# The Deliberative Potential of Facultative Referendums

## *Procedure and Substance in Direct Democracy*

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**Abstract:** Deliberative democracy theorists have long dismissed direct democratic mechanisms, suspecting them of fundamentally contradicting the deliberative ideal. One reason for this dismissal is that, as aggregative devices, all direct democratic institutions would implement a purely procedural view of democracy deemed undesirable. In this article, I contest this objection to all direct democratic procedures by showing that one of them, namely, the facultative referendum, corresponds to Joshua Cohen's definition of substantive democracy. Moreover, because it introduces uncertainty in the democratic system and replaces hypothetical with actual acceptance of reasons, the facultative referendum gives political actors strong incentives to think in terms of acceptable justifications and can screen outcomes that fit the three principles of Cohen's deliberative ideal. These findings should encourage deliberative democracy theorists to further develop tools to inform the design and assessment of the growing number of popular votes around the world and ultimately enhance their democratic quality.

**Keywords:** contestation, democratic legitimacy, institutional design, participatory politics, popular vote, veto power

> "Nothing … could be more antithetical than
> deliberative democracy and referendums."
> John Parkinson, "Beyond 'Technique'"

As the use of popular votes for making political decisions becomes more common around the world, the question of the democratic legitimacy of direct democratic devices remains largely unanswered. Direct democracy has indeed largely been ignored or dismissed by the dominant strand of contemporary democratic theory, deliberative democracy theory (Saward 2001a: 375), since its very first phase (Elstub et al. 2016: 141; Mansbridge et al. 2012: 25–26; Owen and Smith 2015: 213). The rejection of direct democracy by the contributors to the initial phase of development of the

deliberative ideal, according to whom, as Joshua Cohen writes, its aggregative aspects prevent it from being "a particularly good arrangement for deliberation" (Cohen 1989: 30), has largely remained unquestioned in subsequent developments of this theory (Chambers 2009: 331; Owen and Smith 2015: 231; see, e.g., Gastil and Richards 2013; Leib 2006; Urbinati 2006). The most recent, "systemic" development in deliberative theory has introduced innovative ways to discuss and even defend direct democratic arrangements from the deliberative perspective. Yet, by acknowledging that "internally nondeliberative" avenues can play a virtuous role in deliberative democracies (Mansbridge et al. 2012: 6; see also, e.g., Dryzek 2016: 211), this approach preserves the assumption that referendums have a non- or low deliberative character and proposes to include them in deliberative systems as "necessary evils," which can trigger quality deliberations in other parts of the system or link micro- and macrolevel deliberative spaces (see, e.g., Curato and Böker 2016: 175; Felicetti et al. 2016: 440; Parkinson 2012: 162–163).

However, a number of scholars have questioned the deliberativists' dismissal of the deliberative potential of direct democratic mechanisms. They have proposed answers to basic objections against direct democracy from deliberative debates—such as its infeasibility in modern societies (Budge 1996: 24–28) or the incapacity of citizens to make decisions on policy issues (Saward 2001a: 369)—and highlighted some deliberative virtues of initiatives and referendums, for instance, in terms of incentive structure for elected representatives (Setälä 2006: 716; Steenbergen 2009) or political engagement of lay citizens (Gastil et al. 2014: 80). But additional evidence is required to lift the deeply entrenched suspicion of deliberative democracy scholars toward direct democratic devices.

In this article, I propose to remove one reason for suspicion by answering a latent principled objection against direct democratic mechanisms introduced in the initial wave of deliberative democracy theory: as aggregative institutions, these mechanisms would all implement a purely procedural view of democracy incompatible with the deliberative democratic ideal. On the question of procedure and substance, "one of the most striking issues in political philosophy" (Martí Mármol 2005: 263; see also Christiano 2003: 4–6), deliberativists actually agree that democracy must have a substantive aspect, and that it should achieve desirable outcomes (see, e.g., Gutmann and Thompson 2009: 16–18, 31; Habermas 2006: 413; Manin 1987: 363). Without this dimension, democracy would fail to produce political legitimacy: a purely procedural account of democracy makes it impossible to qualify "execrable" results (as, for example, restrictions of fundamental liberties) as undemocratic (Cohen 1997: 409). Procedures that do not provide ways to disqualify certain outcomes, and

that support the view that, as is often heard in "semidirect democratic" Switzerland, "popular will has to be respected" with no further questioning once a popular vote has taken place (see, e.g., Masmejan 2013), should thus be rejected as ways to implement deliberative democracy.

In what follows, I challenge this objection to direct democratic institutions and offer support for the claim that deliberative and direct democracy "can be regarded as *mutually supportive*" (Saward 2001a: 363) by coming back to the deliberative ideal articulated by the first wave of deliberative theorists. More precisely, I claim that the bottom-up direct democratic institution of the facultative referendum can realize Cohen's ideal of substantive deliberative democracy (Cohen 1997).

Cohen's discussion of procedure and substance actually remains a seminal reference for contemporary theorists to identify the "default" deliberative conception of democratic legitimacy (Peter 2014; see also, e.g., Gledhill 2015: 11–12; Sen 2004: 349n57). In this view, outcomes can neither be determined prior to any procedure, nor be considered a priori legitimate simply because they are the result of a certain procedure (Bagg and Knight 2014: 2085; Chambers 2010: 898; Saward 2001b: 565). Simultaneously, because Cohen largely contributed to rejecting direct democracy in the first place (Saward 2001a: 375), and his definition of the deliberative ideal is considered to be more demanding than the ones proposed by subsequent deliberativists (see, e.g., Chambers 2010: 900; Dryzek 2016; Elstub and Gagnon 2015), engaging with his conception of deliberative democracy offers a strong case for reassessing the deliberative legitimacy of direct democratic procedures that might convince not only readers who share Cohen's views, but also advocates of less strict versions of deliberative democracy.

Before turning to the argument, I should explain why I focus on one direct democratic mechanism and what it is. My focus on the facultative referendum benefits this article in the sense that it prevents the blurring of normatively relevant differences between various direct democratic institutions[1] and allows an in-depth clarification of this mechanism's actual deliberative potential. The facultative referendum enables a minority of citizens to contest a law accepted in parliament and to demand that the final decision regarding this law's adoption or rejection be made through a popular vote. In Maija Setälä's typology of referendums, it corresponds to a binding rejective decision-controlling referendum (Setälä 2006: 705–706). It is a two-step institutional mechanism. To launch a facultative referendum, citizens must in a first step gather a fixed number of signatures in a specified amount of time. In a second step, the authorities organize the popular vote, which is preceded by a campaign in which the representatives have the opportunity to defend their law proposal

and the challengers can present their arguments for rejecting it. This mechanism is implemented in Switzerland, where the citizens have the political right to launch referendums at the local and national level.[2] The present discussion is, however, concerned with the facultative referendum as an ideal institution detached from the pragmatics of its realization in real-existing democracies.[3] As the pure proceduralism objection is a principled one, I believe this approach to be the appropriate one to observe whether the principles on which this institution relies really are incompatible with substantive accounts of deliberative democracy.

My argument unfolds as follows. In the next section, I draw on Cohen's distinction between purely procedural and substantive conceptions of democracy to show that the facultative referendum procedure fits his definition of the substantive view of democracy; the deliberative critique to direct democratic mechanisms thus does not apply to it. Taking the investigation further, I show that the facultative referendum can live up to Cohen's demanding ideal of deliberative democracy. I first reject an objection implying that such a veto procedure deeply contradicts Cohen's democratic requirement of equality. I then highlight the facultative referendum's capacity to implement all three of Cohen's principles of deliberative democracy — deliberative inclusion, promotion of the common good, and participation — by shifting the focus to the actual acceptance of reasons by the citizens and by introducing uncertainty thanks to its bottom-up aspect. I finally emphasize the value of the shift from hypothetical to actual acceptance of reasons and the acceptable character of the final, majoritarian vote for deliberativists. I conclude by emphasizing the value of this analysis for systemic deliberative theory and insisting on the necessity for deliberative democrats to go beyond the general dismissal of direct democratic institutions and to engage in defining the circumstances in which referendums can be "more or less deliberative" (Chambers 2009: 331).


## Procedure versus Substance

How do political decisions become democratically legitimate? Answers to this fundamental question of democratic theory are generally of two sorts (Martí Mármol 2005: 263; Peter 2014). For substantivists, a decision is legitimate if it corresponds to values defined independently from the decision-making process. In a democratic context, this implies that the population shares "a comprehensive moral or religious doctrine," and that only decisions that exhibit "congruence with that view" are considered legitimate. In such a case, "the test for legitimacy will be … dependent on

the outcomes, not simply the process through which they are reached" (Cohen 1997: 407). The same, however, might not be true in societies in which the members have different moral or religious views, a pluralism that characterizes most existing political communities. In the absence of "a comprehensive consensus on values," the only democratically legitimate way to make decisions could actually seem to consist in finding a procedure that all can consider as fair (409) and to determine the legitimacy of these decisions in a proceduralist way, namely, by checking whether the democratic procedure has been appropriately followed. But this answer does not satisfy deliberative democracy theorists, for reasons highlighted by Cohen in one of the "leading essays" in nascent deliberative theory (Christiano 2003: 12).

### Purely Procedural Democracy

In Cohen's view, the procedural view that fair processes of collective decision making alone create political legitimacy is associated with an aggregative view of democracy, broadly defined in the deliberative democracy debate as taking "the expressed preferences as the privileged or primary material for democratic decision-making" (Gutmann and Thompson 2009: 15). It favors methods of decision making that aggregate these preferences, for example, by putting "the question to the people and [letting] them vote" (14). Majoritarian institutions give an equal weight to the interests of each member and are promoted for being a "relatively uncontroversial" way of making decisions that can be accepted by all the members of a pluralist society (16). In the aggregative perspective, the only condition for creating democratic legitimacy is that these procedures are fair, namely, that they implement certain values such as "openness, equal chances to present alternatives, and full and impartial consideration of those alternatives" (Cohen 1997: 409). If this condition is fulfilled, democratic legitimacy is created as soon as the procedure has been properly followed.

In Cohen's view, two critiques must be made to this purely procedural, aggregative view of democracy. First, it makes it impossible to criticize the procedure's outcomes as "undemocratic" — or, more precisely, to qualify them as such *because of their content.* The purely proceduralist view does indeed offer a way to contest an outcome, which is to argue that the process did not grant equal consideration of all members' interests. For instance, as Cohen writes, "it might be said that collective choices that depend on discriminatory views" constitute a "failure to give equal consideration to the interests of each" and that they should therefore be dismissed (1997: 411). However, this ex post contestation of the outcomes would be of no help to question the democratic legitimacy of "execrable"

collective choices resulting from the well-implemented procedure (409). As Cohen explains, the procedural account of democracy does not protect all fundamental individual liberties. Only the liberties necessary for the realization of the fair decision-making procedure, namely, political liberties — the "liberties of the ancients" — are protected, because respecting them is necessary to the creation of democratic legitimacy. What Cohen calls "the liberties of the moderns" — namely, "religious liberty, liberty of conscience more generally, liberty of thought and expression, and rights of person and personal property" (410) — are, however, not directly attached to the fair procedure. These liberties benefit from no protection in the purely procedural view, and nothing prevents them from being restricted by collective choices. To the contrary, what would be considered undemocratic would be to criticize a decision violating modern liberties, since it would put into question the idea that democracy is "the way we must decide how other political values are to be ordered" (410).

The fact that aggregative forms of democracy provide no means to reject outcomes that violate nonpolitical liberties is, in Cohen's view, not only problematic because of our moral intuitions. His second critique of aggregative models of democracy is that the aggregative, procedural account of democracy fails to implement its own principle of "equal consideration of the interests of each" (1997: 411). Such equal consideration would require that the varying "stringency or weight of the demands" be seriously taken into account (412). Some citizens have more stringent convictions than others, in which case they need better reasons to be compelled to go beyond these convictions than other members of the society. Treating others as equals would thus imply providing the former with "reasons of especially great magnitude for overriding those demands" that they have "reason to accept" (412–413). By assuming that the interests of all are of equal weight — and thus that all can be given equal consideration in a majoritarian procedure and should accept the outcome it produces with no further justification (see also Gutmann and Thompson 2009: 15) — the procedural conception of democracy would fail to achieve this requirement of equality.

### Substantive Democracy

Cohen thus argues that this conception should be replaced by a "more substantive" understanding of democracy (1997: 409). To make it possible to protect more than political liberties and to treat all the members of the community as equals, we should in his view reject the aggregative model and adopt a deliberative conception of democracy.[4] Instead of focusing on the equal consideration of everyone's interests in the collective

decision-making process, Cohen argues that we should conceive democracy as "organized around an ideal of political justification," according to which the exercise of political power must be justified in ways acceptable to the plurality of citizens (412). Such a model "expresses the equal membership of all in the sovereign body" and represents "an especially compelling picture of the possible relations among people" to the members of the pluralist society (416, 415).

This ideal is embedded in a procedure of political deliberation in which participants should "regard one another as equals, … aim to defend and criticize institutions and programs in terms of considerations that others have reasons to accept … [and be] prepared to cooperate in accordance with the results of such discussion" (Cohen 1997: 413). The decision regarding which considerations are deemed acceptable depends, in Cohen's view, on the context of the community – but if a specific community accepts the democratic process, it should also reject appeals to considerations that violate equality (415).

It is precisely this limitation to the reasons that may be invoked in public reasoning that constitutes the substantive aspect of Cohen's conception of democracy. He writes that "these constraints on reasons *will limit the substantive outcomes of the process*; they supplement the limits set by the generic idea of a fair procedure of reason giving" (Cohen 1997: 415, emphasis added). These limits would, for instance, guarantee the protection of religious liberties: if the requirement to provide reasons that others can accept is taken seriously, and if we want to treat them as equals, we must be able to justify a restriction of their religious liberty by "finding reasons that might override these obligations." However, we are soon forced to "acknowledge that such reasons cannot normally be found" (417), and religious liberty must therefore be preserved.

Deliberative democracy would thus offer ways to protect not only political, but also modern liberties. "Abridgments of such liberties would constitute denials to citizens of standing as equal members of sovereign people, by imposing in ways that deny the force of reasons that are, by the lights of their own views, compelling" (Cohen 1997: 418). Cohen, therefore, argues that "the deliberative conception of democracy captures the role of 'undemocratic' as a term of criticism applying to results as well as processes" (424), even in pluralist societies.

However, this widely shared "substantive" view of deliberative democracy – "the constraint on reasons" limits "the outcomes of the process" (Cohen 1997: 421), or to put it as Jack Knight and James Johnson did, "a political outcome is legitimate … because it survives the deliberative process" (1994: 284) – appears to be rather limited. Cohen actually offers no way to control the outcomes independently of the procedure, adding

no "substantive constraints on the outcomes of the deliberative process" (Knight 1999: 164); as in the procedural view that he rejects, his substantive view only allows one to criticize the outcomes that have been chosen through a procedure that failed to implement the deliberative requirement of equality.[5] The distinction between procedural and substantive accounts of democracy thus appears to be more tenuous than Cohen claims. The only control of substance that his conception offers lies in the fact that the process itself eliminates certain arguments and proposals from the discussion, and thus selects, or screens (Pettit 1999: 213), what results the democratic process can possibly produce.[6] The two accounts of democracy hence mainly differ in the values, or "substantive constraints" (Knight 1999: 163), that the decision-making procedures should realize: while what Cohen describes as purely procedural accounts of democracy promote procedures that aim at protecting the interests of all equally, his more substantive account recommends the adoption of procedures that further the requirement of equality.

## The Substance of the Facultative Referendum

With such an understanding of the substantive view of democracy, the direct democratic procedure of the facultative referendum cannot be rejected for promoting a purely procedural understanding of democracy. It does actually offer a way to screen the possible results that the procedure of collective decision making can produce: only the laws that are (a) not contested by any minority launching a facultative referendum or (b) accepted by the majority of citizens if a vote is organized are implemented. The pure proceduralism objection thus does not apply to the facultative referendum.

Suspicious deliberative theorists might, however, now question the desirability of the substance promoted by such a direct democratic procedure. In this final section, I thus take my investigation a step further and explore whether the substance promoted by the facultative referendum can correspond to the demanding deliberative ideal of Cohen. I first eliminate an objection according to which the facultative referendum would violate his ideal of political justification. I then turn to highlighting how it offers an appealing way of implementing his three principles of a deliberative democracy.

### A Tyranny of the Minority?

Does the facultative referendum impede the realization of Cohen's most fundamental standard of substantive, deliberative democracy, namely,

the requirement to "defend and criticize institutions and programs in terms of considerations that others have reasons to accept"? Veto institutions – "the deadlock of democracy," as Robert Goodin puts it (1996: 331), namely, all kinds of institutional means to check and contest governmental action such as the facultative referendum – have actually been criticized for leading to "absurd" outcomes, because they enable minorities to unilaterally decide for the whole society.

Goodin argues that this is caused by the conception of public interest that these institutions rely on: The "'least-common-denominator' definition of the … public interest" (333) sets that only policies to which all members of the society consent serve the public interest and should be implemented, and hence that vetoed policies are undesirable for the common good. But this view produces nonsense outcomes, Goodin argues, using the following example: everyone "must breathe tolerably clear air and drink tolerably clean water in order to live," and preserving clean air and water thus appears to be quite objectively in the public interest (338). Yet, following the "least-common-denominator" understanding of the public interest, a community would justifiably renounce policies promoting these goods if a minority profiting from polluting air and water opposed them.

Developing a similar critique, Richard Bellamy argues that veto institutions tend to preserve a status quo beneficial to privileged groups by providing them with means to contest policy changes. He writes that deadlock procedures may "unfairly [favor] the *status quo*, potentially entrenching the unjust privileges of historically powerful minorities" (2007: 9), especially since citizens are in his view characterized by the "small 'c' conservative predisposition … to stick to what they know" (227). Requiring the acceptance of all would thus imply that certain ambitious policy projects, aiming, for instance, at furthering social justice, do not stand a chance to be implemented.

What these critiques highlight is that veto institutions enable minorities to impose a situation favorable to them without requiring them to give others reasons they can accept. They would thus necessarily violate Cohen's requirement of equality and promote an illegitimate and undemocratic lawmaking process.

This objection, however, does not apply to the facultative referendum, a process that promotes reason giving throughout its different stages. At its first step of collection of signatures to contest a law, which might contain the "least-common-denominator" view of public interest depicted by Goodin, the minorities launching the referendum must already convince other citizens of the relevance of their action. They must think of reasons that others can accept to convince them to sign the pe-

tition so that the contestation can take place. But more importantly, contrary to the institutions Goodin and Bellamy have in mind, the launch of a facultative referendum does not stop the lawmaking process by itself; it only triggers the second step of the procedure, the campaign and popular vote. The fact that it is the majority of citizens that makes the final binding decision provides, to reuse Goodin's pollution example, big industries with a strong incentive to find arguments supporting their position in the eyes of the largest number of citizens possible. They would have to offer reasons closer to Cohen's criterion — reasons that others can accept, arguing, for instance, that preserving the status quo would be in everyone's interest rather than claiming that they "profit from polluting the air or water."

### Realizing "Directly" the Three Principles of Deliberative Democracy

The actual acceptance of reasons by the citizens is thus an essential element to explain the deliberative potential of the facultative referendum, as will appear below. But let me first introduce Cohen's three principles of a deliberative democracy, "deliberative inclusion, the common good, and participation" (1997: 431).

Linked to the requirement of equality, the first principle of deliberative inclusion demands "that we find politically acceptable reasons — reasons that are acceptable to others, given a background of differences of conscientious conviction" (Cohen 1997: 417). Not offering acceptable reasons to a group or to individuals is, according to Cohen, a "failure of democracy," as it denies the quality of these "others" as equal citizens (419, 418). The second principle that a deliberative democracy should implement is that of common good. In a pluralist context, Cohen defines the common good according to what he calls the "minimal constraint" (421). This standard sets that "citizens have good reasons to reject a system of public policy that fails to advance their interests at all" (421), and requires the rejection of such systems of policy. Finally, the third principle promotes the participation of citizens in the decision-making processes. Cohen argues that deliberative democracy should not let only the elected elite debate and make informed choices for the whole society, but also grant citizens "equal opportunities for effective influence" (422). Equal political rights are actually necessary: first, to implement the democratic procedure and "promote the common good" by serving "as a reminder that citizens have to be treated as equals" (422–423). Second, if certain inequalities in political rights can be justified in legitimate ways (such as giving more voice to regions in a federal state), they should never be based on social conventions, discriminatory features, or historical argu-

ments. And third, since all "citizens have substantial, sometimes compelling reasons for addressing public affairs" (423), it would be impossible to find a reason for restricting their participation rights that they can accept.

Even though Cohen does not list it among the political rights that he has in mind (1997: 422),[7] it is rather straightforward that the right of facultative referendum could belong to the rights that allow for "effective influence." It enables citizens to exert effective influence both by launching a facultative referendum and by participating in the popular vote. In addition, this formal right to contest serves effectively as a "reminder that citizens are to be treated as equals," since all have an equal right to question the legitimacy of a law.

Actually, this "reminder" influences the entire lawmaking process in a way that corresponds to Cohen's two other principles. On the one hand, it gives political actors strong incentives to think in terms of "how their positions could be justified in terms acceptable to voters" (Setälä 2006: 716) and to include the interests of most groups of the society in their law projects.[8] The main reason for that is that representatives want to avoid facing defeat in a popular vote for the laws they have designed and adopted – or even to completely "avoid popular scrutiny" (Hug 2008: 261). Because they cannot control the uncertainty as to whether a facultative referendum will be launched or not, all they can do to prevent it is to provide reasons that the citizens find acceptable for all the law projects that could be contested and "take seriously the concerns of the dissenter" (Steenbergen 2009: 288). As Setälä puts it, they must "prepare for the challenge" (2006: 715–716) by providing actually acceptable justifications for their action that can convince the largest possible number of citizens or by censoring themselves when they are unable to find good reasons.

On the other hand, it constitutes a chance to question laws that would not correspond to Cohen's principles in terms of justification or common good. In a context in which the resources needed to launch such a procedure are accessible to all citizens, no referendum is asked if elected representatives succeed in providing acceptable reasons and in including the interests of most of the citizens. The absence of facultative referendum can be interpreted as a sign that the justifications for a law were accepted by those who will be subjected to it, and that no minority group feels that it "has been left less well off than anyone needs to be" (Cohen 1997: 422). Alternatively, if elected representatives fail to respect these criteria, a minority might launch a facultative referendum. The law promoters then have a second opportunity to propose other, potentially better reasons and to answer the arguments of the facultative referendum launchers during the campaign preceding the vote. But if these jus-

tifications are rejected by the majority of the citizens, the law deemed illegitimate according to Cohen's requirement of equal respect is rejected at the popular vote.

The facultative referendum thus promotes the realization of Cohen's deliberative ideal rather than precludes it. It gives elected representatives a strong motivation to include the interests of most citizens in the new laws they adopt, and both opposing interest groups and the parliament have strong incentives to give reasons acceptable to all in order to justify their use of political power.

## Actual Acceptance and Majority Vote: Institutionalizing Deliberative Democracy

The potential deliberative merits of the facultative referendum high-lighted above derive from the option it provides to test whether the reasons given are actually accepted. This additional "testing" step is, however, not required by Cohen, for whom there is no need to verify whether reasons really are acceptable. He actually argues that we can consider that we provide "justifications on terms acceptable to others" as soon as we acknowledge that they must follow some stringent demands and adapt our reasons to these demands (1997: 416, 412, 419). Engaging in actual conversation with these "others" to learn about their actual convictions is superfluous (412). Their hypothetical acceptance would be sufficient for democratic legitimacy.

Does the shift from hypothetical to actual acceptance, then, contradict Cohen's principles of deliberative democracy? I think not. One of the main reasons why Cohen himself does not require actual acceptance despite the importance of this standard in his theory — if the reasons provided for public action were not acceptable, democracy would "fail" — is that he excludes the possibility that legislators could vote for laws based on reasons that do not respect all members of the society. They would not even discuss such laws, as in his view, the "constraint on reason" a priori screens the very proposals that can be discussed (1997: 415).

But it seems problematic to only rely on our own conception of what reasons could be accepted by others to claim that none of the laws discussed are based on unacceptable reasons, for we might misconceive of their interests and obligations. Iris M. Young provides some examples of how one can misconceive the situation of others, and she defends the necessity to engage in an actual discussion with others for political action (2001: 208–211). "When people obey the injunction to put themselves in the position of others, they too often put themselves, with their own particular experiences and privileges, in the positions they see the oth-

ers," a fact that can "often function to legitimate the privileges of the privileged groups and to undermine the self-respect of those in oppressed groups" (215). Presupposing that all laws discussed and adopted do respect all members as equals just because those legislating have imagined what their stringent demands are could thus undermine the position of minorities even more by reinforcing the assumed legitimacy of the decisions made. In Young's view, "the only correction to such misrepresentation of the standpoint of others is their ability to tell me that I am wrong about them" (212). Bellamy argues in the same way, claiming that asking for actual acceptance creates the possibility to "show how the prevailing interpretation of the public political culture excludes or potentially harms particular categories of citizens" (2007: 187).

The presence of the facultative referendum provides elected representatives with an incentive to promote laws that can be accepted by the citizens and to self-censor when a law project stands no chance to be accepted (see, e.g., Leemann and Wasserfallen forthcoming; Leuenberger 2014), thus corresponding in a way to Cohen's screening hypothesis.[9] But this procedure also presupposes that parliamentarians *can* vote for laws based on reasons unacceptable to parts of the population. In such cases, it offers an institutional way for minorities to correct misconceptions concerning them. It thus represents a way to guarantee that everyone really is "standing as equal citizens" (Cohen 1997: 418), especially in pluralist societies, by making it possible to check whether the justifications proposed really are compelling to others, or whether they are based on misconceptions of the stringency of their interests, or unknowingly ignore, exclude, or oppress parts of the population. As such, it seems that Cohen's model should favor actual over hypothetical acceptance to guarantee the realization of the first two deliberative principles.

This discussion, however, points toward one final possible objection against the facultative referendum's potential to implement the deliberative ideal. While launching such a procedure is a way for minorities to make their perspective visible and correct misconceptions of their views, it also means that the majority of citizens will make the final, binding decision about the adoption or rejection of the contested law. Therefore, minorities can still see their interests be disrespected. Is the capacity of the facultative referendum to implement the three principles thus annihilated by its final decision-making step? Again, I think not.

Two answers can be given to this objection. First, the facultative referendum produces its positive impact even when it is not used — and, therefore, even when there is no vote. As Philip Pettit argues, actual contestatory power does not need to be used to have an effect: the citizens' "virtual control of every piece published" is sufficient to encourage elected

representatives to think in terms of reasons acceptable to the citizens and to include a variety of interests. Moreover, this "virtual control" provides strong democratic legitimacy to uncontested decisions (2004: 61).

Second, Cohen and other deliberativists do not reject all kinds of majoritarian votes. After all, the aim of the deliberative process is to produce "a decision that is *binding* for some period of time," and this decision might very well be made by a vote (Gutmann and Thompson 2009: 5). But they highlight two characteristics of deliberative votes. On the one hand, it should remain clear that no vote constitutes the last word on an issue. Votes must be acknowledged as part of a long-term decision-making process, of "an ongoing open conversation" (Chambers 1998: 165). The facultative referendum votes implement well this reversibility criterion, contrary to Simone Chambers's view that all referendums necessarily "offer the illusion that by putting something to a vote we can finally resolve it" (160). If a law adopted by the parliament on a specific topic is accepted in the popular vote, nothing should prevent legislators from modifying it again in the future.[10] But more interestingly, if the contested law is rejected at the popular vote stage, there are high chances that the parliament legislates on the same topic again quite fast, as it has identified a need to modify the status quo. The future law's design might be informed by the debates about the previous law on this issue, thus maintaining a certain continuity and having a better chance of being accepted.

On the other hand, in the deliberative perspective, the legitimacy of the vote depends on the campaign preceding it. As John Parkinson writes, the ratification of a proposal by the citizens through a referendum only is "the final collective decision making mechanism of a much longer process" (2009: 15). And I have tried to show that this process can promote desirable outcomes: it motivates representatives to think in terms of acceptable justifications or to abandon proposals that cannot be justified; it provides a way to check whether these justifications are actually accepted; it opens the possibility to acknowledge biases as to how the interests of others are (mis)conceived; and it offers these "others" the possibility to correct such potentially harmful misconceptions and to make their voice heard and their perspective more visible and accurate, thus giving citizens a chance to gain knowledge and potentially to "agree about what is at stake in a particular political conflict" (Knight and Johnson 1994: 282). And even if the proposed law is accepted in the popular vote, contestatory voices are made visible during the collecting of signatures phase and during the campaign, registered by the vote, and may as such impact future lawmaking design and processes.

Of course, we cannot preclude the possibility that certain actors in the referendum campaign act in a strategic or even manipulative way

(Cohen and Sabel 1997: 321). And as votes are information poor (Urbinati and Warren 2008: 402), we cannot know whether the reasons of citizens for accepting or rejecting a law are generally acceptable ones, as Cohen would demand for the support of a majority to count as a supplementary justification to accept a system of policy (1997: 414). But if we adopt the "plausible view" that "all parties … may accept the importance of finding considerations that others acknowledge as reasons" (Cohen and Sabel 1997: 321), we can expect the facultative referendum process, including the essential step of the final popular vote, to produce legitimate outcomes.

## Conclusion: The Deliberative Potential of the Facultative Referendum

I have shown in this article that deliberative democracy theorists cannot dismiss the bottom-up direct democratic device of the facultative referendum for implementing a purely procedural view of democracy. It actually corresponds to a widely shared account of what substantive deliberative democracy should be, as it offers a process that screens the possible outcomes that can be achieved. These outcomes might moreover very well fit the deliberative ideal. I suggested that the facultative referendum can promote the three principles of deliberative democracy set by Cohen. Introducing the institutional possibility for citizens to contest almost any law adopted in parliament and force a popular vote on its adoption, this direct democratic device gives elected representatives strong incentives to reason in terms of justifications that citizens can accept from the beginning of the lawmaking process and to include the interests of the plurality of citizens in their legislative projects. Moreover, the facultative referendum's focus on the actual acceptance of reasons provides an opportunity for minorities to gain visibility and to correct potential misconceptions of their interests and perspective in a way that limits the chances that they will be undermined in the long term in the "dynamic processes" of democracy (Anderson 2009: 222).

Despite its primary focus on the deliberative potential of one direct democratic institution rather than on its impact on the democratic system to which it belongs, my argument contributes to enhancing the defense of referendums in systemic deliberative theory. Commentators of the systemic turn actually argue that, because of its "unmooring from the ideal of deliberative democracy" (Owen and Smith 2015: 226), systemic deliberative theory risks losing its critical force as a regulative ideal and weakening its standards to the point that it could legitimize any "weakly

deliberative, or even anti-deliberative behavior" (Mansbridge et al. 2012: 19; see also Bächtiger et al. 2010: 48; Elstub et al. 2016, 145–146). To prevent these high "normative costs," purely systemic analyses should go hand in hand with considerations about the deliberative quality of the system's components, such as direct democratic institutions (Owen and Smith 2015: 227). By removing a reason to suspect that referendums can only be defended as "necessary evils" antithetical to the deliberative ideal in deliberative systems, and showing that facultative referendums can correspond to the deliberative ideal, the present article thus provides additional support for reassessing the deliberative value of direct democratic mechanisms from both a macro- and a microlevel perspective. In particular, it is urgent that deliberative democracy theorists inform the institutional design of the variety of direct democratic devices and establish criteria to assess their implementation in real-existing democracies, so that these institutions best realize their deliberative potential (Knight 1999: 167). These contributions are an essential step toward making the popular votes that are part of both our democratic present and future more democratically legitimate.

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▶▶ **NOTES**

1. This way, there is also no risk of making broad claims about "direct democratic institutions" that actually fail to apply to the wide variety of mechanisms included in this all-encompassing term (see, e.g., Gastil and Richards 2013).
2. At the national level, they must collect 50,000 signatures from their fellow citizens within 100 days to oppose federal laws, urgent laws adopted for a period longer than one year, and certain federal resolutions and international agreements.
3. While its implementation in the Swiss context is worthy of study, it thus remains beyond the scope of this article, as well as considerations regarding its use in unequal societies.

4. Given the limits of space, I only sketch the view of deliberative democracy proposed by Cohen in the mentioned article.
5. Gutmann and Thompson offer a similar argument, which highlights another principle, that of reciprocity: "Given certain assumptions about reciprocity, citizens should accept certain principles and conclusions" (1999: 278).
6. Since the present article's aim is to clarify Cohen's definition of substantive democracy to apply it to the facultative referendum institution, I do not develop this discussion further. Yet as support for my interpretation, Cohen's substantive view corresponds to Richard Bellamy's definition of a procedural account, whose "substantive qualities relate primarily to the character of the process itself and only secondarily … to the substantive worth of the decisions they produce" (2007: 191).
7. Namely, "rights of voting, association, and political expression … ; rights to hold office; … equally weighted votes" (Cohen 1997: 422).
8. As seems to be the case in the Swiss system (see, e.g., Sciarini and Trechsel 1996: 6; Stojanovic 2009).
9. This also means that the facultative referendum introduces a bias toward the status quo, as it might encourage the representatives to favor policies with higher chances to be accepted and supported by the citizens in case of a referendum over more ambitious projects. In Setälä's view, such institutions should thus not be implemented alongside other pro status quo ones (2006: 716). However, this aspect of the facultative referendum corresponds to Cohen's substantive deliberative ideal: it preserves the status quo over systems of policies justified by reasons that are not compelling to most of the members of the society.
10. Alexander Trechsel (2010) argues that one of the advantages of another direct democratic device, the popular initiative, is that it enables citizens themselves to bring a specific topic into discussion.

### ▶ REFERENCES

Anderson, Elizabeth. 2009. "Democracy: Instrumental vs. Non-instrumental Value." Pp. 213–227 in *Contemporary Debates in Political Philosophy,* ed. Thomas Christiano and John Christman. London: Wiley-Blackwell.

Bächtiger, André, Simon Niemeyer, Michael Neblo, Marco R. Steenbergen, and Jürg Steiner. 2010. "Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Blind Spots and Complementarities." *Journal of Political Philosophy* 18 (1): 32–63.

Bagg, Samuel, and Jack Knight. 2014. "Legitimacy." Pp. 2079–2090 in *The Encyclopedia of Political Thought,* ed. Michael Gibbons, Diana Coole, Elisabeth Ellis and Kennan Ferguson. London: John Wiley & Sons.

Bellamy, Richard. 2007. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy.* Cambridge: Cambridge University Press.

Budge, Ian. 1996. *The New Challenge of Direct Democracy.* Cambridge, MA: Polity Press.

Chambers, Simone. 1998. "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis." *Politics & Society* 26 (1): 143–172.

Chambers, Simone. 2009. "Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?" *Political Theory* 37 (2): 323–350.

Chambers, Simone. 2010. "Theories of Political Justification." *Philosophy Compass* 5 (11): 893–903.

Christiano, Thomas. 2003a. "Introduction." Pp. 3–16 in *Philosophy and Democracy: An Anthology,* ed. Thomas Christiano. Oxford: Oxford University Press.

Cohen, Joshua. 1989. "Deliberation and Democratic Legitimacy." Pp. 17–34 in *The Good Polity: Normative Analysis of the State,* ed. Alan Hamlin and Philip Pettit. Oxford: Basil Blackwell.

Cohen, Joshua. 1997. "Procedure and Substance in Deliberative Democracy." Pp. 407–437 in *Deliberative Democracy: Essays on Reason and Politics,* ed. James Bohman and William Rehg. Cambridge, MA: MIT Press.

Cohen, Joshua, and Charles Sabel. 1997. "Directly-Deliberative Polyarchy." *European Law Journal* 3 (4): 313–342.

Curato, Nicole, and Marit Böker. 2016. "Linking Mini-Publics to the Deliberative System: A Research Agenda." *Policy Sciences* 49 (2): 173–190.

Dryzek, John S. 2016. "Symposium Commentary: Reflections on the Theory of Deliberative Systems." *Critical Policy Studies* 10 (2): 209–215.

Elstub, Stephen, and Jean-Paul Gagnon. 2015. "A Genealogy of Deliberative Democracy." *Democratic Theory* 3 (2): 100–117.

Elstub, Stephen, Selen Ercan, and Ricardo Fabrino Mendonça. 2016. "The Fourth Generation of Deliberative Democracy." *Critical Policy Studies* 10 (2): 139–151.

Felicetti, Andrea, Simon Niemeyer, and Nicole Curato. 2016. "Improving Deliberative Participation: Connecting Mini-Publics to Deliberative Systems." *European Political Science Review* 8 (3): 427–448.

Gastil, John, and Robert Richards. 2013. "Making Direct Democracy Deliberative through Random Assemblies." *Politics & Society* 41 (2): 253–281.

Gastil, John, Robert Richards, and Katherine Knobloch. 2014. "Vicarious Deliberation: How the Oregon Citizens' Initiative Review Influenced Deliberation in Mass Elections." *International Journal of Communication* 8 (January): 62–89.

Gledhill, James. 2015. "The Ideal and Reality of Epistemic Proceduralism." *Critical Review of International Social and Political Philosophy* online first: 1–22.

Goodin, Robert E. 1996. "Institutionalizing the Public Interest: The Defense of Deadlock and Beyond." *The American Political Science Review* 90 (2): 331–343.

Gutmann, Amy, and Dennis Thompson. 1999. "Democratic Disagreement." Pp. 243–279 in *Deliberative Politics: Essays on Democracy and Disagreement,* ed. Stephen Macedo. Oxford: Oxford University Press.

Gutmann, Amy, and Dennis Thompson. 2009. *Why Deliberative Democracy?* Princeton, NJ: Princeton University Press.

Habermas, Jürgen. 2006. "Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research." *Communication Theory* 16 (4): 411–426.

Hug, Simon. 2008. "Some Thoughts about Referendums, Representative Democracy, and Separation of Powers." *Constitutional Political Economy* 20 (3–4): 251–266.

Knight, Jack. 1999. "Constitutionalism and Deliberative Democracy." Pp. 159–169 in *Deliberative Politics: Essays on Democracy and Disagreement,* ed. Stephen Macedo. Oxford: Oxford University Press.

Knight, Jack, and James Johnson. 1994. "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy." *Political Theory* 22 (2): 277–296.

Leemann, Lucas, and Fabio Wasserfallen. 2016. "The Democratic Effect of Direct Democracy." *American Political Science Review* 110 (4): 750–762.

Leib, Ethan J. 2006. "Can Direct Democracy Be Made Deliberative?" *Buffalo Law Review* 54 (October): 903–925.

Leuenberger, Moritz. 2014. "Schafft sich die Demokratie selber ab?" Paper presented at the Zentrum für Demokratie Aarau (ZDA), 6 December. http://www.zdaarau.ch/dokumente/de/news/Referat_Leuenberger.pdf (accessed May 4 2016).

Manin, Bernard. 1987. "On Legitimacy and Political Deliberation." Trans. Elly Stein and Jane Mansbridge. *Political Theory* 15 (3): 338–368.

Mansbridge, Jane, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis Thompson, and Mark E. Warren. 2012. "A Systemic Approach to Deliberative Democracy." Pp. 1–26 in *Deliberative Systems: Deliberative Democracy at the Large Scale,* ed. John Parkinson and Jane Mansbridge. Cambridge: Cambridge University Press.

Martí Mármol, José Luis. 2005. "The Sources of Legitimacy of Political Decisions: Between Procedure and Substance." Pp. 259–281 in *The Theory and Practice of Legislation: Essays in Legisprudence,* ed. Luc J. Wintgens. Aldershot, UK: Ashgate.

Masmejan, Denis. 2013. "C'est un pas dans le sens du respect de la volonté populaire." *LeTemps.ch,* 22 May. http://www.letemps.ch/suisse/2013/05/22/c-un-sens-respect-volonte-populaire (accessed September 20 2016).

Owen, David, and Graham Smith. 2015. "Survey Article: Deliberation, Democracy, and the Systemic Turn." *Journal of Political Philosophy* 23 (2): 213–234.

Parkinson, John. 2009. "Beyond 'Technique': The Role of Referendums in the Deliberative System." Paper presented to the Referendums and Deliberative Democracy Workshop, 8 May, University of Edinburgh. http://ow.ly/i4V2309H1lQ (accessed August 3 2016).

Parkinson, John. 2012. "Democratizing Deliberative Systems." Pp. 151–172 in *Deliberative Systems: Deliberative Democracy at the Large Scale,* ed. John Parkinson and Jane Mansbridge. Cambridge: Cambridge University Press.

Peter, Fabienne. 2014. "Political Legitimacy." In *The Stanford Encyclopedia of Philosophy,* ed. Edward N. Zalta. Stanford: Center for the Study of Language and Information. http://plato.stanford.edu/archives/win2014/entries/legitimacy/.

Pettit, Philip. 1999. *Republicanism: A Theory of Freedom and Government.* Oxford: Oxford University Press.

Pettit, Philip. 2004. "Depoliticizing Democracy." *Ratio Juris* 17 (1): 52–65.

Saward, Michael. 2001a. "Making Democratic Connections: Political Equality, Deliberation and Direct Democracy." *Acta Politica* 36 (4): 361–379.

Saward, Michael. 2001b. "Reconstructing Democracy: Current Thinking and New Directions." *Government and Opposition* 36 (4): 599–581.

Sciarini, Pascal, and Alexandre H. Trechsel. 1996. "Démocratie directe en Suisse: L'élite politique victime des droits populaires." *Swiss Political Science Review* 2 (2): 1–35.

Sen, Amartya. 2004. "Elements of a Theory of Human Rights." *Philosophy & Public Affairs* 32 (4): 315–356. doi:10.1111/j.1088-4963.2004.00017.x.

Setälä, Maija. 2006. "On the Problems of Responsibility and Accountability in Referendums." *European Journal of Political Research,* June, 699–721.

Steenbergen, Marco. 2009. "Deliberative Politics in Switzerland." Pp. 283–301 in *Demokratie als Leidenschaft: Planung, Entscheidung und Vollzug in der schweizerischen Demokratie,* ed. Adrian Vatter, Frédéric Varone, and Fritz Sager. Bern: Haupt.

Stojanovic, Nenad. 2009. "Afraid of Direct Democracy? A Reply to Critics." Pp. 357–360 in *Is Democracy Viable without a Unified Public Opinion? The Swiss Experience and the Belgian Case,* ed. Dave Sinardet and Marc Hooghe. Brussels: Re-Bel e-books.

Trechsel, Alexander H. 2010. "Reflexive Accountability and Direct Democracy." *West European Politics* 33 (5): 1050–1064.

Urbinati, Nadia. 2006. *Representative Democracy: Principles and Genealogy.* Chicago: University of Chicago Press.

Urbinati, Nadia, and Mark E. Warren. 2008. "The Concept of Representation in Contemporary Democratic Theory." *Annual Review of Political Science* 11 (1): 387–412.

Young, Iris Marion. 2001. "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought." Pp. 205–228 in *Judgment, Imagination, and Politics: Themes from Kant and Arendt,* ed. Ronald Beiner and Jennifer Nedelsky. Lanham, MD: Rowman and Littlefield.