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DECISION-MAKING IN A GOOD SOCIETY: THE CASE FOR NESTED COUNCILS

SERIES: TOWARDS (A BETTER) POSTCAPITALISM
A HANDY HOW-TO GUIDE

by Stephen R. Shalom

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Decision-Making in a Good Society:

The Case for Nested Councils

Stephen R. Shalom

SERIES

Towards (a Better) Postcapitalism: A Handy How-To Guide

méta Working Papers' series "Towards (a Better) Postcapitalism: A Handy How-To Guide" publishes solicited policy papers on aspects of how would a non-dystopian postcapitalism look like. The series focuses on three 'pillars':

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i.e., how could/would postcapitalist *production* be like (and who would own the means of production), what shape would the *allocation* of goods take (and which alternatives to the market economy may be explored), and what would be the main tenets of postcapitalist *decision making* and *democracy*.

In this paper, **Stephen R. Shalom** addresses the third pillar, i.e. postcapitalist decision-making.

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Every society needs some method of decision-making, some kind of political system. This is true even for a post-capitalist society, where economic power is not concentrated in the hands of the few.

Some, however, dispute this premise, arguing that because many of the conflicts in capitalist societies today can be traced to the economic system, once the capitalists are expropriated, there will be no more divergent class interests, and hence no need for separate political parties, and indeed no need for politics. But not all economic disagreements arise from competing class interests. Should we adopt this economic plan or that one? How should we allocate resources between consumption and investment?

Moreover, many of those working against racism, sexism, and heterosexism would argue that class is not the only source of clashing interests. In principle, we can imagine a society that has eliminated capitalism, but yet has conflicts over racial, ethnic, gender, or sexuality issues. It might be replied that the struggle to overcome capitalism will necessarily be anti-racist, anti-sexist, and so on (or else it won't succeed), and thus inequalities based on race and gender will disappear at the same time as those based on class — not automatically, but as a natural result of a struggle that combines all these concerns.

One would hope this were true, but even if so, there will still be many issues that will divide people in a good society. These issues may not be as fundamental as those that were integral to capitalism, or even to capitalism overlain with patriarchy, institutional racism, and the like, but they are issues that have evoked passionate controversies on the left, that is among those who are agreed on the need to end patriarchal, racist, capitalism. Here, in no particular order, are just a few issues that will continue to vex us in "life after capitalism": transgender rights; animal rights; pornography; sex work; deep ecology; drug legalization; children's rights; allocation of expensive or scarce medical resources; cloning; surrogate motherhood; euthanasia; single-sex schools; religious freedom when the religions violate other important societal values, like gender equity; genetically modified organisms.

On top of this, there are issues that are generally supported by the Left, but not universally so, and about which we can imagine continuing debates in a good society: for example, the extent to which we should recognize abortion rights or preferential policies for members of previously oppressed groups.

And then there are issues that would arise from the fact that the whole world may not become "a good society" all at once — what might be called the "socialism in one country" problem. How will we deal with questions of foreign policy, trade, or immigration?

In short, even in a society that had solved the problem of economic exploitation and eliminated hierarchies of race, class, and gender, many controversies — many deep controversies — would still remain.

Hence, any good society will have to address issues of politics and will need some sort of political system, a polity.

By focusing here only on the political system, of course, I do not mean to suggest that other aspects of life – the economy, racial and gender dynamics — will not have to be changed as well in order to achieve a good society. Indeed, I shall assume that the political system described here is designed to be compatible with an egalitarian and participatory economic system.

My plan will be to survey some of the different possible political systems and assess their advantages and disadvantages, and then try to offer an alternative that retains as many as possible of the advantages, while avoiding as many as possible of the disadvantages.

Two hundred years ago, James Mill[1] explained that the reason we have government at all is because people naturally pursue their self-interest and in the absence of government the strong, in pursuit of their self-interest, would abuse the weak. But if we establish a government, what is to prevent the government from using its power to serve the interests of the rulers at the expense of the rest of the community? The solution, said Mill, is that we must find a way to give the government the same interests as the community, so that when the government seeks to maximize its own interests it will at the same time be furthering the interests of the society as a whole.

There are two ways to make the rulers' interests the same as those of the community. One way is to let the entire community be the

[1] *Essay on Government*, ed. Currin V. Shields, Indianapolis: Bobbs-Merrill, 1955 (1819).

rulers. This is called direct democracy or participatory democracy. In Mill's view, direct democracy is too cumbersome to be feasible. Many political theorists have further argued that the average person is too ignorant, intolerant, busy, or fickle to handle the burdens of direct democracy. But there is another alternative, representative democracy, where a small group of people—representatives—are chosen by the population as a whole and rule on their behalf. Because the representatives are subject to regular election, their interests will coincide with those of the public. If they act contrary to the public interest, they won't get elected or re-elected.

Representative Democracy

Representative democracy is the political system used in almost all current day bourgeois democracies. However, for a variety of reasons, supposedly representative bodies often don't reflect the views of a majority of the population.

To take an example from current U.S. politics, Joe Biden's "Build Back Better" plan is struggling in Congress, being whittled down week by week. If it passes at all, an extremely pared back version of the bill will squeak through. Yet polls show that voters support the bill 61-32 percent, and strongly support each of its key provisions – childcare, pre-K, higher education, green jobs, Medicare expansion, and housing investment.[2]

What accounts for this divergence between the views of the population and the views of their representatives?

[2] https://www.dataforprogress.org/blog/2021/11/3/voters-continue-to-support-the-build-back-better-agenda.

Obviously, the role of money is one key factor. As one study concluded, "moneyed interests exert remarkably effective control over the passage of contested bills"; "moneyed interests systematically affect representatives' decisions on contested bills and, thus, have a substantial impact on policy decisions on controversial issues."[3] Presumably this wouldn't be a concern in an egalitarian society with a participatory economy.

Another reason for the divergence between representatives and their constituents is lying: representatives often say one thing when running for election and then do something else once in office. The failure to keep campaign promises may not be as common as widely thought, but the literature seems to show that campaign pledges are fully or partially fulfilled by governing parties about 60 percent of the time, meaning that many pledges go unfulfilled.[4] And since it is so difficult to dislodge incumbents (particularly in mid-term), voters can't easily punish politicians who fail to keep their promises.[5]

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[3] Ulrich Matter, Paolo Roberti, & Michaela Slotwinski, 2019, "Vote Buying in the U.S. Congress," CESifo Working Paper Series 7841, CESifo. https://ideas.repec.org/p/ces/ceswps/_7841.html.

[4] See Robert Thomson, Terry Royed, Elin Naurin, et al., "The Fulfillment of Parties' Election Pledges: A Comparative Study on the Impact of Power Sharing," *American Journal of Political Science*, Vol. 61, No. 3 (July 2017), pp. 527-542.

[5] In the United States, officeholders can be impeached, but that is for *crimes*, and not simply because the official no longer has the confidence of the public. Several U.S. states allow do recall, but California's version of recall is logically incoherent. See Editorial Board, "California's Recall Election is Broken," *New York Times*, Sept. 9, 2021, https://www.nytimes.com/2021/09/09/opinion/california-recall-newsom.html.

It might be thought that a simple solution here would be to legally require politicians to keep their promises, to "mandate" them? Perhaps, but there are times when circumstances change. For example, Franklin D. Roosevelt campaigned in 1940 on a pledge to keep the United States out of war. Thirteen months later he asked Congress for a declaration of war, but only after Japan had first attacked the United States at Pearl Harbor. Was this the violation of a campaign promise or an appropriate response to altered circumstances? Who decides? Moreover, a mandate would not solve the problem of how the people's voice—and perhaps their evolving opinions—might continue to be heard even after they've elected their representative.

Another problem is gerrymandering, the drawing of district lines so as benefit the party doing the line drawing. In most U.S. states the line drawing is done by partisan commissions. In 19 states Republicans control the process and in 9 Democrats do. So, for example, in 2012, Democrats received 1.4 million more votes than Republicans for the House of Representatives, but Republicans won more seats in the House of Representatives, 234 to 201.[6]

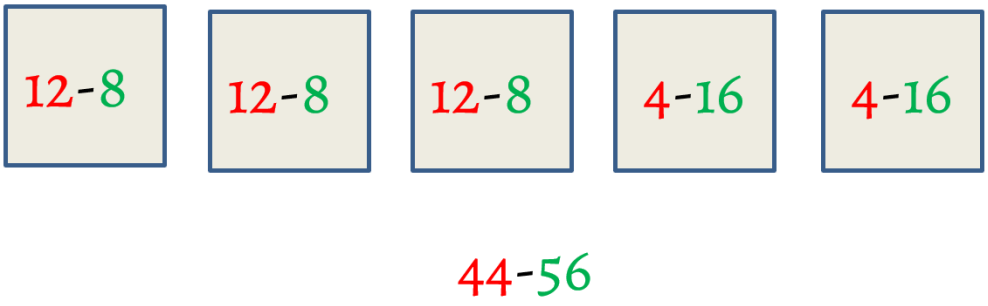
Voter suppression is yet another explanation for the divergence between the views of the people and their representatives. There are many ways this is done. The party in charge can increase the number of polling places in areas where its own supporters reside and decrease them in areas where other parties are strong. In the United States, jurisdictions that had previously denied African Americans the right to

[6] https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html.

vote closed 1,173 polling places between 2014-2018.[7] They can impose voter ID laws that have the effect of depressing turnout among the poor. (The Government Accountability Office estimated that voter turnout is decreased by 2-3 percent as a result of these laws.[8]) They can purge voter rolls in a partisan way. States that had previously denied African Americans the right to vote, disproportionately purged voters after federal oversight was removed by the Supreme Court. *Two million fewer voters* would have been purged 2012-2016 if these jurisdictions had purged voters at the same rate as other jurisdictions.[9]

Crucially, however, even if there were *no* role for money, *no* lying politicians, *no* gerrymandering, and *no* voter suppression, representative bodies will not always represent the views of the people. This is so for several reasons.

Consider a country with 5 regions, each one with exactly 20 voters, for a total of 100 voters. Assume there are two political parties in these countries, Red and Green, with their number of supporters as indicated below.



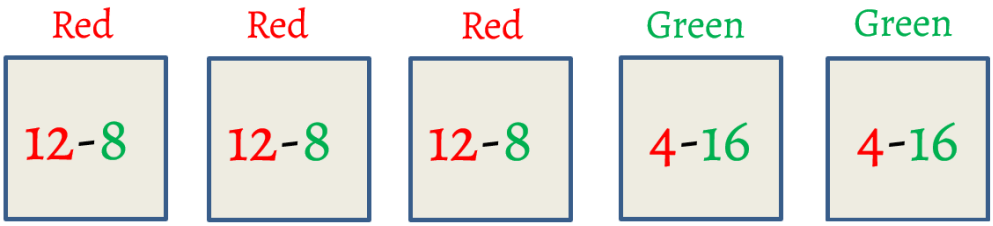
[7] https://civilrights.org/democracy-diverted/.

[8] https://www.gao.gov/products/GAO-14-634.

[9] https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf

If you add up all the Red and Green voters, we have 44 Red voters and 56 Green.

But if each region elects a representative, there will be 3 Reds and 2 Greens, giving the Reds a 60 percent majority in the legislature.



So, the representatives (three out of five, or 60% Red) do not correspond to the population (56% Green).

There's another reason that the views of representatives might not correspond to those of their constituents. When a voter votes for a candidate, that doesn't mean that the voter agrees with the candidate on every issue. Rather, it means that the voter agrees with the candidate more often than not, or more often than the voter agrees with other candidates. Consider then this case, where there are two candidates A and B, 20 voters, and 10 issues.

issue number	position of candidate A	position of candidate B	positions of voters																				How many voters agree with candidate A on this issue?	How many voters agree with candidate B on this issue?
			voter 1	voter 2	voter 3	voter 4	voter 5	voter 6	voter 7	voter 8	voter 9	voter 10	voter 11	voter 12	voter 13	voter 14	voter 15	voter 16	voter 17	voter 18	voter 19	voter 20		
1	y	n	Y	y	y	y	y	y	y	y	y	y	y	y	y	y	y	n	n	n	n	n	15	5
2	y	n	Y	y	y	y	y	y	y	y	y	y	y	y	y	y	y	n	n	n	n	n	15	5
3	y	n	Y	y	y	y	y	y	y	y	y	y	y	y	y	y	y	n	n	n	n	n	15	5
4	y	n	Y	y	y	y	y	n	n	n	n	n	n	y	y	y	y	n	n	n	n	n	9	11
5	y	n	Y	y	y	y	y	n	n	n	n	n	n	y	y	y	y	n	n	n	n	n	9	11
6	y	n	Y	y	y	y	y	y	y	n	n	n	n	y	y	y	y	n	n	n	n	n	11	9
7	y	n	Y	y	y	y	y	y	y	y	y	y	n	y	y	y	y	y	n	n	n	n	15	5
8	y	n	Y	y	y	y	y	y	y	y	y	y	y	n	n	y	y	y	y	y	n	n	16	4
9	y	n	Y	y	y	y	y	y	y	y	y	y	y	n	n	n	y	y	y	y	n	n	15	5
10	y	n	Y	y	y	y	y	y	y	y	y	y	y	n	n	n	n	y	n	n	n	n	12	8
On how many issues does voter agree with candidate A?			10	10	10	10	10	8	8	7	7	7	7	6	7	8	9	4	2	2	0	0		
On how many issues does voter agree with candidate B?			0	0	0	0	0	2	2	3	3	3	3	4	3	2	1	6	8	8	10	10		
Who will voter vote for?			A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	B	B	B	B	B	*15 votes for candidate A*	

Voter 1, whose views align perfectly with those of candidate A, will obviously choose to vote for candidate A. Likewise, the views of voter 20 align perfectly with candidate B, who will therefore vote for B. But not all voters find that their views align perfectly with one of the candidates. So, they will vote for the candidate whose views are closest to their own. Altogether, 15 out of the 20 voters find their views closer to A than B, so they will elect A as their representative. But on some issues, candidate A does not properly represent these 20 voters.

So, on some fraction of issues, representatives – even if fairly elected – will not represent their constituents. (Note that alternative voting systems, such as Ranked Choice Voting, will not eliminate this inherent problem with representation.)

Another problem with representation is that, typically, representatives have a hundred thousand constituents or more, so it is impossible for the representative to personally know the constituent or for the constituent to know the representative.

There's another problem with representative democracy: Representative democracy treats politics as strictly instrumental — that is, as a means to an end, instead of a value in its own right. In fact, however, political participation is intrinsically worthwhile: it gives people the experience of controlling their own lives. The more that the task of thinking about how we can collectively manage our lives is delegated to others, the less knowledgeable we become regarding our society, the less we determine our own destinies, and the weaker become our ties of solidarity to our fellow citizens.

Adam Smith's famous comments on the mindless workplace apply to mindless voting for representatives:

> The man whose whole life is spent in performing a few simple operations, of which the effects too are, perhaps, always the same, or very nearly the same, has no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur. He naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become.[10]

Constituents per Representative, Selected Countries

Country	Seats in Lower House	population	Population/ seat
Australia	150	22,507,617	150,051
Belgium	150	11,420,163	76,134
Brazil	513	210,147,125	409,644
Canada	338	34,834,841	103,062
Chile	155	17,574,003	113,381
France	577	66,259,012	114,834
Germany	709	80,996,685	114,241
Greece	300	10,775,557	35,919
Italy	630	61,680,122	97,905
Japan	465	126,451,398	271,938
Korea, South	300	49,039,986	163,467
Mexico	500	120,286,655	240,573
Netherlands	150	16,877,351	112,516
Portugal	230	10,813,834	47,017
South Africa	400	48,375,645	120,939
Spain	350	47,737,941	136,394
Taiwan	113	23,359,928	206,725
United Kingdom	650	63,742,977	98,066
United States	435	318,892,103	733,085
India	545	1,236,344,631	2,268,522

https://en.wikipedia.org/wiki/List_of_legislatures_by_number_of_members

Because of these defects in representative democracy, many have proposed that we adopt some form of direct (or participatory) democracy. Under direct democracy people make decisions themselves rather than choosing others to do it for them. Supporters of direct democracy reject the claim that people are incapable of self- rule, arguing that the charge confuses cause and effect. That there is much ignorance

[10] Adam Smith, *The Wealth of Nations,* New York: Modern Library, 1965 (1776), p. 734.

and apathy is undeniable, but representative democracy encourages these traits. Why bother studying the details of gun control policies, for example, if strong public support for such policies doesn't translate into support from one's representatives? After a while, voters learn not to invest too much time in learning about issues and not to get very excited about the importance of their vote. So, what about direct democracy?

Referendum Democracy

There are several forms of direct democracy. One of them is Referendum Democracy, where every issue is put to the population as a whole.

In the past such an approach was simply impossible: there was no mechanism for allowing large numbers of people to cast ballots on a nearly daily basis. But modern technology makes this possible on a vast scale. People could use the internet first to access as much background information as they wanted and then to vote on their preferred options.

But even if technically possible, would we really want to spend so much time exhaustively studying the many hundreds of issues that national legislatures currently take up each year? Those legislators are doing this more or less full-time. Do we all want to invest that same amount of time (while doing some other job as well)? Legislators typically have a staff to make the work manageable. Would each citizen have a staff person? Clearly some means is needed to separate the important issues out from all the rather routine issues that legislators currently deal with.

But there are other problems with referendum democracy as well.

First, who formulates the referendum questions? We know that the wording of a question can make a big difference in the outcome.[11]

Second, with referendums, one votes an issue up or down; there is no opportunity for deliberation, for compromise, for trying to work out a consensus. Deliberation is a key feature of representative bodies. Representatives are afforded an opportunity to consider the implications of a proposed course of action and to seek refinements, compromises, and consensus – something that referendums can't do. The final text of a law passed by a representative body rarely is the same as the bill that was initially introduced.

And third, politics produces people as well as decisions: people who make decisions only via referendums have no experience deliberating and compromising with their fellow citizens and thus don't build bonds of solidarity with others.

Autonomous Communities

Another form of direct democracy is *Autonomous Communities*. Fully autonomous small communities are a way to combine the benefits of participation and the benefits of deliberation. However, there are several problems with autonomous communities as well.

First is the question of size. Either they are too small, and thus can't provide adequate diversity or function effectively. Or they will be too large to permit face-to-face direct democracy. After all, a meeting of

[11] For two examples, see Louis Harris cited in Ronald Dworkin, "Affirming Affirmative Action," *New York Review of Books*, 22 October 1998, p. 97, and Eugene C. Lee, "California," in David Butler and Austin Ranney, eds., *Referendums: A Comparative Study of Practice and Theory*, Washington, DC: American Enterprise Institute for Public Policy Research, 1978, p. 103n26.

thousands or even hundreds of people is not typically a very participatory experience.

A second difficulty with autonomous communities is that many problems are not susceptible to small-scale solutions (for example: dealing with environmental problems or pandemics or building a dam). To be sure, autonomous communities could reach voluntary agreements with one another to address such problems. But sharing and cooperating need some decision-making procedure. And if the agreement of all is required (since the communities are autonomous), there will be times when the self-interest of one community will prevent an agreement that is in the best interest of the majority, even the vast majority.

For example, one community might opt to expand an industry that pollutes a river, harming many downstream communities. Obviously, most everyone in a good society will be environmentally conscious, but there are trade-offs, and downstream and upstream communities may not all weigh the benefits and harms in the same way.

Nested Councils

A third type of direct democracy rejects both the autonomous communities and the referendum models and instead has small councils, linked to one another.

The basic idea is this: Everyone gets to participate in a primary council that is small enough for face-to-face decision making and for real deliberation. Many decisions will be made in these councils because the decision affects only or overwhelmingly the members of that council. But because there are many decisions that affect more than the people in a single council, the councils affected will have to

coordinate their decision-making. This means that councils will have to send delegates to a higher-level council. And, if the decision affects more than one of these higher-level councils, they would in turn send delegates to a third-level council. And so on.

How large would these councils be? That would be a matter for society-wide decision, and likely revised on the basis of experience. The idea, however, would be that the councils should be ***small enough*** to guarantee that people can be involved in deliberative bodies, where all can participate in face-to-face discussions; but yet ***big enough*** so that (1) there is adequate diversity of opinion included; and (2) the number of layers of councils needed to accommodate the entire society is minimized.

If each council has 25 members, then, assuming half the population consists of adults, five layers could accommodate a society of 19 million people; with councils of 40 members, five layers could accommodate 200 million people.

The procedures and culture of the councils would emphasize discussion and accommodation rather than scoring debater's points and vanquishing one's opponents, participants would be expected to give reasons for their views framed in terms of the public good, rather than self-interest.

Crucially, the councils would operate by consensus where possible, majority rule where not. To insist on consensus in every case is to give every individual the power to block the overwhelming majority. Such an approach is ill-advised. It is sometimes said that even a large group should be forced to respect and acknowledge the sentiments of a single dissenter who feels strongly on an issue. Respect and

acknowledgment are fine; but the question is whether the strong feelings of the lone dissenter should invariably be able to block the sometimes equally strong feelings of everyone else. Would we really want to give a single person the power to prevent society from building an abortion facility? There is nothing magical, of course, about 50 percent plus one, but it does deserve more moral weight than 50 percent minus one.

The culture of consensus decision-making that says that everyone's opinion ought to be respected, that ways of accommodating everyone ought to be sought, that decisions shouldn't be railroaded through — all these are important and ought to be part of council decision-making. But when, after all these things are done, no consensus is achievable, then some other decision-making rule is needed, and majority rule makes the most sense. Why not use some sort of super-majority rule instead, such as requiring 90% of the votes for something to pass (or three quarters or two thirds)? This way, the single ornery person can't block a socially necessary decision. But the same objection as applies to unanimity applies to super-majorities. Why should, say, 12 percent of a group be able to override the deeply held views of 88 percent? Note that majority rule runs into problems if the majority acts foolishly; consensus runs into problems if the minority acts foolishly. One would hope to avoid both, though presumably the majority will act foolishly less often than a minority.

To many anarchists, majority rule is inherently coercive and thus morally unacceptable. As one modern-day anarchist put it: "When there is no unanimity the vote becomes the tyranny of the many over

the reluctant few."[12] The philosophical argument against majority rule strikes me as weak. It doesn't seem to be a violation of my liberty if I voluntarily decide that I want to join a collective where all members agree that they will submit their disagreements — or a specified subset of their disagreements — to majority rule. After all, when I sign a contract to trade something, I am constraining myself (I have to provide the goods in question) but assuming I agreed to the contract freely, my liberty has not been compromised.

This said, in fact the dynamics of small groups strongly incline towards consensus. People who find themselves in the minority on some issues are likely to be willing to go along with the majority because they know they'll be in the majority on some other issues. In large, anonymous groups this sense of reciprocity is unlikely to be as strong, but where there is face-to-face contact, social pressure will tend to encourage people to avoid votes and to go along with the sense of the meeting. But on some occasions, this will not be the case, and then it makes sense — after appropriate deliberation — to have a vote. The vote is of benefit not just to the majority, which gets its policy preference, but to the minority as well, which can officially register its dissenting view.

The delegates from one council level to the next would be charged with trying to reflect the actual views of the council they came from. But they would not be "mandated": that is, they would not be told "this is how you must vote," for if they were, then the higher council they

[12] E.g., Judith Malina, "Anarchists and the Pro-Hierarchical Left," *Anarchos*, June 1972, cited in Janet Biehl, "Bookchin Breaks with Anarchism," *Communalism*, 2007, p. 12, http://theanarchistlibrary.org/library/janet-biehl-bookchin-breaks-with-anarchism.

were attending would not be a deliberative body. In fact, the delegates could then be easily replaced by computer messages relaying the sentiments of the lower council.

But though not mandated, these delegates will be much more responsible to and representative of the people that they are supposed to represent than in current-day representative systems:

- They are chosen by a small council whose members know them personally.
- The delegates are part of — and constantly returning to — their sending council. Indeed, technology would allow the higher-level councils to meet virtually, which would allow a group of council size to enjoy full participation, using similar non-hierarchical mechanisms as would be used in in-person meetings. This would mean that delegates to higher level councils would not need to move away from their sending council, so their connection to their home council would remain close.
- The delegates are rotated, so no one delegate serves too long. Ideally, everyone would get a chance to serve, but the group might not want to send someone as its delegate who is opposed to the majority sentiment. But at a minimum, those who hold the confidence of the majority would need to be rotate as delegates. There would also be mechanisms to assure that there was adequate race and gender balance among the delegates.
- The delegates are subject to immediate recall whenever the sending council no longer feels the delegate represents them.

- Most importantly, however, what prevents the unmandated delegates from usurping power is that the higher-level councils will only vote on matters that are relatively non-controversial.

Whenever a vote is close (or when enough citizens or lower councils insist), the issue is returned to the lower councils for a decision.

Note that this procedure eliminates the problem discussed earlier of representative bodies.[13] Say on some issue 13 delegates from councils with a slight majority in favour of a policy faced 12 delegates from councils over-whelming against the policy. If the upper-level council voted, the policy would be approved 13-12. But if we go back to the lower-level councils, a clear majority oppose the policy.

So, if having the lower-level councils decide is more democratic, why not send every issue to the lower councils for decision?

This is where our concern to avoid overdoing participation with excessive time demands comes in. By sending back contentious issues or those so requested by the citizens or the lower-level councils, we have a check on abuse of power by the delegates to the higher-level councils. But to send everything back would simply be a waste of time.

The Challenge of Majority Rule

Obviously, we reject a political system where the rich or the well-born or the meritocratic rule over the majority. So, in that respect, of

[13] This problem is raised as a criticism of nested councils by Moshe Machover in his "Collective Decision-Making and Supervision in a Communist Society," Oct. 2009, available at http://www.matzpen.org/docs/Machover-Collective%20Decision-Making.pdf. My response to Machover is here: "Machover on Collective Decision-Making," Nov. 14, 2009, *New Politics online*, https://newpol.org/machover-collective-decision-making/.

course we favour majority rule. On the other hand, we also care about the rights of individuals and of minorities. The majority's right should not be absolute; it should not have right to oppress a minority or to intrude on to the basic rights of individuals.

Recall that in justifying majority rule earlier, it was argued that people have the right to voluntarily decide that they want to join a collective where all members agree that they will submit their disagreements — or a specified subset of their disagreements — to majority rule, and that this consent is what gives majority rule its moral legitimacy. But few would ever agree beforehand that they would allow the majority to tell them what they can say or think or believe.

Therefore, a good society will have restrictions on the majority, entrenched in some sort of constitution. But no brief document is going to be able to provide a full elaboration of what these rights entail. So, we will need some means of interpreting the constitution, a task performed in many countries by a Supreme Court or High Court.

But choosing the judges for these courts presents a real dilemma for democratic theory.

If the judges (or justices) are appointed or chosen by some system of indirect election, particularly if they have long or even life terms, then they are removed from majority control and may not reflect the views of the majority of the population. For example, in the United States today the Supreme Court with its 6-3 conservative majority is ***far*** to the right of the U.S. population.

On the other hand, if the judges are directly elected by majority vote, then they will reflect the views and passions of the majority and not provide strong protection for the rights of unpopular minorities.

One promising way to address this dilemma is analogous to the model of the U.S. jury system. Choose a small group at random from the population to constitute "council courts." These courts will review decisions made by councils to see if they interfere with basic rights and constitutional protections. Like current-day juries, these courts will be deliberative bodies, though unlike juries they would have a term longer than a single case — perhaps staggered two-year terms.

As a cross-section of the population, these council courts will be democratic bodies: democratic bodies serving to check the democratic councils.

The logic here makes use of a social science finding that when people make decisions through a deliberative process, the result is likely to be less intolerant than a simple poll of public opinion.[14]

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Redesigning political institutions alone cannot assure a decent political system. A good political system needs a good economic system. Put another way, without an economic system that is equitable, democratic, and participatory, no political system will be able to offer the values we seek. Thus, the criticism of the value of democratic deliberation (e.g., "emphasis on deliberation attends too little to the degree to which moral disagreements in politics are shaped by differences of

[14] James S. Fishkin, *The Voice of the People*, New Haven: Yale University Press, 1995.

interest and power"[15]) is well taken – in the context of existing economic inequalities.

But if we have a participatory economy that emphasizes equity and where we have minimized systemic patriarchy and racism, then a system of nested councils seems an appropriate political structure.

Nested councils can only achieve democracy, participation, and equality, however, if (1) issues can, whenever desired, be returned to the primary council level for decision, and (2) there is a means of protecting minority rights that is consistent with majority rule, such as by using a random-selected group of citizens.

[15] Ian Shapiro, "Enough of Deliberation: Politics Is about Interests and Power," in Stephen Macedo, *Deliberative Politics: Essays on Democracy and* Disagreement (New York: Oxford, 1999), p. 29.

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