Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk

James A. Gardner
University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/articles

Part of the American Politics Commons, Constitutional Law Commons, and the Election Law Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/articles/208

This article was published originally at 63 Tenn. L. Rev. 421 (1996) and is reproduced here by permission of the Tennessee Law Review Association, Inc.

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
SHUT UP AND VOTE: A CRITIQUE OF DELIBERATIVE DEMOCRACY AND THE LIFE OF TALK

JAMES A. GARDNER*

I. INTRODUCTION

In the last few years, the subject of "discourse" has received enormous attention in the legal academy. It is virtually impossible to open a legal journal without coming across articles devoted to the dynamics of legal and political discourse, the power relations among the participants, or the significance of the dialogic process. Much of this work has been devoted to establishing the desirability—and in some cases the ethical necessity—of social dialogue, especially patient and respectful listening.1 However, until recently, few serious attempts had been made to fold the insights of dialogic theory into any kind of political theory that might provide concrete guidance to real people about how they ought to live their lives.2

* Professor of Law, Western New England College School of Law; B.A. 1980, Yale University; J.D. 1984 University of Chicago Law School. Thanks to Neal Devins, Lise Gelernter, Eric Gouvin, Don Korobkin and Sam Stonefield for helpful comments and suggestions. I am especially grateful to Jay Mootz for his meticulous criticism and for his patience over the course of many discussions that greatly helped me clarify my thinking. An earlier version of this Article was presented at a faculty colloquium at the College of William & Mary, Marshall-Wythe School of Law. My thanks to the participants.


2. In this regard, Jürgen Habermas, one of the most important figures in the blossoming of interest in discourse, has warned against the possibility of using his theory of discourse ethics as a ways of justifying a theory of politics. Jürgen Habermas, Discourse Ethics: Notes on a Program of Philosophical Justification, in THE COMMUNICATIVE ETHICS CONTROVERSY 60, 83 (Seyla Benhabib & Fred Dallmayr eds., 1990); see also Seyla Benhabib, Liberal Dialogue Versus a Critical Theory of Discursive Legitimation, in LIBERALISM AND THE MORAL LIFE 143, 149-50, 154 (Nancy L. Rosenblum ed., 1989). Recently, however, Habermas seems to be making steps in this direction himself. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1995); Jürgen Habermas, Human Rights and Popular Sovereignty: The Liberal and Republican Versions, 7 RATIO JURIS 1, 12-13 (1994). For further reviews, see James Bohman, Complexity, Pluralism, and the Constitution-al State: On Habermas's Faktizitat und Geltung, 28 L. & SOC'Y REV. 897 (1994); Michel
A number of legal and political theorists have now begun to fill this gap by developing a political theory of "deliberative democracy." Motivated by serious concern over the steady erosion in the quality of American political discourse, and inspired by a combination of communitarian, civic republican, and discourse-ethics principles, proponents of deliberative democracy have built a political theory around the premise that substantial, open, ethical dialogue is a critical, and indeed defining, feature of a good polity. As its name suggests, deliberative democracy both recommends and attempts to justify a political life devoted centrally to talk.

While the deliberative democracy project is attractive and well-motivated, I shall argue in this Article that it is largely a failure, whether viewed in instrumental or normative terms. From an instrumental perspective, deliberative democracy is no better suited than other forms of democracy to deliver whatever benefits a life of dialogue might confer on citizens or society, and in some cases deliberative democracy would be substantially worse than some of its competitors. Normatively, both the kind of life recommended by deliberative democracy and its corresponding conception of the good citizen turn out to be highly unattractive; a deliberative democracy is quite simply not a place that most people would want to live.

The Article is organized as follows. Part II introduces the problems of American political life to which deliberative democracy purports to respond, and then describes deliberative democracy's four main features: dialogue, diversity, openness, and consensus. Proponents of deliberative democracy contend that it merits our attention because it is historically grounded in the thought of the framers of the Constitution, and because it is an independently attractive political theory with favorable constitutional ramifications. Part III examines the historical claim to constitutional status, and concludes that it is unfounded.


Parts IV and V take up deliberative democracy's merits as a political theory. Dialogue is at the heart of deliberative democracy. Part IV examines the instrumental benefits that deliberative democracy might confer by requiring citizens to engage in more and better dialogue, and concludes that it either cannot deliver such benefits, or does so no better than its competitors. Part IV additionally suggests that deliberative democracy may usefully be viewed less as a prescription for improving the quality of American political life than as a justification for a radical and obstructionist form of protection of political minorities.

Part V examines the normative claim that a life lived under deliberative democracy is a good life and that in consequence deliberative democracy can be expected to constitute citizens who possess the character and exercise the virtues of the good democratic citizen. I argue that the ultimate though unintended result of deliberative democracy is to constitute citizens who are likely to be ineffectual, tyrannical and obstructionist—precisely the opposite of what deliberative democracy’s supporters hope to achieve. Finally, Part V concludes with a brief sketch of what I call the “Madisonian citizen,” a citizen far better suited to life in a modern republic characterized by the Madisonian conditions of large territory and population, a heterogeneous citizenry, and indirect democracy under a regime of popular elections.

II. DELIBERATIVE DEMOCRACY

A. The Problem of American Politics: A Brief History

Criticism of the debased state of American politics has become almost a part of American politics. Political scientists have long documented, and political theorists have long decried, the superficiality of American electoral politics as well as the apathy, alienation, and lethargy of the American electorate. One relatively common diagnosis of what ails our society is that it is insufficiently democratic. Under this view, the primary culprit is our system of indirect democracy, in which public questions are decided by distant legislators and citizens are confined to the occasional choice of government officials.


5. See, e.g., Arendt, supra note 4; Peter Bachrach, The Theory of Democrati-
If this is the problem, then more democracy certainly seems to be the cure. One difficulty with this analysis is that American society has become continuously more democratic ever since the founding. The collapse of the electoral college into a form of popular presidential election; the constitutional switch from state legislative appointment of Senators to popular election; the broadening of the franchise; the introduction of initiatives and referenda on the state and local levels; and the provision for electoral control over proliferating special governmental districts are among the more visible formal changes injecting greater democracy into the Madisonian system. Of perhaps even greater importance is the recent introduction of what seems like an informal system of governance by public opinion poll, in which politicians do virtually nothing that their constituents have not approved in the latest commissioned survey. Although it is hardly clear that these changes have actually caused an erosion in the quality of American politics, they seem certainly to have accompanied such a decline without stemming it.

Some critics have responded to this situation by denying the existence of a problem. Public choice theorists, for example, have taken this tack by arguing that political apathy merely reflects a rational, utility-maximizing strategy of free individuals, and that the apparent superficiality of political discourse shows only that politics is nothing more than a competitive struggle for control over social resources. Needless to say, some democracy theorists who are concerned about the state of American politics...
have been horrified by public choice theory’s celebration of the very aspects of democratic politics that they find most distasteful. The problem, they say, is not so much the lack of democracy, as the lack of democracy of the right kind, under the right conditions—the lack, that is to say, of meaningful democracy. It follows that the challenge facing political theory is to investigate ways in which democratic politics can deliver more fully the benefits it is generally thought to confer.

American thinking about democracy has long been dominated by two competing political theories sometimes known, in C.B. Macpherson’s terminology, as “protective democracy” and “developmental democracy.” Protective democracy is the theory of democracy most closely associated with liberalism, and with liberal thinkers such as Locke, Montesquieu and Madison. It holds that the ultimate justification for democracy lies in democracy’s unique capacity to protect private citizens from government tyranny. This protection is typically accomplished through the use of such devices as frequent elections; the division of governmental power; and the constitutional and legal protection of individual rights and liberties. The ultimate purpose of this security is to enable citizens freely to pursue their private ends.

Theories of developmental democracy, in contrast, hold that democracy is justified primarily by its effect on the citizenry. Active participation in a democratic polity creates informed, politically aware, and public-spirited citizens who, as a result of participating jointly in the public enterprise of collective self-government, enjoy meaningful membership in a genuine community. In some accounts, democratic citizenship is understood as the ultimate fulfillment of human life, and thus an end in itself. This view has its roots in Aristotelian notions of the political nature of human beings.

15. C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977) [hereinafter MACPHERSON, LIFE AND TIMES]. Although the terminology is Macpherson’s, his definitions of the terms are not very useful for my purposes because of his idiosyncratic notion of liberal democracy and because of the strong Marxist streak running through his work, id. at 10. Instead, I shall follow more closely the usage suggested by David Held, which traces these concepts to their origins in a more conventional way. See DAVID HELD, MODELS OF DEMOCRACY (1987).
17. MACPHERSON, LIFE AND TIMES, supra note 15, at 47-48, 51-52; HELD, supra note 15, at 72, 80, 86-89.
and probably found its most influential modern expression in the writings of John Stuart Mill.19

Viewed through this conceptual frame, the problem with American democracy—what makes it less than fully meaningful—seems to be its lack of an effective developmental component. This belief gave rise, particularly in the 1970s, to widespread calls for “participatory democracy.”20 Advocates of participatory democracy contend that the machinery of government must be radically opened to popular participation and control, primarily by distributing meaningful power downward toward decentralized local bodies small enough to allow individual citizens to experience self-governance in an authentic way.21 Participatory democracy is, in other words, a form of direct democracy.

At this point, however, the prescription of greater developmental democracy for the ailments of American politics runs head-on into what is almost certainly the only other American social problem of comparable magnitude and concern: the treatment of minorities.22 The difficulty is this: direct democracy tends to be distinctly inhospitable to the claims of minorities. Madison himself disparaged direct democracy on the ground that it was unstable because it gives vent to the passions that occasionally sweep democratic majorities; Madison went so far as to identify “majority faction,” or the rule of the majority in its own self-interest, as the single most important danger which a constitution can guard against.23

This makes the problem of American politics far more complex: improving politics requires giving citizens a more meaningful form of

19. **John S. Mill, Considerations on Representative Government**, in *On Liberty and Other Essays* (1991). Although developmental democracy and protective democracy differ in their emphases on the public and private lives, respectively, of citizens, the two can be roughly reconciled if democracy is understood to be the only form of government capable of creating the kind of citizens who have the capacity to discern, and to use the power of government to protect, their individual and collective interests. This was essentially Mill’s position. See id. at 254 (government by one or the few cultivates passivity in the populace).

20. See **Participation in Politics: Nomos XVI** (J. Roland Pennock & John W. Chapman eds., 1975); **Participatory Democracy, supra note 5; Fateman, supra note 5.** Sympathetic accounts can be found in Barber, supra note 4; Mansbridge, supra note 5; and Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale L.J.* 1623 (1988).

21. See, e.g., Barber, supra note 4; Dahl, supra note 5.

22. The term “minorities” should be understood throughout to refer to political minorities rather than racial or ethnic minorities. Of course, a racial or ethnic minority may also be a political minority, but my analysis does not focus specifically on the problems of racial or ethnic minorities as such.

23. **The Federalist No. 10** (James Madison). The suspicion of democracy of course goes back as far as the ancient Greeks, who defined it as the rule of the poor. See Macpherson, *Life and Times* supra note 15, at 9-10.
democratic experience, but doing so puts at risk the rights and liberties of minorities. Madison, of course, saw this tension clearly and opted for liberty over democracy, for protection over development. But is the choice really as stark as that? Must we make do with one or the other, or might there be some form of democracy that offers citizens a meaningful life of genuine participation in self-governance while still protecting the basic liberties of minorities? This is the challenge to which deliberative democracy is addressed.

B. The Deliberative Democracy Solution

1. General Principles

One difficulty in attempting to criticize deliberative democracy is that it is sometimes difficult to define. Not all proponents of deliberative democracy call it by that name, and the term itself has been invoked by theorists approaching the problem of American politics from a wide variety of perspectives, from classic liberalism to radical participatory democracy.

At the liberal end, for example, James Fishkin suggests that the poor quality of contemporary American political discourse can be improved by supplementing existing political campaign institutions with a “deliberative opinion poll,” in which a national sample of voters would meet intensively with presidential candidates to discuss issues in depth. This solution is fully compatible not only with classic liberalism, but also with existing American political institutions. Toward the other end of the spectrum, Jane Mansbridge thinks that the only way to improve deliberation meaningfully is to alter existing institutions to include universal opportunities for direct, participatory democracy in face-to-face encounters under a rule of consensus. I will focus here far more on the latter varieties of deliberative democracy, particularly those in which political deliberation—talk, dialogue—is elevated to and commended as a way of life, for it is this position that I wish ultimately to criticize.

Although the theorists who commend a life of talk sometimes disagree even among themselves, they seem to agree on certain fundamentals. By and large, these theorists accept some of the insights of both protective and developmental democracy, and criticize each from the perspective of the other. For example, writers such as Sunstein, Pateman, Ackerman, and Gutmann generally agree with the protective democracy principle that democratic institutions ought to enable citizens to protect their liberties from government tyranny. At the same time, these theorists, along with others

25. MANSBRIDGE, supra note 5.
26. See BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter ACKERMAN, SOCIAL JUSTICE]; I BRUCE ACKERMAN, WE THE PEOPLE (1991);
such as Arendt and Barber, agree with the position of developmental democracy that the institutions of self-governance play a significant role in constituting the characteristics of the polity, and that the institutions of modern republican government involve citizens too little in self-governance, thereby constituting a citizenry that is lethargic, politically unsophisticated, and apathetic.27 Correspondingly, deliberative democrats praise the institutions of direct democracy for their ability to support a meaningful political life, but view direct democracy as excessively susceptible to misuse by a tyrannical majority and thus insufficiently protective of individual rights and liberties.28 Ultimately, deliberative democracy aims for a "preservative transcendence"29 of both protective and developmental democracy that incorporates only the best features of both. To accomplish this feat, deliberative democracy theorists have drawn generously on recent developments in civic republican and communitarian thought.

2. Specific Features

The type of deliberative democracy with which I am concerned has four basic and mutually supporting features: deliberation, diversity, openness, and consensus. First and foremost, deliberative democracy institutes a form of "government by discussion,"30 under which political outcomes "are to be produced by an extended process of deliberation and discussion"31 in politics consisting of "an argumentative interchange among persons . . . jointly directed by them towards arriving at a reasonable answer to some question of public ordering."32 The ability to engage in this kind of

Sunstein, Partial Constitution, supra note 3; Pateman, supra note 5; Gutmann, Disharmony, supra note 3.

27. See, e.g., Gutmann, Disharmony, supra note 3, at 126 (criticizing "the general condition of our politics"); Arendt, supra note 4, at 237 (the people become lethargic when they are deprived of a significant role in self-governance); see also Barber, supra note 4.

28. See, e.g., Fishkin, supra note 24, at 21-64; Bessette, supra note 3, at 104-05.

29. Christopher J. Berry, The Idea of a Democratic Community 16 (1989) [hereinafter Berry, Democratic Community]. Sunstein seems to get at this idea with his paradoxical notion of "liberal republicanism." Sunstein, Republican Revival, supra note 14, at 1566-71.


32. Michelman, Pornography Regulation, supra note 14, at 293.
dialogue is sometimes said to be an absolute prerequisite to citizenship in such a society. Deliberative democracy thus contemplates, in essence, a life of political talk.

The second widely accepted feature of deliberative democracy is the requirement of diversity. Theorists approaching the problem from otherwise very different perspectives agree that the value of deliberation depends critically on the diversity of the points of view expressed by the participants. This kind of diversity not only maximizes the amount of information put before the citizenry, thereby improving the quality of political decisions, but also “can lead to new understandings of what [the citizens’] interests are and where they lie.” Put this way, the diversity requirement is only a matter of common sense; if a society’s members and their opinions are homogeneous, deliberation is unnecessary, and its benefits will be inaccessible to the society’s citizens.

Third, precisely because they are diverse, citizens of a deliberative democracy are duty-bound to approach the dialogic process in a spirit of open-mindedness and flexibility. Deliberation inevitably involves argument and persuasion. If this process is to be productive, the participants must conduct the debate in good faith, and with a willingness to open themselves “to ‘otherness’ as a way toward recognition not only of the other, but also of oneself.”

33. ACKERMAN, SOCIAL JUSTICE, supra note 26, at 70-71.
34. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 24, 253; SUNSTEIN, DEMOCRACY, supra note 30, at 21-22; Cohen, supra note 3, at 21; see also ARENDT, supra note 4, at 225 (unanimous public opinion is incompatible with freedom of opinion because opinion cannot be formed “without the benefit of a multitude of opinions held by others”).
36. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 253; see also id. at 24; Peter Bachrach, Interest, Participation, and Democratic Theory, in NOMOS XVI, supra note 5 (individuals discover their real needs and interests through participation in politics). For an especially expansive view of the scope of the dialogue to which the United States Constitution is committed, see Robert Post, Managing Deliberation: The Quandary of Democratic Dialogue, 103 ETHICS 654 (1993).
40. Id. at 33. Unlike the citizens of the pluralist democracy postulated by public choice theory, citizens of a deliberative democracy are willing to change themselves: they do not “try at all costs to protect their prepolitical understandings of interests and ends against the possibility of change in political conflict or debate,” but rather can “embrace such changes as exercises of freedom rather than as impairments of integrity.” Michelman, Voting Rights.
should be modeled on and guided by the ideal of friendship. At the root of this requirement of openness and friendship lies the notion that open, dialogic engagement is, in the final analysis, the ultimate way to show others the respect to which they are entitled as autonomous human beings.

The fourth, final, and most problematic feature of deliberative democracy is its commitment to consensus. There can be no question that consensus plays an exceedingly important role in theories of deliberative democracy. Joshua Cohen, for example, states unequivocally that the purpose of deliberation is "to arrive at a rationally motivated consensus." For Cass Sunstein, consensus is a "regulative ideal" governing the entire process of deliberative democracy. Nevertheless, the precise role of consensus in deliberative democratic theory is frustratingly elusive. Because part of my critique of deliberative democracy turns on its commitment to consensus, I want to tread carefully here.

In most accounts of deliberative democracy, the prominent place of consensus seems to grow directly from its other main features: when democracy is conducted by dialogue among diverse individuals undertaken in a good faith spirit of friendship and genuine openness, consensus at least becomes possible in principle, and may result in fact. This proposition raises two related questions.

First, how strongly do deliberative democracy theorists believe that an open dialogic process will actually achieve consensus? In the maelstrom of contemporary politics, the possibility of consensus sometimes seems so remote that it is hard to imagine assigning it any kind of role in a realistic political theory. One of the inconvenient facts of life is that people often disagree, no matter how compelling the arguments that are laid before them. Moreover, even if dialogue could bring about consensus under some limited set of circumstances—for example, a largely homogeneous citizenry—deliberative democracy itself immediately subverts any realistic

Rights, supra note 37, at 450.

41. MANSBIDGE, supra note 5, at 8-10.

42. Gutmann, Disharmony, supra note 3, at 141. Deliberative democracy appears in this respect to have been influenced by Habermasian theories of communicative ethics, in which dialogic engagement is understood as a form of respect crucial to fair argumentation, and thus to legitimacy. See Benhabib, supra note 2, at 152.

43. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 137; Cohen, supra note 3, at 23.

44. Cohen, supra note 3, at 23 (emphasis deleted).

45. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 137.

46. Sunstein, Republican Revival, supra note 14, at 1550, 1554-55; see also MANSBIDGE, supra note 5, at 3, 9-10, 26-28, 32; Gey, supra note 31, at 834; Fleming, supra note 31, at 244.

47. See JOHN RAWLS, POLITICAL LIBERALISM 54-58 (1993) (discussing the dynamics of disagreement).
DELIBERATIVE DEMOCRACY

possibility of achieving consensus by insisting on diversity as a condition for meaningful dialogue. If this diversity itself is to be meaningful in the sense that citizens bring to the discussion genuinely distinctive viewpoints and some degree of cognitive independence, consensus is highly unlikely.48 It is worth recalling in this regard that Madison favored a large republic because he believed that the diversity of its citizens would severely impair the ability of majority factions to coalesce.49

Nevertheless, some deliberative democracy theorists seem to believe that actual consensus really is possible. Sunstein, despite paying lip service to the possibility that disagreement might persist even after deliberation,50 seems to think that consensus is truly inevitable if the deliberators approach their task in the proper spirit.51 Others take more seriously the possibility that irreconcilable differences may remain even after extensive dialogue and debate.52


49. See THE FEDERALIST NO. 10 (James Madison); see also text accompanying note 21.

50. E.g., SUNSTEIN, DEMOCRACY, supra note 31, at 19.

51. See, e.g., Robin L. West, The Constitution of Reasons, 92 Mich. L. Rev. 1409, 1432 (1994) (reviewing CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (attributing to Sunstein the view that “through the exercise of reason . . . we will reach consensus on divisive moral issues”)). This outlook goes hand in hand with the deliberative democracy critique of public choice theories of democracy, in which political outcomes are seen as the result of self-interested bargaining. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 24-25; Sunstein, Republican Revival, supra note 14, at 1545. This critique suggests strongly, if implicitly, that failures to reach consensus result primarily from character flaws of the deliberators—specifically, their inability to elevate their view toward the common good and to transcend their selfish interests. E.g., Bessette, supra note 3, at 105; Sunstein, Republican Revival, supra note 14, at 1545.

52. See, e.g., Cohen, supra note 3, at 23 (“Even under ideal conditions there is no promise that consensual reasons will be forthcoming.”); Gutmann, Disharmony, supra note 3, at 148 (deliberative democracy “does not dissolve all conflicts among values” or “guarantee that any single deliberator or community of deliberators will converge upon a singularly correct resolution to a difficult problem”); id. at 155 (“well-informed collective decisions are rarely unanimous”). See also Manin, supra note 35, at 359-61.

Some theorists seem aware that genuine consensus is too demanding a standard, and have substituted a form of consensus that is weak to the vanishing point. For example, Mansbridge writes that when the interests of group members conflict, consensus results “either in deadlock in favor of the status quo or social pressure on dissenters to go along.” MANSBRIDGE, supra note 4, at 32. It is hard to see how the exertion of social pressure on the minority is very different from the majoritarianism she criticizes as divisive. Mansbridge tries to salvage her conception of consensus by arguing that meaningful consensus is not vitiating when dissenters go along with the majority out of empathy, or by making the good
Second, and far more important, how necessary is it for a society to achieve consensus before taking collective action? Is consensus a formal prerequisite to collective action? Or is it merely an ideal toward which we ought to strive? And if consensus is merely an ideal, how diligently must citizens strive, through open-minded dialogue, to attain it? Here deliberative democracy theorists become frustratingly difficult to pin down. In my view, a fair reading of the deliberative democracy literature suggests that deliberative democracy as a political theory is founded on the notion that political action is legitimate, and therefore permissible, only when a society has either achieved actual consensus, however unlikely, or after society members have made some extraordinary effort to achieve it.

Sunstein, for example, repeatedly characterizes his theory of deliberative democracy as calling for a form of "government by discussion." Assuming that a precise and careful writer like Sunstein has chosen this phrase more for its substantive accuracy than for its rhetorical appeal, he seems to have revealed implicitly an underlying commitment to the achievement of actual consensus, for the phrase "government by discussion" is a contradiction in terms understood in any other way.

Governance is a means of taking collective action, and it therefore requires some form of power or control; in Madison's words, "you must first enable the government to control the governed and [then] . . . oblige it to control itself." Discussion, however, is not in ordinary terms a form of control, and thus not a form of governance: you and I can discuss things, but when the talking ends I retain the power to do what I want unless you have some way of controlling my actions. Clearly, Sunstein is not thinking of governance in ordinary terms: he has redefined it to mean collective action implemented through persuasion rather than control. But governance can be accomplished by persuasion only where unanimity is a prerequisite to collective action; if anything less than unanimity authorizes collective action, then we are talking about government by majoritarian rule rather than by discussion. Thus, government by discussion—as opposed to

---

of the whole their own good. *Id.* at 26-28. But this kind of "consensus" is indistinguishable in principle from majoritarianism. Achieving consensus by yielding before a vote is no different from achieving consensus by yielding after the vote. Benello tries a similar tactic in C. George Benello, *Group Organization and Socio-political Structure, in Participatory Democracy, supra* note 5, at 44-45 (consensus is achieved in groups not because all always agree, but "because every member is aware of his continuing impact on the group, and is thus capable of accepting occasional decisions in opposition to his own views").


55. There is another contradiction inherent in this phrase. If collective action is ruled out unless unanimous, then it is hard to see how a "government" is necessary at all; what we
governance preceded by discussion—is possible only under the assumption that actions are not taken except unanimously, or at the very least after some extraordinary effort to achieve unanimity.

There is another way to reach the same conclusion about deliberative democracy's commitment to consensus: unless deliberative democracy is committed very strongly to the achievement of consensus, it is not meaningfully distinct from standard liberal theories of protective democracy, a distinction it claims. Deliberative democracy's other features—dialogue, diversity, and openness—do not adequately distinguish it from liberal democracy. Citizens can and ought to treat each other humanely and respectfully in a liberal democracy, and the willingness to engage open-mindedly in political discourse is not only compatible with, but obviously desirable under, any such form of government. Thus, deliberative democracy must embrace a strong consensus requirement if it is to avoid collapsing into protective democracy, a theory it has set out to transcend.

Moreover, this commitment to consensus must be broad enough to encompass virtually all types of collective action on any subject because even consensus, at least in sparing doses, is hardly unique to deliberative

---

seem to have is a form of philosophical anarchism. See ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM (1970); see also AMY GUTMANN, DEMOCRATIC EDUCATION 11-12 (1987) ("Only in a society in which all other citizens agreed with me would my moral ideal simply translate into a political ideal. But such a society would have little need for politics . . . ") [hereinafter GUTMANN, EDUCATION]; Estlund, supra note 3, at 1447 (when individuals adopt the interests of all others as their own, there is no need for a constitution). Sunstein responds by claiming that some form of government is still necessary at least to police the conditions that make popular discussion possible. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 232; SUNSTEIN, DEMOCRACY, supra note 31. The problem with this, however, is that we then have government by control again. Such a government may also be a government by discussion, but only in the trivial sense that any democratic government is a government by discussion in virtue of leaving some decisions to the populace. Deliberative democracy, after all, begins from the premise that the kind of discussion carried on in ordinary democracies is inadequate because it is not meaningful—it is not the kind of discussion meant by the phrase "government by discussion."

56. On this point, Terrance Sandalow has written:

Nothing in liberal theory requires a denial of the obvious, that politics may be a process of collective deliberation in which the participants, through reasoned argument, attempt to persuade and are open to persuasion by one another. Nor does liberalism deny that collective deliberation may assist in locating common ground among individuals with differing interests or views. Nor, finally, is there any reason that liberals must deny that participation in politics may be transformative, leading individuals not merely to compromise, but to alter their initial objectives.


57. See supra note 25 and accompanying text.
democracy. It is commonplace even for ordinary liberal democracies to require consensus or a supermajority for some socially significant decisions, such as society-formation or constitution-making.

Having described deliberative democracy’s principal features, we are now in a position to evaluate its merits. Deliberative democracy theorists offer two reasons why we should embrace it. First, some proponents of deliberative democracy contend that it is a political theory embraced by the framers and therefore embedded in the Constitution. Second, advocates of deliberative democracy claim that, regardless of its historical pedigree, it is a meritorious political theory to which we ethically should adhere. I deal with each of these claims in turn.

III. DELIBERATIVE DEMOCRACY’S HISTORICAL CLAIMS

Theorists who claim a historical basis for deliberative democracy in the thought of the framers rely on the thinnest of evidence, amounting largely to a few scattered remarks by Madison. Most prominent among these is Madison’s defense of representative democracy in The Federalist No. 10, where he claims that national representation is a means “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”

Fishkin, for example, quotes this passage and then goes on immediately to conclude that, in Madison’s view, “representation may make possible greater deliberation.” Even torn from its context, this passage provides scant support for Fishkin’s conclusion. In context, it is clear that what Madison meant by “refine and enlarge the public views” was that the people’s elected representatives were likely to be wiser and more virtuous than the people themselves, characteristics they would bring to Congress, not acquire there through debate.

Sunstein also relies on some additional remarks in which some of the framers favorably mention deliberation, the clashing of opinions, and the value of open-mindedness in debate. In addition, he argues that certain structural features of the Constitution, such as indirect election of the Senate

58. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 87, 89, 95-99 (C.B. Macpherson ed., 1980) (arguing that the formation of a society from the state of nature is an act of mutual, voluntary, and unanimous consent).
59. See U.S. CONST. arts. V, VII.
60. THE FEDERALIST No. 10, supra note 54, at 82.
61. FISHKIN, supra note 24, at 16.
63. SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 22, 24.
DELIBERATIVE DEMOCRACY

and President and the system of checks and balances, were designed to encourage discussion among government representatives.\textsuperscript{64}

To conclude from this evidence that the framers had in mind anything remotely resembling a contemporary theory of deliberative democracy is to commit a serious historical solecism. In the first place, this argument incorrectly equates “deliberation” with “dialogue” or “discussion”—concepts that were quite distinct in the late eighteenth century (as they are today). Samuel Johnson’s dictionary, for example, defines “deliberate” as “To think, in order to choice [i.e., choose].”\textsuperscript{65} There is nothing about thinking, however, that inherently requires discussion.

Fishkin and Sunstein’s reading of “deliberation” as “dialogue” also utterly ignores the reigning rationalist epistemology of the founding era. The framers believed that moral truths, including the nature of the common good, were objective and could be discovered through proper reasoning.\textsuperscript{66} For example, Madison’s conception of a “majority faction” as a group “united and actuated by some common impulse or passion, or of interest, adverse to . . . the permanent and aggregate interests of the community,”\textsuperscript{67} is incomprehensible under any other assumption. Those who adopted the Declaration of Independence went so far as to declare certain political and moral truths to be “self-evident.”\textsuperscript{68} The value of discussion under these circumstances seems slight. The framers did, of course, divide power sharply, but this was hardly because they wanted to “encourage discussion among different governmental entities.”\textsuperscript{69} What they wanted to do was create an institutionalized form of governmental gridlock to safeguard the people against the unpleasant possibility that “[e]nlightened statesmen will not always be at the helm.”\textsuperscript{70}

A second and even more serious flaw in the claims of deliberative democracy theorists is that their arguments conflate legislative deliberation and popular deliberation. Again, the two are distinct in salient ways. It is perfectly reasonable to suggest that legislatures ought to engage in some degree of collective discussion to supplement the private reflection of the delegates, and undoubtedly the framers anticipated that Congress would do so.\textsuperscript{71} But the justification for legislative deliberation is purely instrumental:

\begin{itemize}
\item \textsuperscript{64} Id. at 23.
\item \textsuperscript{65} SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1756). The definition remained unchanged as late as the 1813 edition. See id. at 167 (1813 ed.).
\item \textsuperscript{67} THE FEDERALIST No. 10, supra note 54, at 78.
\item \textsuperscript{68} DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776); see also MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 9-60 (1978).
\item \textsuperscript{69} SUNSTEIN, PARTIAL CONSTITUTION, supra note 3, at 23.
\item \textsuperscript{70} THE FEDERALIST No 10, supra note 54, at 80.
\item \textsuperscript{71} For example, Locke, and probably many of the framers, believed that a lack of
it leads to better decisions. The justifications for deliberative democracy are quite different, and inapplicable to legislative deliberation: surely the last thing we want is for the members of a legislature to constitute themselves a separate society by talking themselves into a collective identity different from that of the people. Thus, arguments supporting a process of legislative deliberation do not translate into support for deliberative democracy as a way of life for citizens.

Finally, Sunstein claims to find additional support in the Supreme Court’s doctrine of rationality review.\footnote{72} This doctrine requires the government to justify its actions with reasons. But the justifying of government action with reasons has no particular relation to discussion; reasons can be chosen just as well through individual reflection. The Court implicitly recognizes this by applying the rationality requirement indiscriminately to all government decisions whether made by plural government decision makers like Congress, or individuals like agency officials. A far more plausible explanation for rational basis review is the wholly Lockean notion that unexplained governmental action is arbitrary, and arbitrary government is illegitimate because it is a form of political slavery forbidden by natural law.\footnote{73}

Just because deliberative democracy's historical claims are implausible, however, does not mean that the theory can be dismissed; an independently meritorious political theory still ought to demand our serious attention.\footnote{74} Unfortunately, upon close examination, deliberative democracy is not such a theory.

IV. THE INSTRUMENTAL BENEFITS OF DELIBERATIVE DEMOCRACY

Although deliberative democracy theorists often set out the contours of their theory with care, they are not always so plain about explaining why deliberative democracy is a good political theory, and why we should prefer it to other forms of democracy. Nevertheless, two such reasons are implicit intellectual equipment and the leisure time to use it could prevent the proper exercise of reason. See White, Philosophy, The Federalist, supra note 66, at 217. Tocqueville believed that the conditions of life in America, particularly the nearly universal devotion to continual hard work, deprived most Americans of the leisure time necessary to cultivate proper reasoning abilities. See Tocqueville, supra note 4, at 207-08; Tocqueville, supra at 43-45; see also Arendt, supra note 4, at 68-69; Shklar, supra note 4, at 67-68. Thus, discussion might be practically necessary even among the most competent American thinkers.


73. Locke, supra note 58, at §§ 17, 22-24, 135-37, 159-68.

in the deliberative democracy literature, one instrumental and the other normative. From an instrumental perspective it might be said that dialogue is a positive good, and deliberative democracy is the one form of government that allows a society to reap fully the benefits of dialogue. Alternatively, a straightforwardly normative reason for preferring deliberative democracy is that it is simply a good way of life. In this Part, I want to show why deliberative democracy's instrumental claims fail. The normative claim is taken up in Part V.

A. Achieving the Benefits of Dialogue

As its name suggests, deliberative democracy purports to differ from its non-deliberative cousins primarily in its stress on dialogue. Moreover, since Americans now live under a form of democracy and already engage to some degree in overtly political discourse, deliberative democracy, if it is to differ meaningfully from standard liberal theories of protective democracy, must be understood to contend that Americans do not talk enough, or that they talk in some way improperly, or both. This justifies our asking: What is so important about dialogue that leads deliberative democracy to demand so much more of it? Talk, of course, takes time, and time is limited: "One can discuss only for so long, and then one has to make a decision." If we must talk so much more, and so much more meaningfully, than we already do, what benefits can we expect to obtain?

Theorists approaching the problem from different perspectives have suggested three possible benefits that might flow from the kind of dialogic engagement recommended by deliberative democracy: collective self-improvement of the citizenry, the forging of a collective identity, and the enhancement of governmental legitimacy. None of these benefits, however, makes much of a case for the instrumental superiority of deliberative democracy.


76. Elster, supra note 75, at 38.

77. Some theorists have identified as a fourth benefit of enhanced discourse the improvement of the quality of political decisions by facilitating the collection of information and by testing policy alternatives for weaknesses. E.g., Fishkin, supra note 24, at 30-31, 81-86; George F. Will, Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy 103 (1992); Bessette, supra note 3, at 105-06; Galston, supra note 3, at 355-56; see also Manin, supra note 35, at 351-52. This seems more like a makeweight argument, for it seems more at home in a theory of protective democracy, and certainly does not justify a transcendent theory of deliberative democracy. No theory of democracy is indifferent to the quality of democratic decision making, nor does any
1. Self-improvement of the Citizenry

The first benefit of enhanced discourse is said to be the collective self-improvement of the citizenry. Deliberative democracy, however, is not well suited to deliver such a benefit because of its strong emphasis on consensus. In fact, the more strongly deliberative democracy is committed to the achievement of consensus, thereby successfully distinguishing itself from traditional liberal forms of protective democracy, the more severely it impedes the delivery of the developmental benefits of dialogic engagement.

Deliberative democracy theorists are surely correct to note that participation alone will not improve the quality of political discourse or constitute citizens who are alert, interested and politically alive. To provide these benefits, the participation must be meaningful. Participation is only meaningful, however, when it is a means by which citizens can play a significant role in shaping the decisions that affect their lives. For this condition to hold, citizens must feel that there is some reasonable prospect for their participation to lead eventually to actions that affect them.

When democratic deliberation is conducted under a requirement either of actual consensus or of something approaching actual consensus, citizens are unlikely to experience the sense of self-mastery necessary for them to benefit from the deliberative process. If consensus or near-consensus is a prerequisite to collective action, then little of consequence ever will be done. Citizens can talk all they want, but their talk ultimately disappears into a black hole. Deprived of the satisfaction of seeing their talk translated into social action, the citizens of a deliberative democracy are likely to

democratic theory deny that careful consideration is better than haphazard consideration. If anything, deliberative democracy seems ill-suited to accomplish this task since it demands a kind of dialogic engagement that goes far beyond the mere exchanging of whatever information may be necessary to make sound decisions, and might actually impede a society from putting this information to any kind of good use in the ways described below.

Bruce Ackerman takes the somewhat different, though related, view that talk is necessary to discover particular pieces of vital information: the scope of moral disagreement, and whether any accommodation among disparate groups is possible. Bruce Ackerman, Why Dialogue?, 86 J. Phil. 5 (1989). For a critique of his position, see Benhabib, supra note 2, at 154-55.

78. Arendt, supra note 4, at 253-54; Barber, supra note 4, at 136-37, 155; Sunstein, Democracy, supra note 31, at 244-45; Michelman, Foreword, supra note 1, at 19.
79. Mill, supra note 19, at 328.
80. Barber, supra note 4, at 117-39; C. George Benello & Dimitrios Roussopoulos, Introduction to Participatory Democracy, supra note 5; David Braybrooke, The Meaning of Participation and of Demands For It: A Preliminary Survey of the Conceptual Issues, in Participation in Politics: Nomos XVI, supra note 5, at 59 (demand for participation are demands to “act in ways capable of making a significant difference to the [political] outcome”).
experience dialogue as a burden—a kind of wasteful, tedious, and purely formal ritual useful only to demonstrate some form of socially mandatory respect for fellow citizens. Deliberative democracy’s continual striving for consensus thus hobbles dialogue by undermining its power to benefit the citizenry.

2. Forging Collective Identity

A second benefit of dialogue, suggested in more communitarian-oriented accounts of deliberative democracy, is the forging of a collective identity. Dialogue is said to accomplish this result because it is the process by which citizens produce, or in some accounts discover, the shared understandings that collectively constitute them as a society. In addition, the bonds of community are strengthened simply by the joint participation of citizens in the common task of dialogic self-governance. Once again, deliberative democracy is hardly uniquely suited to provide such benefits, and there is reason to think it is less well-suited than other forms of democracy.

First, it is fanciful to suppose that the kind and amount of dialogue that takes place in any large, contemporary republic is inadequate to the purpose of producing or discovering significant shared understandings. A group of

81. Michelman, Voting Rights, supra note 37, at 451; Ackerman, Social Justice, supra note 26, at 100.

82. For a perceptive discussion and critique of these approaches, see Berry, Democratic Community, supra note 29, and Christopher J. Berry, Shared Understanding and the Democratic Way of Life, in Democratic Community: Nomos XXXV (John W. Chapman & Ian Shapiro eds., 1993) [hereinafter Berry, Shared Understanding]. Some of the leading legal expositors of deliberative democracy seem equivocal about whether deliberation leads to the discovery of shared, external standards of political truth, or whether dialogue is the process by which shared understandings are created and then, in consequence of having been agreed to, elevated to the status of political truth. Cass Sunstein, for example, never makes his position entirely clear. Compare Sunstein, Partial Constitution, supra note 3, at 26 (legislators “select values through deliberation and debate”), 134-35 (preferences are formed in discussion, not brought to it), 178 (in deliberation “citizens decide... who they are—what their values are and what those values require”) with Sunstein, Democracy, supra note 30, at 243 (“[p]ublic deliberation may reveal truth or falsity of factual claims about the state of the world”).

Steven Gey, however, understands Sunstein to hold an objective conception of civic virtue that is discovered, rather than created, through deliberation. Gey, supra note 31, at 809. By way of contrast, compare Feldman, supra note 31, at 68 (propounding a theory of “republican interpretivism” in which the function of dialogue is to identify the common good, but contingently, as part of a continual process of reconstituting truths and the cultural understandings that make them possible) with Estlund, supra note 3, at 1468-69 (propounding a theory of “epistemic proceduralism” in which democratic deliberation is the process by which citizens come to know an independent standard of truth and to make political decisions that are more often substantively just than under other competing procedures).

83. Barber, supra note 4, at 152.
strangers, with no common history, experiences or ideas, might need to talk for a considerable period to discover the kinds of shared understandings necessary to constitute a meaningful community. But political dialogue never occurs in such a setting. A real society, as opposed to an abstract, hypothetical one, already has shared understandings; without them it could hardly function as a society. It also stands to reason that the longer a society has existed, the deeper and broader the shared understandings of its members. Thick shared understandings may never relieve a society of the need to make collective decisions, but such understandings might well render dialogue largely unnecessary for decision making in many instances.  

Second, societies constitute their collective identities just as much through action as through dialogue. Who we are is not merely a function of what we say; it is also decidedly a function of what we do. Furthermore, a society constitutes itself at least as much in its daily routine of unself-conscious human interaction as it does in its more transcendent moments of purposeful political discussion. Shared understandings and communal bonds are not forged solely in the heat of active dialogic engagement; on the contrary, they are also—perhaps principally—generated incrementally, through the gradual, everyday accretion of shared experiences. Moreover, these everyday activities need not even be experienced by the participants as political. The forging of a common identity is thus, in Jon Elster's term, a "byproduct"—a benefit that cannot be realized unless undertaken in pursuit of "a serious purpose which goes beyond that of achieving this satisfaction." In this sense, deliberative democracy is not nearly as different as its proponents seem to think from its spiritual opposite: a democracy in which the people make decisions by voting without significant prior discussion.

84. An example of this can be found, strangely enough, in Jane Mansbridge's glowing account of a town meeting in a tiny New England community. See Mansbridge, supra note 5, at 39. In considering an agenda of more than two dozen items, Mansbridge reports, meaningful debate appears to have taken place on only two items, the school budget and zoning. Id. at 54-58. The last few items on the agenda, we are told, "passed unanimously with little discussion." Id. at 58. Thus, discussion was unnecessary; the citizens could decide how to act by voting immediately. Note that this result does not depend on the existence of social consensus; if a shared understanding is widely but not universally held, a vote could be taken without significant dialogue under a majoritarian rule of decision.


86. See West, supra note 51.

87. ELSTER, supra note 75, at 91.

88. As Hannah Arendt has written: "In [both] acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world . . . ." ARENDT, THE HUMAN CONDITION, supra note 85, at 179.
3. Enhanced Legitimacy

The third and final benefit of discourse suggested by deliberative democracy theorists is its ability to enhance the legitimacy of political decisions. As Amy Gutmann has written, "[d]eliberative democracy legitimates the collective judgment resulting from deliberative procedures." Or, in the words of Bernard Manin, deliberative decisions are legitimate "because they are, in the last analysis, the outcome of the deliberative process taking place before the universal audience of all the citizens."

---

89. Gutmann, Disharmony, supra note 3, at 148; see also Barber, supra note 4, at 170 (norms of political judgment are "produced by an ongoing process of... deliberation... and... are legitimized solely by that process"); Sunstein, Democracy, supra note 31, at 72 (respect is due only to the "considered judgments of a democratic polity" reached under the conditions appropriate to democratic choice); Cohen, supra note 3, at 21 ("free deliberation among equals is the basis of legitimacy"); Michelman, Pornography Regulation, supra note 14, at 317 (legitimacy of Constitution as higher law depends on conception of political process as deliberative rather than strategic); Post, supra note 36, at 660 (democracy reconciles individual autonomy with collective self-determination by "subordinating governmental decision making to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification").

David Estlund adds an additional condition: for him, "[a] decision is made legitimate by being chosen in an actual deliberative democratic procedure that tends—though imperfectly—to produce substantially just decisions.” Estlund, supra note 3, at 1469.

90. Manin, supra note 35, at 359. There is an obvious and somewhat disturbing circularity to these explanations in which deliberative democracy legitimates itself by being the only political system that is both deliberative and democratic. But it is unclear why decisions reached democratically without deliberation, or deliberatively under a non-democratic regime, are not legitimate. One possibility is that decisions that are not produced under conditions of both deliberation and wide participation are unlikely to be good decisions; but this is an instrumental objection, which implies a theory of protective liberal democracy that deliberative democracy aims to transcend. A different resolution might be that the individual and collective benefits of political participation and community cannot be achieved unless political decisions are made under circumstances of genuine deliberation and widely distributed participation, but under this explanation the theory collapses into developmental democracy, which deliberative democracy hopes to transcend due to developmental democracy’s inadequate attention to the protection of liberty. This is precisely the instability identified by Berry, and the reason he deems deliberative democracy a noble failure. See Berry, Democratic Community, supra note 29; Berry, Shared Understanding, supra note 82; see also Gey, supra note 31, at 810 (mounting a similar attack on civic republicanism's treatment of civic virtue and collective action, and accusing republicans of “ascribing to certain kinds of collective action an almost mystical significance”).

Another possible explanation relies on the discourse ethics of Jürgen Habermas. See, e.g., Jürgen Habermas, Reason and the Rationalization of Society (Thomas McCarthy trans., 1984). Indeed, Joshua Cohen ascribes the similarity of his and Bernard Manin's writings on deliberative democracy to their independent reliance on Habermas. Cohen, supra note 3, at 33 n.12. However, Habermas has now made quite plain that his theory of discourse ethics cannot prescribe in any particular situation when individuals should
To assess the value of deliberative democracy in these terms, we must first understand what precisely about deliberative democracy confers this legitimacy. Presumably, legitimacy under deliberative democracy derives in large part from the commitment of such a society to diverse, open-minded dialogue. But it seems equally clear that this legitimacy cannot depend upon every communication within a society satisfying these conditions—no real community could possibly measure up. On the other hand, surely some communication in any society, whatever its form of government, must meet these conditions. If so, then legitimacy under deliberative democracy is a matter of degree rather than of kind, and the critical question becomes whether deliberative democracy provides significantly greater legitimacy than other forms of democracy, and at an acceptable cost.

Deliberative democracy itself, unfortunately, does not provide us with any tools for assessing when social discourse is “good enough” to legitimate collective action, or when more talk needs to occur in order either to convert an illegitimate decision into a legitimate one, or to enhance legitimacy to the point where the benefits of additional legitimacy exceed the costs of trying to achieve it. Moreover, the costs of achieving legitimacy under deliberative democracy increase rapidly depending upon how strongly it insists upon the achievement of consensus as a condition for collective action. This puts deliberative democracy in something of a bind. The more strenuously its proponents claim that it is different from liberal forms of protective democracy, the more they are driven to rely upon consensus as a distinguishing requirement. But the more strongly deliberative democracy theorists insist upon consensus as a condition for collective action, the less likely it is that any significant collective action will ever qualify as legitimate.

Here, I think, we have hit upon an illuminating characteristic of deliberative democracy, one that suggests a rather different way of understanding it. In the next section, I raise the possibility that deliberative democracy, at bottom, is not really directed to the improvement of politics through discourse, but is instead a political theory designed primarily to justify a radical form of protection for political minorities. Specifically, it provides a justification for virtually permanent social inaction, apparently on the theory that if people can be kept talking they will not act, and if they do not act, majorities will be unable to do serious harm to the interests of minorities.

A final explanation is Aristotelian and holds that the legitimating power of deliberative democracy derives from its intrinsic value as a substantively good life. This is the approach I adopt in Part V, in which I argue that the life of deliberative democracy is far from good. A final explanation is Aristotelian and holds that the legitimating power of deliberative democracy derives from its intrinsic value as a substantively good life. This is the approach I adopt in Part V, in which I argue that the life of deliberative democracy is far from good.

91. See Habermas, Discourse Ethics, supra note 2, at 60-110.
We have seen how the problem of American politics to which deliberative democracy claims to respond is the problem of improving the quality of political life without sacrificing the rights of minorities. My contention is that deliberative democracy tends to favor at nearly every turn the protection of minorities over the improvement of politics, and we can begin to see this by examining its conception of individual autonomy. Let us start with deliberative democracy’s notion of respect.

Deliberative democracy theorists who write about respect seem to agree that deliberation, understood as debate or dialogue, is the only way in which a society shows genuine respect for the individual autonomy of its citizens. But why is this so? One could say that it is just as or more respectful of individual autonomy to respect a citizen’s judgment regardless of whether that judgment has been preceded by dialogue. Evidently deliberative democracy does not deem such judgments worthy of respect. Why not?

One possibility is that judgments untested by dialogue are more likely to be poor quality judgments because they will be based on inadequate information, or inadequate exploration of their weaknesses. But one hardly needs a theory of deliberative democracy to justify this position: a standard liberal theory of protective democracy will do just as well. The real reason why deliberative democracy disfavors judgments untested by dialogue has nothing to do with the judgment itself, but with the process by which it is formed: deliberative democracy disfavors judgments formed without dialogue because such judgments result from a process that is not respectful of others. People who make such judgments have not adequately opened themselves to the possibility of persuasion or, perhaps worse, seek to enter the political process at the point of exercising raw majoritarian power without having first tried diligently to persuade others to their point of view.

92. See Gutmann, Disharmony, supra note 3; see also Michelman, Foreword, supra note 1, at 33, 40-41.

93. This is, for example, the position of utilitarianism. See John S. Mill, Utilitarianism, in ON LIBERTY AND OTHER ESSAYS 129, 141 (John Gray ed., 1991). It is also the position that Richard Fallon calls “ascriptive autonomy.” Richard H. Fallon, Jr., Two Senses of Autonomy, 46 STAN. L. REV. 875, 878 (1994). Gutmann criticizes the position under the label of “populist democracy.” Gutmann, Disharmony, supra note 3, at 129, 134.

94. See, e.g., Fishkin, supra note 24.

95. Manin, supra note 35; Gutmann, Disharmony, supra note 3, at 140-46.

96. Cohen, supra note 3, at 23-24; Gutmann, Disharmony, supra note 3; see also Michelman, Pornography Regulation, supra note 14, at 291-304 (rejecting strategic view of politics).
At work here is a vision of citizenship that imposes a duty to attempt to seek the approval of all before going ahead and simply taking collective action, even when it would be possible to do so because of clear and perhaps even overwhelming majority support for the contemplated action. The citizen of a deliberative democracy must, it seems, make some kind of serious attempt to obtain at least the “blessing,” if not the actual agreement, of interested minority groups before taking collective political action. This is of course a position that accords well with some contemporary judgments about the need to pay proper respect to minorities.

There are at least two difficulties with this aspect of deliberative democracy. The first is a practical difficulty resulting from the possibility that minorities might abuse their entitlement to dialogic respect. Such abuse can occur when minorities attempt to use dialogic engagement not merely as an opportunity to persuade the majority on the merits of the question under debate, but to determine in addition the content of respect itself. Thus, a minority group might argue that respectful treatment requires not only good faith debate, but also an acknowledgement of the truth or merit of some underlying claim or value. We sometimes see such a move in the more extreme claims of multiculturalism. These claims must be rejected, however, because what constitutes a respectful dialogic encounter is something that a society can only decide collectively; it cannot be dictated by groups or individuals. Further, such claims undermine deliberative democracy’s goal of meaningful dialogue: if some claims are off the table, the range and quality of the dialogue can only suffer.

The other difficulty is far more serious, and brings us to the second way in which deliberative democracy’s conception of autonomy tilts decisively in favor of the protection of minorities. In a nutshell, deliberative democracy’s ultimate goal seems to be to provide minorities with a means of protecting the integrity of their identity. This goal, however, rests on flawed conceptions of how identity is formed, and the degree of control that groups and individuals are capable of exercising over their identity.

Our identities are constituted by our life experiences. These experiences not only provide us with information about the world, but shape the way we perceive it. Certainly the most direct and obvious influences on our identity come from our family, friends, and community. However, there are also more subtle influences, such as the media and popular culture, which can shape our understanding of the world.

---

98. Id. at 70; see also Susan Wolf, Comment, in id. at 78.
99. See Post, supra note 36, at 659-63. This is Post’s reason for rejecting suggestions made by Sunstein and others that the First Amendment ought to be construed to permit government intervention designed to improve the quality of public dialogue. Id.
100. Quite a range of thinkers have taken this position. See, e.g., STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980); HANS-GEORG GADAMER, TRUTH AND METHOD (1975); ALASDAIR MACINTYRE, AFTER VIRTUE (1984); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); MICHAEL SANDEL, THE LIMITS OF LIBERALISM (1984);
identities come in the form of dialogic encounters, particularly those in which others try to persuade us to adopt some belief or point of view. But our identities are also influenced by our environment, to which we inevitably react, and those who have the power to influence our environment have the power indirectly to influence our identities.

One way in which this latter type of influence is exercised is in the political arena, through political action. For example, suppose a society contemplates passing a law legalizing euthanasia. Whether it passes the law will depend on the background values, beliefs and understandings—the identity—of the citizens. If the society passes the law, however, it will then have become a society that has legalized euthanasia, a fact which inevitably affects those same background understandings of the citizens, and changes who they are. A citizen of a society with legalized euthanasia has slightly different experiences, and thus a slightly different identity, than a citizen of a society that prohibits euthanasia. For some citizens the two experiences might differ in genuinely transforming ways.

What deliberative democracy seeks to do is restrict the field in which identity is formed to the arena of dialogue, and to rule out of bounds attempts to influence the identity of others indirectly through political action taken over their objection. The intention seems to be to establish a set of ground rules for fair play in the political struggle over collective identity. The deliberative democrat wants to say: “You can change who I am by attempting to persuade me, face to face, in a fair and open dialogic encounter. Go ahead and take your best shot. But you can’t try to change me by sneaking around behind my back and using your majoritarian control over government to pass laws that will eventually transform me into someone that I’m not and don’t wish to become.” In dialogue, the reasoning goes, the participants are in control; they can accept or reject arguments, and in so doing control the content of their identities.


102. There are striking parallels between deliberative democracy and Calhoun’s theory of concurrent majorities. Calhoun argued that society is composed of different interests, and that majoritarian government merely grants to one interest the power to tyrannize the others. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSES 13-14 (C. Gordon Post ed., 1953). The key to preventing this kind of tyranny, he claimed, is to “give to each division or interest . . . either a concurrent voice in making and executing the laws or a veto on their execution.” Id. at 20. This will confine the government to taking only measures that “promote the prosperity of all.” Id. at 30. But where Calhoun thought these measures necessary to protect minorities’ property, deliberative democracy deems them necessary to protect minority identity.
This reasoning is fatally flawed: deliberative democracy cannot provide minorities with an effective means of preventing impairment of the integrity of their own identities because no group's identity is wholly within its control. Group identity is a constantly evolving product of background social understandings. It may well be that deliberative democracy, by granting minorities a veto over collective political action, might slow the process by which a minority's identity gradually evolves. It might also give minorities more of a sense of control over their own destinies by creating the illusion that minorities are going along only with measures with which they agree. But deliberative democracy cannot prevent minority identity from being influenced by its environment, and the way the majority talks and acts in normal everyday life will inevitably change the minority regardless of whether the majority is able to enact its beliefs into law.

V. THE NORMATIVE VIEW: DELIBERATIVE DEMOCRACY AND CITIZENSHIP

A. The Windy Citizen

At this point, a deliberative democrat might make the following response. All these objections are beside the point: they proceed from the premise that democratic dialogue is merely a means to some other end, such as the creation of a collective identity or the protection of minorities. The instrumental benefits of deliberation are not unimportant, but the primary reason why citizens of a democracy should deliberate is simply because a dialogic life is a substantively good life. Furthermore, because the dialogic life is substantively good, it constitutes citizens who possess the character and exercise the virtues of the good democratic citizen.

This is a cogent response, and it is probably the best one that can be made on behalf of deliberative democracy. But it is unavailing. In fact, the life of talk contemplated by deliberative democracy is not particularly good. One need hardly regret, with Machiavelli and Arendt, the overthrow of


104. This problem forms a severe tension in Cass Sunstein's work especially. Sunstein is strongly committed to deliberative democracy, but he also follows Elster in postulating a process of "adaptive preference formation" in which people's opinions can be influenced decisively by their environment. Compare Sunstein, Partial Constitution, supra note 3, at 162-94 with Elster, supra note 75, at 1-108.

105. For a discussion of whether this claim is one of intrinsic goodness or really an instrumental claim according to which the value of some version of democracy depends on its consequences, see Smith, supra note 5, at 133-34.

106. See Galston, supra note 3; see also Gutmann, Education, supra note 55.
DELIBERATIVE DEMOCRACY

antiquity’s vita activa at the hands of Christianity\textsuperscript{107} to reach this conclusion. Rather, one need only recognize that deliberation can never be solely an end in a society in which self-governance has any meaning; any plausible account of deliberation must accord it some instrumental component as well. And if deliberation has any kind of instrumental component, then there necessarily comes a time when talk may stop; there may even come a point when too much talk can be harmful. The only alternative is to maintain that active dialogic democracy is the highest state of human existence, and what is important is not the quality of democratic decisions, or even that any decisions be made at all, but that we talk things over. But this is just too extreme a vision; even Socrates, history’s most dedicated talker, periodically shut up and went to war.

The deficiencies of deliberative democracy are even better illustrated by examining the kind of citizens it is likely to constitute. Deliberative democracy theorists seem to think that these citizens will be generous, open-minded and self-sacrificing. For the reasons set out in the previous section, I think it far more likely that deliberative democracy would constitute citizens who are ineffectual, tyrannical, obstructionist, and in general poorly suited for the kind of life demanded of citizens in a large, modern republic.

First, citizens of a deliberative democracy are likely to live in a constant state of frustration because they are unable to live up to deliberative democracy’s unrelenting demands of openness, good faith, and authenticity in dialogue. Every debate cut off in heated argument or terminated short of agreement is a failure, and deliberative democracy implies that the failure is one of character because it likely results from laziness and insufficient openness.

Second, citizens of a deliberative democracy are likely to be uncooperative and obstructionistic.\textsuperscript{108} Many of the personal benefits of democracy flow, as we have seen, from the sense of self-mastery that citizens gain when they have an opportunity to participate meaningfully in the governmental processes that affect their lives. Because deliberative democracy is so heavily weighted toward protecting minorities, and because it so strongly emphasizes consensus, just about the only way for citizens to feel like they are actually influencing the process of collective decision making is to exercise a veto. Moreover, since deliberative democracy indirectly teaches minorities the legitimacy of maintaining the integrity of group or individual identity against outside pressures for change, people who believe that they are in the minority are especially likely to dig in their heels, further obstructing the possibility of collective political action.\textsuperscript{109}

\textsuperscript{107} See ARENDT, THE HUMAN CONDITION, supra note 85, at 77-78.

\textsuperscript{108} For a parallel critique of civic republicanism, see Michael A. Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 YALE L.J. 1651, 1655-57 (1988).

\textsuperscript{109} Aristotle believed that good rulers needed to learn first how to be ruled.
Third, deliberative democracy is likely to constitute citizens who are self-centered rather than open as a result of grounding its conception of dialogic encounter on a deep notion of respect. It is all too easy under those circumstances for citizens whose views are rejected on the merits to interpret such rejections not as a sign of the weakness of their opinions, but as a sign that their audience failed to attend to the argument in an appropriately respectful manner. The result may be extensive special pleading under the guise of demands for respect.

Finally, citizens of a deliberative democracy are likely to be ineffectual. The only public training they receive is in persuasion, so they are unable to organize for action. Because they must always remain open to persuasion, they are forever preparing to act, but never acting, and their opinions are always provisional.

Life in a large, modern, heterogeneous republic requires plenty of talk, to be sure, but it also requires action. Peace, security, prosperity, and liberty do not consist in talk alone; they are goals to be achieved through acts performed on the public stage. A world that requires action necessarily requires that its inhabitants be able to formulate opinions that are good enough, and in which they have sufficient confidence, to guide and justify the kinds of actions that people are sometimes called upon to take. The citizens of a deliberative democracy are simply not the kind of citizens who would flourish under the conditions of modern society, and life among them is not likely to be satisfying.

B. An Alternative: The Madisonian Citizen

I conclude by sketching some of the rudiments of an alternative conception of citizenship, suitable for the conditions of life in a large, diverse republic like the contemporary United States. As these citizens live in a republic, I would like to call them “republican” citizens, but the word has been pretty fully expropriated by civic republicanism. I will settle for calling my citizens “Madisonian” to emphasize that they live in a Madisonian republic characterized by large size, a diverse citizenry, and indirect democracy in which the daily business of government is conducted by popularly elected officials.\(^{110}\)

My conception of the Madisonian citizen is guided by four main considerations. First, Madisonian citizens should have the characteristics necessary to avoid falling into the twin traps that define the problem of contemporary American politics. Thus, Madisonian citizens should want to

be actively engaged in politics in order to reap the personal and collective benefits of developmental democracy, and they should be capable of doing so. At the same time, they need to observe the prescription of protective democracy that the rights and liberties of minorities not be trampled in the process. Thus, they should be respectful of minorities. This gives us:

1. Citizens should be substantially engaged by the political process; and
2. Citizens should exhibit a high degree of concern and respect for the views of minorities.

Up to this point, the characteristics of Madisonian citizens do not differ from those of deliberative democrats. However, a third consideration sets the Madisonian citizen apart. Citizens ought to have a conception of the good and some kind of plan for achieving the good as they understand it. Not all conceptions of the good are equivalent; deliberative democrats are certainly correct to demand that citizens conceive and pursue an affirmative vision of the common good rather than undertake the kind of egoistic, self-interested strategizing approved by public choice theory. However, Madisonian citizens are not confined to the achievement of their visions of the common good by persuasion. On the contrary, Madisonian citizens not only have personal visions of the common good, but believe that they should pursue their visions through action, and that political action is the most effective way to implement the common good as they understand it. Thus,

3. Citizens should be willing, and even eager, to pursue their conceptions of the common good through political action.

Finally, the last consideration is practical, and is designed to set a realistic constraint:

4. Citizens should be able to meet the first three conditions within institutions that are feasible in a Madisonian republic.

Of course, these criteria are broad enough to encompass quite a range of citizen characteristics, so I will content myself with mentioning just three: Madisonian citizens' conception of politics; the nature of their participation; and their experience of politics.

1. Conception of politics. Madisonian citizens see politics as an opportunity to implement laws or establish regimes for the common good. They like democracy because it allows them far greater access to the political process than other forms of government, thus giving them more and better chances to use politics to achieve their goals. Madisonian citizens may even take pride in their skills at influencing the political process to achieve the goals that motivate their activism.

2. Nature of participation. Madisonian citizens want sincerely to see the common good implemented. They are responsibly reflective, and

111. This notion is similar to the Rawlsian concept of a life plan. See JOHN RAWLS, A THEORY OF JUSTICE 407-16 (1971).
engage in reflection and discussion, within pertinent time constraints, to formulate conceptions of the common good with which they are satisfied. But once they have formed a conception of the common good, they are competitive in the pursuit of political success. They have distinct goals and want to see those goals implemented—over the objection of those who disagree, if necessary. To this end, they are prepared to organize with other citizens, to attempt to persuade others as seems appropriate, and to vote their inclinations. They see success in bringing their vision to fruition as a kind of excellence, which they strive to cultivate.

In addition, Madisonian citizens are not unmoved by the possibility of public praise and positive historical evaluation, though they view these accolades as secondary to the personal satisfaction of helping to bring about the common good. Their heroes include Abraham Lincoln, Franklin D. Roosevelt, and Martin Luther King, Jr.—individuals who were thoughtful yet decisive, who tirelessly pursued their visions of the public good and were willing to take steps to force it on those who did not share it.

Madisonian citizens understand that their approach to politics entails risks—they can be wrong as well as right—but they believe that the potential benefits justify the risks, and that the risks can be somewhat mitigated by careful study, continuing reflection, and a willingness periodically to reconsider their views in the face of novel arguments or new evidence. Madisonian citizens view the career of Lyndon B. Johnson as a kind of cautionary tale. Johnson pursued his vision of the common good and implemented it with enormous success, and when he was right he was as right as anyone could be; but his mistakes were equally colossal. Madisonian citizens hope that they can learn how to avoid Johnson’s errors as well as imitate his successes.

3. Experience of politics. Madisonian citizens experience politics as bonding, not divisive. Their brand of politics is competitive, but not hostile; perhaps “sporting” describes it best. In their politics, winners do not eradicate losers; losers do not peevishly refuse to go along with collective decisions with which they disagree; and everybody, winners and losers alike, remains loyal to the larger political community. Madisonian citizens believe in fair play in politics, and in the possibility of losing honorably. They respect opponents who put up a spirited fight, and demand such respect in return. They respond to their losses with continued loyalty and expect others to do the same, and they resent those who do not take losing well.

Although Madisonian citizens are open to dialogic persuasion, the high value they place on principled political action makes them quite responsive to a wholly different form of persuasion, persuasion by principled example. Thus, they may find persuasive value in being consistently outvoted when in the minority and, when in the majority, in consistently outvoting a

112. I am thinking, of course, of Johnson’s civil rights successes, and his failure regarding Vietnam.
committed (but loyal) minority of dissenters. In the latter case, for example, Madisonian citizens will admire the persistence and principled example set by the dissenters, which may in turn cause Madisonian citizens in the majority to wonder what makes the minority hold its view so strongly. Madisonian citizens are willing to acknowledge that the strength of the minority’s beliefs may be evidence of the correctness of those beliefs, and that a reevaluation of the majority position may be called for. But the key here is action. In the view of Madisonian citizens, talk can be effective, but it is cheap; action in conformity with talk, however, speaks far more powerfully and effectively.

VI. CONCLUSION

The theater critic Jan Kott once wrote that tragedy lies in “the necessity of making a choice between opposing values.” But, he went on, “[t]he tragic situation becomes grotesque when both alternatives of the choice are . . . compromising. The hero has to play, even if there is no game. Every move is bad, but he cannot throw down his cards. To throw down the cards would also be a bad move.”113 This is the situation of the social human being, yet it is the situation that deliberative democracy wishes to deny. Deliberative democracy seeks to create in a life of dialogue a safe, inviolable haven for the cultivation of personal and group identity; it seeks a way for society to reap the benefits of politics without the risks. Such a goal, alas, is unattainable. There is no safe haven, either for individuals or minorities, from the transforming pressures of social life. You are always in the game, even when you think you are out.

To admit this is not by any means to say that individuals have no power to affect the course of events: the ideas that people introduce into the public arena and the things they do there can greatly influence the nature of a society’s institutions and the ultimate shape of its collective identity. But it is a mistake to think that a life of discourse is one that is somehow lived off the public stage. On the contrary, to advocate a life of discourse is to advocate transforming the public stage into an endless collective seminar starring a cast of professors—a kind of permanent faculty meeting. If such a spectacle were worth producing, then deliberative democracy might have some merit, but it would surely prove impossibly dull and ultimately unedifying.

It is far better to concede that because we must do something, we might as well do the only thing we can do, given the constraints of human knowledge and fallibility: we should do what seems to us best. That is what Madisonian citizens try to do—their best. It is all anyone can do, and it is therefore all that we can hope to strive for.
