) six months would result in policy recommendations (consensual or otherwise) in the form of an executive summary, together with the reasoning from which the recommendations derive. The identity of members would ideally be kept anonymous through the time of deliberations so as to shield the deliberators from outside influence. Neither governments nor citizens would be pressured to follow those policy recommendations. Governments (and, perhaps, political parties) might, however, be formally required to publish an official statement specifying the reasons why they did *not* follow the advice, in cases in which they decide not to do so.

It is impossible to know whether the outcome of the Brexit decision would have been different if it had been processed through an institutional arrangement of will formation such as the one just outlined. Whatever the answer, British voters and elites would at least have been more certain that they made the right decision than they can possibly be after the experience of the Brexit referendum.

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- <sup>1</sup> This generalization does not apply to the Chinese case of industrial capitalism presided over by a “Communist” party. But that model is neither intended for export nor appealing to elites or masses of Western societies.
- <sup>2</sup> The day after the referendum, Philip Stephens, chief political commentator of the *Financial Times*, commented in undisguised horror: “Who would have thought pragmatic, moderate, incrementalist Britain would tear down the political temple? This week’s referendum result was a revolt against the status quo with consequences, national and international, as profound as anything seen in postwar Europe.” Philip Stephens, “How a Cautious Nation Came to Tear Down the Political Temple,” *Financial Times*, June 24, 2016, <https://www.ft.com/content/b90a7278-3a02-11e6-9a05-82a9b15a8ee7>.
- <sup>3</sup> The ironic label “post-truth” has been attached by several commentators to populist movement practices. This label is not only deserved by the generous use populist campaigns have made of outright lies, but also, as in the Trump campaign, by their anti-intellectual aversion to expertise and educated intelligence.
- <sup>4</sup> Princeton economist Ashoka Mody has put it well: “Cameron misjudged . . . by making an economic case for remaining in the European Union rather than attempting a serious political argument for Europe – one based on shared values.” Ashoka Mody, “Don’t Panic: Britain’s Economy Can Survive Just Fine Outside the European Union,” *Independent*, July 4, 2016, <http://www.independent.co.uk/news/business/analysis-and-features/dont-panic-britains-economy-can-survive-just-fine-outside-the-european-union-a7118736.html>.
- <sup>5</sup> There is more than a grain of truth in Edmund Burke’s famous claim: “Your representative owes you . . . his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” In the case of Brexit, it was the plain cowardice of representatives facing a populist challenger that caused this sacrifice. Edmund Burke, “Speech to the Electors of Bristol,” November 3, 1774.
- <sup>6</sup> Jon Elster, “Arguing and Bargaining in Two Constituent Assemblies,” *Journal of Constitutional Law* 2 (2) (March 2000): 345 – 421.
- <sup>7</sup> John Curtice, “Brexit: Behind the Referendum,” *Political Insight* 7 (2) (2016), <http://pli.sagepub.com/content/7/2/4.full.pdf+html>.
- <sup>8</sup> Ibid. Wolfgang Streeck has argued that “the losers under neoliberal internationalism [globalization] place their hopes on their nation states.” Wolfgang Streeck, “Where Are We Now? Responses to the Referendum,” *London Review of Books* 38 (4) (July 14, 2016), <http://www.lrb.co.uk/v38/n14/on-brexit/where-are-we-now#streeck>. This causal explanation of the outcome commands a great deal of empirical plausibility. But equally great is the temptation to exclaim, with the words of the great Austrian poet Ernst Jandl, “What an error!”
- <sup>9</sup> A reciprocal loss of socioeconomic status rights applies to British citizens who were economically active in EU member states and, after Brexit, are now relegated to the status of third country nationals.
- <sup>10</sup> Benjamin D. Hennig and Danny Dorling, “In Focus: The EU Referendum,” *Political Insight* 7 (2) (2016), <http://pli.sagepub.com/content/7/2/20.full>.
- <sup>11</sup> This was widely seen by commentators to have happened in a Dutch referendum held on the highly technical as well as politically rather marginal issue of a Dutch Approval Act on a European Union–Ukraine Association Agreement, which was held in The Netherlands on April 6, 2016. The outcome was a turnout of 32.8 percent, with 61 percent voting against the Act. In an interview after the referendum, the members of the rightist nationalist Citizens’ Committee EU that had successfully campaigned for holding it admitted not caring about Ukraine, but rather were just against the EU political system. See Wilmer Heck, “Oekraïne kan ons niets schelen,” NCR, March 31, 2016, <https://www.nrc.nl/nieuws/2016/03/31/oekraïne-kan-ons-niets-schelen-1606419-a969298>.

- <sup>12</sup> See James Crouch, “Voters React to Post-Referendum World,” *Opinium*, July 1, 2016, <http://opinium.co.uk/voters-react-to-post-referendum-world/>. The thought that voting for Brexit means “taking back control” is plainly delusionary, at least in the short and medium term. Article 50, which is still binding for the United Kingdom, stipulates that “the Union shall negotiate and conclude an agreement with [the UK].” In the interest of the Union to prevent the Brexit decision from becoming a template that other member states might follow, the EU is likely to opt for the harshest possible terms in negotiating Britain’s exit arrangement, thus “taking control” over the economic fates of the United Kingdom to an unprecedented extent. The Lisbon Treaty, Article 50 of the Treaty of European Union, December 13, 2007.
- <sup>13</sup> There is, however, a strong argument for having a second referendum at a later point. As the proponents of Brexit had no plan (and could not have one) concerning the many and very different versions of what is going to happen next in re-embedding Britain into the international political economy, the eventual outcome of negotiations with the EU must also be subject to a (dis)approval by voters. As Simon Wren-Lewis has cogently argued: “I cannot see the logic in saying people should have a direct say in whether to leave the EU, but no direct say on what to leave *for*.” Simon Wren-Lewis, “Why We Must Have a Second Brexit Referendum,” *Social Europe*, August 29, 2016, <https://www.socialeurope.eu/2016/08/must-second-brexit-referendum/>. The emphasis is mine.
- <sup>14</sup> As one commentator has noted: “It is highly unusual [in mature democracies] that, particularly on issues of great constitutional significance, a simple majority of those who happened to vote on a particular day should be regarded as binding.” Brendan Donnelly, “After Brexit: The Light at the End of the Tunnel is Several Oncoming Trains,” *Social Europe*, July 18, 2016, <https://www.socialeurope.eu/2016/07/light-end-tunnel-several-oncoming-trains/>.
- <sup>15</sup> “The 48 [percent] of voters . . . who wanted to remain in the European Union now suddenly find themselves substantially unrepresented in the British Parliament.” *Ibid*.
- <sup>16</sup> This question touches on the thorny issue, not to be dealt with in the present essay, of what kind of policy issues are “safe” to be processed by plebiscitarian methods. Referenda on constitutions can arguably enhance the self-binding effect and thus the constitution’s validity and longevity. The adoption of legal rules, the consequences of which are easily understood, predictable, and largely uncontroversial (such as local referenda on opening hours of stores), would also seem unproblematic. The same can surely not be said of the plebiscitarian adoption, now common in several EU countries, of rules that discriminate against moral, ethnic, migratory, sexual, religious, or criminal minorities (as in the current initiative of the Turkish president to hold a referendum on the reintroduction of the death penalty).
- <sup>17</sup> Richard Gordon and Rowena Moffatt, *Brexit: The Immediate Legal Consequences* (London: The Constitution Society, 2016), 7.
- <sup>18</sup> Future-regardingness, other-regardingness, and fact-regardingness can serve, taken together, as a standard of political rationality. See Claus Offe, “Crisis and Innovation of Liberal Democracy: Can Deliberation Be Institutionalised?” in *Citizens in Europe: Essays on Democracy, Constitutionalism and European Integration*, ed. Claus Offe and Ulrich K. Preuss (Colchester, United Kingdom: ECPR Press, 2016), 73–98.
- <sup>19</sup> See Hubertus Buchstein, “Elective and Aleatory Parliamentarism,” in *Parliamentarism and Democratic Theory*, ed. Kari Palonen and José María Rosales (Opladen, Germany: Budrich, 2015), 255–278; and David van Reybrouck, *Against Elections: The Case for Democracy* (London: The Bodley Head, 2016). Some also use the word “sortition” and others “the lot” to describe this feature of representation through random selection.
- <sup>20</sup> Rousseau was still convinced that a democracy must be built on a mix of territorial and aleatory representation. See chapter three of book four of Jean Jacques Rousseau, *Du contrat social*.
- <sup>21</sup> See Patrizia Nanz and Claus Leggewie, *Die Konsultative: Mehr Demokratie durch Bürgerbeteiligung* (Berlin: Wagenbach, 2016). See also Baogang He and Mark E. Warren, “Authoritarian Deliberation in China,” *Daedalus* 146 (3) (2017) for the spectrum between advisory/consultative deliberative panels and empowered ones.