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Democracy and the Extended Republic: Reflections on the Fishkinian Project

Sanford Levinson

When holding a “town meeting” during a visit to Strasbourg early in his term of office, President Obama told a German student, “We spend so much time talking about democracy—and *obviously we should be promoting democracy everywhere we can.*”¹ One might, of course, write a full essay about the extent to which we *should* or, perhaps more to the point, *can*, promote democracy throughout the world, but that is not my concern in this essay. Instead, I take it as a given that most Americans, regardless of political affiliation, broadly support such a commitment, even if there might be differences of opinion over the limits suggested by the “we can” at the end. If “ought implies can,” after all, then perceptions of practical possibility might well temper the enthusiasm for what I would label the international “democracy project” conducted by American presidents, with various degrees of enthusiasm, at least since Woodrow Wilson (and domestically by their predecessors going back most famously to Abraham Lincoln).

The obvious issue presented by the “democracy project,” whether foreign or domestic, is what counts as its achievement. If, as is patently the case, “democracy” is a model example of what political theorists have grown to call “essentially contested concepts,” then different definitions may have considerably different ramifications, not only for actual effectuation but also for the normative evaluation of what is achieved. So consider President Obama’s own elaboration of what he meant by “democracy”:

But democracy, a well-functioning society that promotes liberty and equality and fraternity, a well-functioning society does not just depend on going to the ballot box. It also means that you’re not going to be shaken down by police because the police aren’t getting properly paid. It also means that if you want to start a business, you don’t have to pay a bribe. I mean, there are a whole host of other factors that people need to—need to recognize in building a civil society that allows a country to be successful. . . .²

A number of things might be said. One is that Obama rejects a “procedural” version of democracy in favor of a stunningly

substantive one, where the values of “liberty, equality, and fraternity”—one wonders what the domestic reaction in the United States would have been had he said these words in their original French!—seem to dominate the undoubted good of being able to go to the “ballot box.” This, too, could be the subject of an independent essay, for it is difficult indeed to disagree with the President’s comment and its reminder that a “well-functioning society,” which we might describe as “democratic” requires an honest police force and civil service, in addition to the ability to participate in elections. That being said, it is also worth noting some important additional limitations of focusing on “going to the ballot box” as an index of “democracy,” even if one has the boon of living in a corruption-free society that respects a wide variety of important rights. And here is where the work of James Fishkin takes center stage.

One of the major contributions of Fishkin’s new book, *When the People Speak: Deliberative Democracy and Public Consultation*, is to underscore the extent to which a robust conception of popular government cannot stop with “going to the ballot box” (and, presumably, having one’s votes counted honestly). That may be a necessary condition of democracy, but in no sense should it be viewed as even close to a sufficient condition even in a regime that features an honest constabulary and civil service. Rather, as he eloquently writes, a model of “Competitive Democracy,” which focuses almost exclusively on the occurrence of elections by which oppositional political parties can mount plausible challenges to the maintenance of power by current political insiders, “keeps the mechanism of democracy without its soul.”³ It is unacceptable to limit “the decision-making capacity that is sup-

posed to animate the democratic process” to “whatever competitive efforts, exercised in whatever way happens to win in a mostly unrestricted adversary process” or, even more so, to esteem elections that “are won by manipulation or deception, by bamboozling an inattentive public.”⁴

For Fishkin, it is essential, in any democratic republic worthy of the name, that there be a genuine opportunity for “the people” to “speak,” where such public speech is the product of some genuine deliberation about the relevant issues facing the given polity,

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whether the nation (or, indeed, the “transnation” of Europe) or a particular city in China or an utility district in Texas. *When the People Speak* is both a heartfelt plea for a far more deliberative conception of political democracy and a rigorous analysis of what now constitute almost two decades of data amassed in the course of conducting what Fishkin terms “deliberative polls” all over the world.⁵ Fishkin is almost literally unique in combining the talents of a world-class political theorist with those of an equally first-rate social scientist. Although some few political theorists attempt to intervene in the world by becoming political activists in a standard sense—working with particular candidates or political parties, perhaps even running for office themselves⁶—exceedingly few are interested in trying to build genuinely new institutional structures designed to transform, in fundamental ways, both the conceptions and practical possibilities of politics within a given society. Fishkin’s interest in what might be termed “real-world institutional design” is what notably distinguishes him from many other contemporary theorists and, for me, makes his work so valuable.

To be sure, such efforts are not unprecedented. One of Fishkin’s models appears to be James Madison, who had the advantage of being at the very center of the efforts in 1787 to design a brand new constitution for the fledgling United States of America. “Constitutional design” offers just the occasion for thinking both most broadly and most deeply about the conceptualization of political order and the creation of institutions commensurate with those conceptualizations. It is, obviously, far more difficult to engage in such efforts when a political order is already established. At that point, it is often tempting to define the most basic goals of the order in terms of fidelity to the visions of a “founding generation” rather than to emulate those founders by asking whether we ourselves should engage in what may be viewed as audacious projects of institutional reform. Or, from a less normative perspective, one might simply emphasize the almost tyrannical force of “path dependence,” by which even quite “rotten compromises”⁷ become structurally embedded and basically impervious to change.⁸

Fishkin is, I believe, asking genuinely radical questions about our political order and, at the same time, suggesting what would be equally radical changes. He is asking us to recognize that our own political system, here in the United States as we enter the second decade of the 21st century, may be far from meeting the criteria we should set for “democracy” and, concomitantly, to think about the changes that might be necessary.

The most basic question Fishkin asks us to wrestle with is the meaning of “representative democracy” in the modern world. An essential feature of the “Madisonian system” elaborated in 1787 and in *The Federalist* essays designed to justify that system, was that a government claiming to be ordained by “We

the People” would in fact reject any direct governance by those people. Instead, governance would take place exclusively through representatives. And, in the initial Constitution, only members of the House of Representatives would be directly elected. Every other federal official would, at best, be only “indirectly” elected: U.S. Senators by state legislatures and presidents by the Byzantine mechanism of an electoral college that would often be deadlocked and therefore generate selection by the House of Representatives itself, on a one-state/one-vote principle mimicking the Senate’s similar allocation of equal voting power to states independent of the actual numbers of people living in any of the constituent units.

It is easy enough to demonstrate that one impulse behind the original United States Constitution was a manifest mistrust of the capacities of the general public to engage in actual self-government. After all, Madison was obsessed by the problems of “faction,” which he describes in *Federalist 10* as “the mortal diseases under which popular governments have everywhere perished.”⁹ “Popular governments,” that is, had not learned how to be genuinely self-maintaining, especially if one requires of an acceptable government that it has some relationship with “establishing Justice,” as set out, for example, in the Preamble to the Constitution. Thus we see set out the Madisonian anxiety, which is “that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”

There are many mechanisms that Madison helped to create (and to justify) that might, he hoped, resolve this anxiety, including the creation of a strong new *national* government that would be dominated by political elites sufficiently removed from the ordinary public to allow some hope of maintaining a justice-seeking republic. He certainly believed that deliberation about the public good would take place, but it would be, basically, confined to the elites enjoying public office. There is certainly no sense in Madison of any esteem for mass participation in politics by the American people. James Fishkin may share some of the doubt about the value of mass participation, but it is not because he shares Madison’s generally dismissive views of the capacity of ordinary Americans to exercise genuine political autonomy. Although his name does not appear in the index to *When the People Speak*, one might suggest that Fishkin writes in a distinctly Jeffersonian spirit of confidence in ordinary Americans and the concomitant rejection of a desiccated version of “elite democracy.” I commend him for this.

But there is an obvious problem with mass participation that is at the heart of the book (and, indeed, his entire project over the past two decades). As the American political system has,

over the decades and at both state and national levels, adopted a more inclusive suffrage and, in the states, various mechanisms of direct (instead of representative) democracy, “the result of these well-intentioned efforts to move government and policy closer to actual, raw public opinion has been a lessened impact of deliberation.”¹⁰ There are, Fishkin notes, “normally strong disincentives for mass public opinion to be very deliberative.”¹¹ These can range simply from what economists would call the “search costs” involved in becoming suitably informed about public issues to the collective-action problems, also much emphasized by economists, that promote “free-riding” by most of the public on the relatively small number of individuals who are willing to invest their scarce time and energy (and money) into the demands of genuine republican citizenship. Some use these economic insights to discredit the very project of popular democracy.¹²

This last issue turns us to another crucial aspect of James Madison’s thought that is central to Fishkin’s own project. After all, one of Madison’s most important arguments was his defense of the possibility of the “extended republic” as against those theorists, the most important of whom was obviously Montesquieu, who believed that republicanism was closely correlated with the relatively small size of the territory (and, presumably, population) in question. Madison, wholly unlike his good friend Jefferson, seemingly had little regard to the virtues of state-level societies and polities, and he fervently believed that one would get both a better set of governors and a greater protection of basic rights the larger, and more extended, the given republic.

But, of course, Madison was writing of an America that consisted, in 1790, of about four million people, most of whom, of course, were excluded from even the possibility of political participation by virtue of their gender, race, or status. Geographically, the country extended from what is now Maine in the North to the southern border of Georgia in the South. The Mississippi River provided a stable border on the West, just as the Atlantic Ocean did for the East. For better or worse, though, today the United States extends westward to Hawaii and southward to Puerto Rico, the world’s largest remaining colony, and our population has now passed 300 million. And the problem, both theoretical and practical, is what sense we can make of Madison’s notion of the “extended republic” in such a context.

To be sure, if the only criteria for such a “republic” involved the holding of competitive elections and the protection of certain basic rights (coupled with a relatively uncorrupt civil service), then one might, at least on sunny days, proclaim we

have achieved this, so there is nothing further to say. And one might even envision such a notion of republican government making further headway in, say, India or, eventually, China, just as, arguably, has been the case in a European Union that is now conducting Union-wide elections. But then we return to Fishkin’s overwhelming concern with the limits of such a vision of popular government, for it is one that has little or no role for deliberation or what he terms, in his subtitle, “public consultation.” At best, we have a façade for manipulation by political elites; at worst, we will see the further rise of a basically plebiscitary form of politics, where leaders rely on charisma or the talents of demagoguery to gain office and the prerogatives that come with positions of leadership. So, in the modern world, can we possibly have a more ambitious notion of popular government that does not fall victim to these telling objections that Fishkin himself emphasizes?

A common device in Fishkin’s impressive corpus of work is the creation of an analytic “trilemma” that limns the challenges facing us. Here the focus is on the tensions produced when we try to maximize what have become, in the modern world,

To the extent that genuine acceptance of Fishkin’s critiques of, and solutions to, our present discontents with regard to methods of governance develops any genuine traction with the public, then one would expect those who benefit from the present scheme to use all of their formidable resources to stifle any of the proffered (and needed) changes.

three basic notions of “democracy.” First, there is the principle of political equality, captured in the notion of one-person/one-vote, which obviously rejects at the outset many traditional notions of elite rule that have no hesitation in identifying aristocracies, “natural” or otherwise, that effectively negate the demand for equality. The notion of democracy as government by “consent” almost necessarily leads to a conception of mass participation, where we speak of literally millions

of voters casting their ballots and thus, presumably, “choosing” their governments. Finally, there is the desiderata of some genuine deliberation by those voting, lest the election turn into an almost literally mindless plebiscite allowing the empowerment of what are often demagogic, even Caesarist, leaders chosen by a basically ignorant electorate.

Fishkin is no utopian. Indeed, a very important part of his argument is that one must choose among the horns of his trilemma. There is, therefore, the sad realization that “the fundamental principles of democracy do not add up to such a single, coherent ideal to be appropriated, step by step. . . . Achieving political equality and participation leads to a thin, plebiscitary democracy in which deliberation is undermined. Achieving political equality and deliberation leaves out mass participation. Achieving deliberation and participation can be achieved for those unequally motivated and interested, but violates political equality.”¹³ He is, therefore, no magician, who can with the wave of a conceptual

apparatus, however impressive, make the trilemma disappear. But it is clear that he believes that we can achieve both better (in terms of policy results) and more legitimate (in terms of meeting contemporary criteria for democracy) governance than is now the case, even as we recognize that there will still be costs to one or another leg of the trilemma.

“Reviving the Athenian ideal,” Fishkin argues, “with the best modern technology available, provides a practical method for bringing deliberative democracy to life.”¹⁴ That ideal rests on a mixture of both the capacity and the equal probability of each citizen’s taking an active part in the deliberations about public policy. Capacity, of course, refers to basic attributes that are desired in any citizen, captured, in modern polities, by such criteria as age or the ability to function at some suitable level of intellectual competence. Some, of course, might wish to add explicit educational qualifications, including literacy (and the ability to function in the dominant language of the community). To be sure, all of these can generate controversy, but there is no one, after all, who supports genuinely “universal suffrage” or participation if that would mean, for example, giving a vote to a six year old or a severely mentally-disabled adult. The real issue, for Fishkin and for most of us, is how to construct a polity in which the literally millions of altogether competent citizens can in fact function together as part of what the Constitution terms a “Republican Form of Government.”¹⁵

As the reference to ancient Athens suggests, the answer is to adopt a form of lottery representation, whereby only *some* of the citizenry actually participates (and deliberates), but those who are excluded accept the legitimacy of both that procedure and the policies adopted thereby. The legitimacy arises from both the equal probability that any given person (discounting for minimal baseline qualifications) might have been chosen *and* the perception by those not chosen that the system of lottery selection assure the relative “representativeness” of the sample chosen. To adopt the language of Bill Clinton, the deliberative assembly will look sufficiently “like America” to provide necessary reassurance that one’s own views are not absent from the assembly. At the very least, this requires a great deal of sophistication on the part of ordinary Americans (or Chinese, or Australians) with regard to the social science of sampling and “representativeness.” Most readers of this article may be comfortable with the notion that a sample of, say, 700 probable voters can predict, within a margin of error of 4%, a national election¹⁶ or, more to the point, the “public opinion” on some controversial subject, but I suspect that many of our co-citizens are skeptical—and would be even more so if what Fishkin calls “deliberative polls” became more truly identifiable as “deliberative assemblies,” with the power to make actual decisions instead of simply supply unusually reliable information as to public opinion to those actually charged with the making of decisions. These latter will presumably continue

to be selected by “ordinary” means of election or appointment by elected officials. Given that I agree with the critiques offered by Fishkin (and many others) of the actual state of our mass democracy, I would hope that the public could be persuaded that Fishkin’s particular form of direct democracy would be a valuable complement to the Madisonian reliance on representative democracy.

This is, however, the point where I remain most uncertain about Fishkin’s own aims. I have suggested earlier that he is truly a radical thinker, forcing us to explore the roots of our standard-form political conceptions. But, at a more practical level, I find him ambiguous. Fishkin notes, for example, that his conception of “deliberative democracy” does not in fact require actual decision-making power by its subjects. I am not interested in entering the debate whether that is a weakness of his own theory as to the value of the “refined” opinions engendered by the deliberative process he has implemented around the world. He has persuaded me that it is not. Rather, the question is whether, in effect, Fishkin *should* embrace a more robust version of “deliberative assemblies” as at least a complement and perhaps, in certain contexts, a replacement for representative democracy that relies on elections as a mechanism of selecting decision makers. And, if he *did* embrace such a version (and vision), would he find himself the target of hostility by those who might give him a hearing if his announced aims are significantly more modest?

As someone who was present at the creation of Fishkin’s new mode of politics—I had the pleasure of observing the initial “deliberative poll” in Austin, Texas in 1996—I recall that his commendable ambitions for a genuine encounter by the participants with those running for the Republican nomination for the presidency were largely torpedoed by New Hampshire Republicans. The reason was simple: The event in Austin took place in early January; if truly successful, it would have at the least complemented and at most actually supplanted the inordinate attention given the New Hampshire primary and its remarkably unrepresentative group of voters. That was, for obvious reasons, totally unacceptable to the New Hampshire denizens, whose threats to retaliate against any collaborators kept the two leading candidates, such as Bob Dole and Pat Buchanan (who actually won the primary), away from Austin. To be sure, Indiana Senator Richard Lugar did come to Austin (as did Vice President Al Gore, who, of course, faced no Democratic competition and thus did not face similar pressures from New Hampshire Democrats.) And Phil Gramm, Lamar Alexander, and Steve Forbes appeared by satellite. This was no small achievement on Fishkin’s part, but the unwillingness of Dole and Buchanan to buck New Hampshire loyalists was also telling as to the difficulties facing any truly radical re-visioning of the American political system. One of my favorite political dicta is John Roche’s emendation of Lord Acton’s famous

adage: "Power corrupts, and the possibility of losing power corrupts absolutely." To the extent that genuine acceptance of Fishkin's critiques of, and solutions to, our present discontents with regard to methods of governance develops any genuine traction with the public, then one would expect those who benefit from the present scheme to use all of their formidable resources to stifle any of the proffered (and needed) changes.

One of the most effective ways of challenging Fishkin would be to denounce him as "un-American," for all of his references to Madison. He is, after all, offering a fundamental critique of the possibility of an "extended republic" that relies exclusively on "representative government" to select its leaders. It is open to question whether he "venerates" Madison's handiwork or, instead, sees it as in some significant sense outmoded and requiring significant amendment.¹⁷ One mode of response, of course, would be to pull back and to say that he means *only* to offer a valuable corrective to contemporary standard-form public opinion polling, but not otherwise to challenge our political verities. That might, in fact, prove to be successful, but I would personally regret the limitation of his project simply to ameliorating problems with reliance on the Gallup Poll or other such "snapshots" of a basically uninformed public. Instead, I hope that Fishkin—or, at least, "Fishkinians"—will acknowledge that he is a far more deeply radical, even "subversive," thinker. And that, of course, is meant as a high compliment.

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Endnotes

1. <http://www.america.gov/st/texttrans-english/2009/April/20090403140808xjsnommis8.250064e-02.html?CP.rss=true>
2. *Ibid.*

3. James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009), 179.

4. *Ibid.*

5. I would personally prefer the term "deliberative assemblies," but, as we shall see toward the end of this essay, whether one uses the term "poll" or "assembly" may depend on the extent to which one wishes simply to aid, or supplant, representative government.

6. And some, of course, have taken part in revolutionary movements.

7. See Avashai Margalit, *On Compromise and Rotten Compromise* (Princeton University Press, 2009).

8. See, e.g., Sanford Levinson, *Our Undemocratic Constitution: Where The Constitution Goes Wrong (and How We The People Can Correct It)* (Oxford University Press, pb. ed. 2008). The book is the subject of a PEGS symposium, available at http://muse.jhu.edu/journals/good_society/toc/gso.18.1.html.

9. One of the many sites at which *Federalist* 10 is available is <http://www.constitution.org/fed/federa10.htm>.

10. Fishkin, 48.

11. *Ibid.*

12. For a debate on the implication of such realities, see Ilya Somin & Sanford Levinson, Debate, "Democracy, Political Ignorance, and Constitutional Reform," 157 *U. PA. L. Rev. Pennumbra* 239–59 (2009), <http://www.pennumbra.com/debates/pdfs/ConstitutionalReform.pdf>.

13. Fishkin, 191.

14. *Ibid.*, 196.

15. Though one should recognize that the exclusion of the polity to "citizens" is itself subject to debate. See Sanford Levinson, "Suffrage and Community: Who Should Vote?" 41 *University of Florida Law Review* 545 (1989).

16. Putting to one side, of course, the fact that there are no "national elections" in the United States.

17. For Madison's views on the necessity of "veneration" and the concomitant skepticism about the kind of questioning that might produce new amendments, see *Federalist* 49, available at <http://www.constitution.org/fed/federa49.htm>.