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## Deliberative Democracy for a Great Society

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Albert Weale's *Democratic Justice and the Social Contract* makes a highly original, significant contribution to our understanding of the nature of democracy.<sup>1</sup> This is no small feat when new books on democracy appear almost daily. Of course, democracy is a very broad topic, but Weale is specifically concerned with the conditions under which democratic decision procedures produce fair or just decisions. As the title of this erudite yet engaging book suggests, Weale takes a social contract approach to identifying those conditions. He is obviously not the first to do so. Yet whereas most contemporary philosophers regard the social contract as a hypothetical thought experiment designed to make vivid our intuitions about democratic justice (e.g., Rawls 1971, 1996), Weale instead chooses to analyse the internal logic of empirical examples.

This move will surely come as a surprise to many. After all, one of the most familiar criticisms levelled at the social contract approach is that the social contract is an historical fiction—in most cases, states and their governments have originated not in contracts but in war and conquest. Yet as far as the argument of *Democratic Justice* is concerned, this criticism does not bite. Weale does not argue that modern democratic states originate in social contracts. But he does argue that some local enterprises may do. In particular, he thinks that some communities in which natural resources have to be managed in common may be thought to embody an implicit social contract—for example, a small logging community or fishing village (*p.* 47). The local fishing waters may provide each fisherman

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<sup>1</sup> Weale 2013. Hereinafter, page numbers in italics refer to this work.

with his livelihood, but agreement on common rules is necessary if the resource is not to be depleted. In other words, what is needed is a social contract to reconcile ‘the existence of separate and competing interests with the need to secure common interests’ (*p. xii*).

Interestingly, in some such ‘common pool resource regimes’ (Ostrom 1990), the contract is made under conditions that resemble the conditions of a procedural democracy—*inter alia*, the contract is made by the fishermen themselves (as opposed to being imposed from outside), local knowledge informs their thinking, they recognise the need for monitoring and sanctions, and, most fundamentally of all, each participates in the negotiations from a position of roughly equal power. Hence, what results is not merely a social contract, but a democratic social contract. Yet even if one were to allow that some common pool resource regimes originate in democratic social contracts, the obvious question is how the analysis of such regimes bears on our understanding of the requirements of democratic justice in large modern democracies—or what Weale terms ‘great societies’ (a term that refers in the first instance to their scale rather than to their normative character). His answer to this question has three main steps.

First, Weale argues that as long as participants in the common pool resource regime are equally powerful, ‘the agreement that they make will incorporate principles of justice’ (*p. 94*; see also *pp. xi, 5-6, 94*). It will incorporate principles of justice not because the members are concerned with questions of right or wrong, but because they have the foresight to realise that failure to agree a contract will harm their interests (*p. 118*). In other words, justice is a by-product of prudence. The participants set out to agree a set of common rules governing their use of the common pool resource. However, the fact that they are equally powerful means that the rules that they agree will comply with the demands of democratic justice, even

though none of them was guided by a concern for democratic justice. The contrast here with John Rawls's (1971, 2001) hypothetical approach is instructive. While real people ('you and I', as Rawls is inclined to say) have a capacity for a sense of justice, the imaginary participants in the original position are concerned only to do the best they can for those whom they represent. In other words, they are rational rather than reasonable. Granted, Rawls does not say that they are unreasonable. However, reasonableness is represented in the original position by the conditions of the original position itself. In particular, Rawls places the participants behind a 'veil of ignorance' (thereby denying them knowledge of their social standing, educational attainment, physical attributes, ethnicity, religion etc.) in order to level the playing field. Yet since empirical theories cannot employ the hypothetical device of a veil of ignorance, 'there has to be some other way of ensuring that morally arbitrary differences of circumstance and ability do not distort the negotiation process' (p. 98). According to Weale, the 'assumption of equality of power, understood as equality of bargaining power, captures this requirement' (p. 98).

Secondly, while Weale argues that common pool resource regimes may be thought to model a just social contract, he also stresses that the precise sense in which they do so needs to be carefully understood. As he explains, the use of common pool resource regimes as empirical models does not imply that those models are to be treated as blueprints for (the design or reform of) great societies; they are not a source of institutional prescription but are instead devices for thinking through the 'logical connections of a theory' (pp. 27, 217-218). Empirically, some common pool resource regimes display the features of a procedural democracy. So, by examining such regimes, we get a better sense of how those features work together to deliver democratic justice (pp. 47, 51, 94, 130-132).

Thirdly, while ‘common pool resource regimes may provide empirical evidence about the agreements that would be made in a democratic contract for justice’, that evidence ‘cannot be applied without modification to the circumstances of other societies’ (p. 94). They are mere ‘village republics’ rather than ‘great societies’ (p. 159). Hence, the democratic characteristics of a common pool resource regime are only suggestive of what those characteristic might look like under the very different conditions of a great society (p. 62). Put more negatively, the model is useful only insofar as its basic features can be scaled up, *mutatis mutandis*, to the level of a great society. Weale thinks that they can be scaled up, and spends a great deal of time explaining what the necessary modifications would look like. For example, he argues that the ‘full fruits’ principle, according to which each fishermen can keep what he catches for himself, can be recast in terms of the modern welfare state. While that might initially strike one as implausible, Weale argues that there is no difficulty here, since, properly understood, the modern welfare state is *not* based on a principle of distributive justice (pp. 204-210).

These three steps add up to a coherent argument. Yet, as I will argue, there are reasons why a really great society—a society that is not just physically large or complex but also morally admirable—should be modelled on something more. Common pool resource regimes can provide evidence about how a modern procedural democracy might generate principles of justice. But what, one might wonder, would happen if equality of power could not simply be assumed? Weale might say that such a question is out of bounds; all research is conducted within certain (more or less carefully specified) parameters. His approach is to examine the internal logic of examples where equality of power *can* be assumed and then to see what that logic implies for modern democratic societies. Yet while such an approach can teach us

much, cases where equality cannot be assumed are both too prevalent and too pressing to be set aside.

Admittedly, Weale is not silent on how a sense of justice might take hold. As he argues, justice ‘can be represented as a convention among persons of equal strength for their mutual advantage’ (p. xv). To begin with, the fishermen consent to the social contract for prudential reasons. Yet over time, and through the force of habit, they come to recognise the principles of justice it embodies as principles of justice (p. xv and chap. 8). Sociologically, this may be how some of our most cherished norms and practices have come about—through social evolution rather than conscious intervention. But sometimes a deliberate break with convention is exactly what is required.

So, just as Weale’s approach seems to have little to say about cases in which equality cannot be assumed, it also has little to say about how a sense of justice might be consciously promoted. That is because the particular conception of ‘deliberative rationality’ that we find in *Democratic Justice* is insufficient to the task. Justice may emerge under conditions of equal bargaining power. More generally, market interactions, in which actors are animated only by their own self-interest, can have socially beneficial outcomes. Yet while bargaining can be construed as a form of deliberative rationality, just as Weale suggests, a richer, more normatively attractive, conception of deliberative rationality is required to consciously meet the challenges arising from unequal bargaining power. In what follows, I look to the literature on deliberative democracy to make this latter case. In particular, I argue that concerns about equality or fairness require us to shift from a bargaining mind-set to one in which each person gives no more weight to his own interests *just because it is his interest* than he gives to another’s interest. After all, fairness is not just about being fair to oneself; it

is also about seeing things as others see them, understanding their reasons and weighing them in the balance equally with one's own.

### **Deliberative rationality**

Social contract theories are typically founded on the notion of the state as a 'voluntary' association. Since political relations lack any natural basis, the natural state of humanity is pre-political. By nature, all people are free and equal. Yet because this 'state of nature' breeds insecurity, people consent to institute government, and cede certain powers to it, on the condition that the government consents to use those powers to ensure their collective security.

The notion of the state as a 'voluntary' association is also central to *Democratic Justice*, where voluntary consent is defined as 'action arising from deliberation' (p. xiii). The thinking behind this definition is obvious enough—to agree on what to do, the contracting parties must first deliberate together (p. 100). It follows, therefore, that social contract theories must provide an account of what that deliberation involves and of the personal capabilities it presupposes (p. 96). According to Weale, to deliberate rationally, the contracting parties must be capable of (1) reflective distance on the choices that confront them, (2) following a chain of reasoning to its conclusion, (3) judging which actions will serve their goals and (4) accepting that they may sometimes get it wrong (pp. 24-26, 103-108).

These four conditions are obviously very general. For example, bargaining, which is how the participants in the common pool resource regime are said to make their contractual decisions

(*pp. xiii, 98, 99, 101*), is one way in which they might be realised. Bargainers walk away from the negotiation table if they do not like the terms on offer (reflective distance), each side tries to convince the other that the deal is good for them (following a chain of reasoning), their thinking tends to be highly instrumental (actions serving goals), and they know that bargains will sometimes need to be revised (defeasible agreements). Yet while Weale argues that justice emerges under conditions of equal bargaining power (*pp. xi, 23, 26*), the problem is that bargaining comes up short as a procedure for determining those conditions in the first place. It is not that actors cannot bargain about matters of procedure. A bargain may also generate fixed parameters that constrain future bargains. Yet the fact remains that questions of fundamental fairness or equality cannot be answered from within a bargaining framework—to borrow a phrase from Russell Hardin, bargainers cannot ‘pull themselves up by their own bootstraps’ (Hardin 1991, p. 167). It is simply the wrong type of procedure.

We can see what is at issue here by comparing bargaining to deliberation, specifically as that latter term might be understood by someone working in the field deliberative democracy (see Gutmann and Thompson 2004 for an overview). As Weale recognises, deliberation can also satisfy the broader conditions of deliberative rationality (*p. 18*). However, there are some major differences between it and bargaining. In essence, deliberation is a form of discussion in which the participants carefully weigh the reasons for or against a proposed measure in order to arrive together at a considered view. So defined, deliberation presupposes a willingness on the part of the participants to listen to one another with an open mind rather than sticking doggedly to their own prior views and positions. Insofar as this presupposition holds, the agreements that they reach will be based not on the balance of advantage but on the balance of argument.



By contrast, the aim in bargaining is not to arrive at a collective view of what is right or best, but to reach an agreement in which each side is happy to give up something in return for something else that it wants even more. In a bargain, one side does not try to convince the other that the better arguments are on its side. Rather, it tries to convince the other side of the advantages of accepting the terms that it is offering (*pp.* 56, 118; ref. to Smith 1976 [1776], p. 27). Assuming that both parties are equally free to walk away from the negotiation table, a bargain will be reached only when both of them consider it advantageous to do so (cf. Barry 1990, p. 86). If one or other of the parties can hold out for a better deal, then both sides will be simply left where they were before. Yet while the parties must therefore take a broader ‘prudential’ or ‘enlightened’ view than simply consulting their own interests (*pp.* 76, 102-103), it is ultimately their own interests that concern them most.

In recent years, there has been a move to accommodate bargaining within a broader deliberative framework (e.g., Mansbridge 2010). In particular, deliberative theorists have argued that the terms under which bargaining proceeds should themselves be agreed through deliberation. On one level, it is not hard to see why deliberative theorists should want to make this move. While bargaining and deliberation are distinct activities, in practice they can be very hard to disentangle; both may feature in complex ways within a single decision-making process. But for another, the fact that there is so much bargaining in modern democracies means that any theory of democracy worth its salt must be able to say something meaningful about it. There are, however, deeper grounds for arguing that bargaining should be located within a broader deliberative framework but which are often left unclear within the deliberative literature. In other words, there are grounds for arguing that deliberation should be treated as fundamental. Those grounds are especially relevant to our assessment of the argument of Weale’s *Democratic Justice*.

If someone were to claim that the social contract was unfair, the obvious thing to do would be ask them why. They might say that it was unfair because it failed to treat some people as political equals. Yet appeals to fairness or equality are not like the appeals that people make when they bargain with each other. When two people bargain, each tries to convince the other that he is getting a good deal. However, what each really wants is the best possible deal for himself. By contrast, assessing the fairness of an arrangement requires each person to give no more weight to his own interests in the arrangement *just because it is his interest* than he gives to the other's interest. After all, fairness is not just about being fair to oneself (even if it is that, too); it is about seeing things as others see them, understanding their reasons and weighing them in the balance equally with one's own. This is not to suggest that deliberation is always desirable or even possible; sometimes people simply have conflicting interest (cf. *p. 187*). Yet while bargaining may sometimes be the best or only way forward, most of us would still want to say that bargains should be fair. More specifically, the conditions under which a bargain takes place should be as fair as possible to all sides. But that, as I have just argued, requires deliberation.

In response, Weale might say that the worry here is overstated, since fairness is already built into the dual logic of the common pool approach. Participants have an individual interest in catching as many fish as possible, but they also have a common interest in ensuring that fish stocks are not depleted (*p. 77*). Consequently, they pursue their individual interests acknowledging the constraints of their collective interest. One might take that to mean that each fisherman should seek no more than his fair share. Yet the fact remains that fairness does not enter into their calculations: concerns of justice are not part of their mental make-up (*p. 118*). They may have a common interest in resource management, but that

interest is born of a pragmatic concession to reality. Each fisherman would prefer to have exclusive use of the lake. But since that is not possible, the constraints that the contract imposes are accepted as a matter of simple prudence or pragmatism.

### **Method and practice**

The alternative to accepting the contract on pragmatic or prudential grounds is accepting its constraints or provisions because they are fair or just. But that, as I have argued, requires deliberation, as does any questioning of their fairness at some future point. So why, then, does Weale continue to emphasise bargaining over deliberation? In *Democratic Justice* he offers us two reasons—one logical and one practical. Let us take those reasons in turn.

In an important passage, Weale tells us that we can distinguish between different social contract theories in terms of how they specify the conditions under which agreement is to be reached—or in terms of the particular conception of deliberative rationality that they employ. Thus, as he explains:

In one conception, the negotiation is assumed to be one in which individuals are seeking to promote their interests over a baseline of non-cooperation, and for this reason they are looking to establish a social contract that is to their mutual advantage.

In the contrasting conception, the negotiation is conceived of as an exchange of reasons that are to be considered from an impartial point of view by the participants in the contract. The distinction between the two conceptions is thus one between a social contract as a form of mutual advantage and a social contract as a form of impartial discussion (*p.* 9).

The capacity for impartial reasoning can be explicated in different ways. For example, the account that Jürgen Habermas provides is grounded in a broader theory of communicative action and is encapsulated in the principle that a valid reason is one that all those affected could accept (e.g., Habermas 1990). That principle is common to many theories of deliberative democracy (e.g., Cohen 1996). Yet as Weale points out, if that principle is treated as a *requirement* of democratic justice, as it typically is, the reasoning that underpins the deliberative social contract will be circular. After all, the whole point of the social contract is to *generate* principles of justice (*p. 13*; see also Weale 2004, pp. 88, 91-92). Of course, in practice, the circularity here may not be particularly vicious. Yet logically there is clearly something amiss in claiming that principles of justice can only be determined through a procedure of impartial reasoning when it turns out that that procedure already presupposes a particular understanding of what justice demands.

On the face of it, therefore, one can see why Weale is wary of deliberative democracy. Any successful definition defines a word or concept in terms of some other words or concepts; we cannot legitimately use the word or concept we are trying to define as part of the definition itself. For example, if we define *birds* as ‘feathered creatures’ and further define *feathers* as ‘the outer layer of birds’, then our definition is circular and uninformative. To a person who does not already know what a bird is, the definition says nothing. Analogously, to avoid circularity, a theory of the social contract should not depend on a prior ability to identify principles of justice. Unsurprisingly, Weale thinks that the empirical approach meets this logical requirement. As he puts it, participants in an empirical social contract ‘seek for the advancement of their own interests. The constraints that make the political agreement one of justice are not to be found in the motives of the agents, but in the circumstances in which they negotiate with potential associates’ (*pp. 10-11, 13*). Unlike the circumstances of the original

position, the circumstances of the empirical social contract are real rather than imagined. Hence, the political theorist does not need to inject ideas about justice into his construal of the initial contractual situation. Whereas Rawls is guided by an idea of justice in the very way he constructs the original position, ensuring that he gets out of the original position exactly what he puts into it, Weale has no need of such a move. Yet while Weale's definition of the social contract situation may not be circular, it arguably commits the fallacy of begging the question: equality is merely assumed rather than justified, an assumption which may be (empirically) warranted in common pool resource regimes, but which is often far from (empirically) warranted in great societies. At the very least, one would have to question whether the common pool resource regime can serve as a model for thinking about principles of democratic justice when, in great societies, the presumption of equality may simply fail to hold.

Of course, it might be responded that, in real terms, a model of democracy that stresses impartial deliberation is even more out of touch with the realities of political life in great societies than a model which stresses fair or equal bargaining. In this spirit, Weale reminds us of the practical, as opposed to merely logical, difficulties of treating deliberative social contracts as models for actual democratic politics. In particular, he draws our attention to the problem of scale: while the deliberative social contract models the idea that everyone should have (quite literally) an equal say, 'in great societies this condition of participation cannot be met' (*pp. 160-161*). Their sheer scale is such that it would be impossible for their members to gather together in a single forum to debate the issues of the day. Even if they could gather together, the inevitable time constraints under which most political decisions must be made would make it impossible for everyone to have his say or reflect seriously on the points raised by others (see, e.g., Goodin 2000, p. 82). Consequently, we 'merely have to suppose that

deliberated decisions could be the object of reasoned agreement, even if they are not in fact so' (p. 161).

Thus, for Weale, the problem of scale 'recapitulates for deliberation the principal problem of hypothetical social contract theory. It is one thing to find that people unanimously agree under some circumstances; it is another to suppose that they would agree without our having some independent evidence about what the terms of that agreement would be' (p. 161).

However, the prospects for deliberative democracy in great societies are better, or more promising, than Weale allows (notwithstanding what he has to say about the deliberative virtues of proportional representation). Deliberative theorists recognise that no one deliberative arena can include everyone. But they also recognise that deliberation goes on in many different places—not just within the institutions of the democratic state, but also within the institutions of civil society and the broader public sphere. Admittedly, the quality of deliberation may vary from forum to forum. But, for many deliberative democrats, what ultimately matters is the quality of the system as a whole (Habermas 1996, pp. 204-308; Dryzek 2010, 2012; Mansbridge et al. 2012).

The literature on 'deliberative systems' is small. The idea itself remains under-theorised (for example, does it really make sense to view every political act or institution through a deliberative lens?) and there is still very little sense of how a deliberative system might be empirically measured (for example, how exactly might we assess the extent to which, if indeed at all, deliberation in one arena influences deliberation in another?). Nevertheless, the idea of a deliberative system may offer a genuine solution to the problem of scale. To see how, and in the process to see why worries about the feasibility of deliberative democracy might be ameliorated, consider Weale's discussion of partisanship.

According to Weale, in ‘discursive terms it is useful to think of public policy formation as a competition among different advocacy coalitions’ (*p. 184*). Each of those coalitions seeks to promote the public good rather than seeking to promote its own special interests. Thus, on the face of it, the Conservative Party is not merely a faction, since it really believes that it is doing what is right for society as a whole. That is to say, whereas a faction appeals to a narrow constituency, a partisan party addresses a much wider constituency (White and Ypi 2011, p. 383). Yet while partisans try to persuade, they are not themselves open to persuasion. They offer justifications for the positions that they advocate, but resist making those positions responsive to what others have to say—they may shift their positions for strategic reasons, but not because of any fundamental changes to their core beliefs and values. They may eventually bargain, but, by definition, they never deliberate.

Weale sees partisanship as part of the democratic furniture of great societies. He is surely right to do so. Yet while he accepts that partisans typically talk past one another, and while he also accepts that such behaviour is bad for democracy, he doubts that this is really the serious problem that some people make it out to be (*p. 185*; see Weale et al. 2012 for an empirical analysis). He may or may not be right in that. But had he been less sceptical about the prospects for scaling deliberative democracy up to the level of a great society, he might have been able to make an even stronger case. Partisanship clearly falls short of the deliberative ideal. Yet from systems perspective, partisanship may nevertheless contribute to a society’s overall deliberative capacity. Partisans may not be concerned to weigh competing arguments in the balance and assess them on their merits. But they may nevertheless serve the deliberative purpose of articulating competing positions which others can then consider in the course of their own deliberations. The fact that they address their arguments to society as

a whole means that they also further the cause of deliberative inclusion. Viewed from this perspective, the issue is not the extent to which partisans talk past one another but the extent to which they encourage deliberation at other points in the system. In short, practical worries about deliberative democracy may be overstated. Conversely, bargaining may not be all that much more realistic after all.

### **Moral motivation**

While *Democratic Justice* has much to teach us about what democratic justice would be like under conditions of political equality, it has much less to say about how those conditions might be secured in the first instance. The reason why it has much less to say is because of the conception of deliberative rationality on which it relies: while bargaining can easily shade into coercion unless the conditions under which bargains are negotiated are roughly fair, fair conditions cannot themselves be determined through (fair) bargaining. What is instead required is deliberation. Weale is sceptical about the prospects for deliberation in great societies; there are simply far too many of us to deliberate together. Yet a systemic approach may allay such worries.

Bargaining has another important limitation (although it is not clear that Weale would necessarily regard it as such). As I mentioned in my introductory remarks, one of the central claims of *Democratic Justice* is that democratic justice ‘can be represented as a convention among persons of equal strength for their mutual advantage’ (p. xv; see also pp. xii, 115-116, 224). We initially agree to the social contract for prudential reasons, but over time we become accustomed to treating one another as political equals. In other words, we internalise a sense of fairness. Sociologically, that may be how things go (p. 234). But from a



philosophical perspective, we would surely want something more. Every great society—by which I mean a society worthy of our admiration as opposed to a society that is merely large in size—must form some conception of the kind of society that it is and would like to be. It must decide what it stands for and what values it holds dear. Of course, societies do not choose their values in a vacuum; tried and trusted conventions will certainly have a role to play. But sometimes a society can only be truly great, or at least aspire to be so, by breaking with convention.

One reason why Weale thinks that conventions are important is because institutions cannot do it all; as he puts it, to ‘secure stability, just practices need not only to be externally enforced but to be recognised from the inner point of view’ (p. 226). That is certainly true. Yet if, among other things, a sense of justice is important because it involves our seeing things from others’ points of view, then a great society must make room for more than bargaining. It must also make room for deliberation—and hence for deliberative institutions. Indeed, it must treat the creation and maintenance of deliberative institutions as one of its fundamental concerns. Otherwise the danger is that justice will be left to chance. Over time, just conventions may emerge and take root, such that people feel that there are right ways to behave towards one another. But the likelihood of that happening is increased if we consciously prioritise deliberation—perhaps not everywhere, but surely at crucial points throughout the deliberative system.

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