

# Deliberative Democracy and the Problem of the Second Best

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## Abstract

*In Democracy When the People Are Thinking Fishkin offers a wholehearted defense of the possibilities of realizing the democratic ideal of self-government within contemporary societies. However, there is a fundamental tension in the book between participatory and non-participatory interpretations of deliberative democracy. Although Fishkin defends the desirability of mass participation in a deliberative democracy, he also defends a non-participatory conception as our second-best option under non-ideal conditions. Against this proposal, I argue that it fails to take the so-called “problem of the second best” into account. Once we recognize this problem it becomes clear that, under non-ideal circumstances, the second-best option is not the improvement of some democratic values to the detriment of the others. To the contrary, our second-best strategy is to use institutional innovations such as Deliberative Polls with the aim of improving on all democratic values in ways that are optimally suited toward securing each of them.*

**Keywords:** *deliberative democracy, deliberative mini-publics, Deliberative Polls, citizen participation, problem of the second best, democratic control*

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*With the right design, the people can speak for themselves.*

—J. FISHKIN, *DEMOCRACY WHEN THE PEOPLE ARE THINKING*

In *Democracy When the People Are Thinking*, James Fishkin offers a wholehearted defense of the possibilities of realizing the democratic ideal of self-government within contemporary societies. Although the book is remarkably honest in its assessment of current democratic deficits it resists fatalism with respect to our chances of overcoming such deficits. To the contrary, this is the book of a convinced deliberative democrat who is willing to keep up the fight for democracy with the help of political imagination and institutional innovation. At a time when books on the topic carry such uplifting titles as *How Democracies Die*, *Post-Democracy* or *Against Democracy*,<sup>1</sup> it is utterly refreshing to read a book describing, analyzing, and promoting practical designs for empowering the people to actually rule themselves.

In order to fulfill this argumentative aim, the book works simultaneously on three fronts. From a normative perspective, it aims to show that a conception of deliberative democracy that secures deliberation and political equality is more attractive than available alternatives (Parts I & II). From an empirical perspective, it aims to show that we can actually operationalize core normative assumptions of Fishkin's preferred version of deliberative democracy in practice. To this end, the book offers a wealth of data from experiments with Deliberative Polls that have been run in countries all over the world since the 1990s (Part III). Finally, from a practical perspective, it aims to show how such institutional innovations could be implemented in current societies in order to overcome democratic deficits, offering a variety of stimulating proposals for institutional democratic reform (Part IV).

Apart from Fishkin, very few democratic theorists have the combination of skills, experience, and political imagination needed to fulfill such a complex task. As a political philosopher, I am not in a position to evaluate all the experiments, data, and institutional proposals contained in the book. Moreover, since I am a deliberative democrat, I am also not in a position to offer an external critique of the book's essential argument that we can, and must, weave citizen deliberation more deeply in the decision making of nominal and aspirational democracies. Instead, I will focus my comments on some normative tensions behind the book's overall argument. These tensions harbor potential for disagreement and might thereby serve as a basis for fruitful discussion.

By way of preview, my main concern with the book's overall argument is that there is a fundamental tension between participatory and non-participatory interpretations of deliberative democracy that reverberates throughout the book and ultimately remains unresolved. In clear contrast to his own previous work, here Fishkin *explicitly and emphatically* defends the need, desirability, and feasibility of a deliberative democracy wherein fundamental democratic values such as a political equality, deliberation, mass participation, and non-tyranny—the avoidance of policies imposing “severe deprivation” on anyone (24) whenever possible—would be simultaneously secured (7–8).<sup>2</sup> However, he still defends a non-participatory conception of deliberative democracy as our second-best option under non-ideal conditions (24, 169). As long as the ideal strategy of simultaneously pursuing all four democratic values is unattainable, the second-best strategy is to channel energy toward securing political equality and deliberation (e.g., through the institutionalization of deliberative mini-publics such as Deliberative Polls) while, if necessary, temporarily abandoning mass participation and non-tyranny. I disagree. Fishkin's proposal fails to take the so-called “problem of the second best” into account. Once we recognize this problem it becomes clear that, under current non-ideal circumstances, the second-best option is not the improvement of some democratic values *to the detriment of the others* through the use of institutional innovations such as Deliberative Polls. To the contrary, our second-best strategy is to use such mechanisms with *the aim of improving on all four values in ways that are optimally suited toward securing each of them*. Accepting this more complex political aim as non-negotiable has direct consequences both for the precise interpretation of the core democratic values themselves as well as for the kind of uses of deliberative mini-publics that can best promote them.

### Participation or Representation?

The title “Democracy When the People Are Thinking” can be read in two ways. One reading suggests a *participatory* interpretation of deliberative democracy and the other a non-participatory, *epistocratic* model of democracy. Both strands are present in the book but the tensions they produce are never fully resolved. Under the participatory interpretation, the title suggests that “we need the people to be thinking in order to have democracy.” Thus, we need to scale-up quality deliberation among the citizenry to ensure that they can exercise the right type of democratic control over the

political system and, in so doing, see themselves as engaged in a democratic project of self-government. There is simply no alternative. As Fishkin puts it, ultimately, “We need a deliberative society” (7).

However, under the non-participatory, epistocratic interpretation, the title suggests that “we can have democracy even if only the few are thinking.” Ideally, of course, democracy is the rule of the people, not the rule of the people who are thinking. But if the aim of establishing the former is unattainable, so the argument goes, then the second-best strategy is to try to at least establish the latter (149). We could strengthen the “rule of the people who are thinking” by generalizing the institutional use of deliberative mini-publics—a representative sample of citizens encouraged, enabled, and incentivized to think together—in order to make recommendations on political issues, which those who are not thinking—the citizenry at large—simply follow. This would allow us to enjoy the best political outcomes by ensuring that they are arrived at by the considered judgments of people empowered to think, instead of the uninformed judgments of the average citizen who has little opportunity to do so (72). In line with this strategy, Fishkin proposes institutional innovations allowing:

a representative sample of the public to deliberate and make its recommendations and then somehow to make those recommendations effectively available to many other voters. This strategy would spread cues that resulted from the public’s extensive deliberations. It would, in effect, allow the voters in microcosm to make recommendations to the wider electorate. . . . *In theory, if the people’s deliberations create the cues and the rest of the public follows the cues that could realize a form of deliberative popular control* (51; my emphasis).

To make the tension between these two lines of argument explicit, let me briefly sketch their respective key claims, as we find them in the book:

	<b>Participatory</b> Deliberative Democracy	<b>Epistocratic</b> Deliberative Democracy
Deliberative Democracy	1. Deliberative democracy is rule by considered public opinion	
	2. Considered public opinion on many political issues is not given (it does not coincide with actual public opinion), it needs to be generated	

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	Participatory Deliberative Democracy	Epistocratic Deliberative Democracy
Participatory vs Epistocratic Claims	3. To generate it “we need more than deliberative microcosms of the people. We need a deliberative macrocosm—a deliberative society” (7).	3’. To generate it we should consult the people who are thinking, not those who are not thinking, i.e. those who can’t deliberate under the best available conditions (72, 147, 148).
Relevant features of Mini-publics	4. Micro-deliberation on political issues by a representative random sample can let us find out what considered public opinion on these issues would be if the people could deliberate about them under the best available conditions (71).	
Feasibility Considerations	5. If the reasons that led to the mini-publics’ considered judgments on the issue at hand can be identified, those reasons “should resonate with other citizens” (72, 89, 91).	5’. Ideally, we should get everyone to deliberate. In the meantime, using the microcosm rather than the macrocosm is the second-best option (148).
Distinctive Political Function of Mini-publics	6. To generate considered public opinion voters “should have the opportunity to consider <i>the same reasoning that led the microcosm to support the proposal</i> ” (89).	6’. Voters should “accept” the deliberative conclusion of the majority within the mini-public “provided all opinions were properly counted and the relevant arguments were made on the basis of the best information available” (147).
Institutional Proposals	7. Consequently, “the key would be institutionalization and follow-up, not only to put the people’s choice before the entire electorate but <i>to make the reasoning available as a basis for choice</i> . That would <i>add a truly deliberative element</i> to mass direct democracy and fulfill many of the initial aspirations of the initiative <i>to empower the people to engage in thoughtful self-government</i> ” (91; my emphasis).	7’. Consequently, to realize a deliberative democracy the electorate should <i>blindly defer</i> to the recommendations or decisions of participants in mini-publics: “if the people’s deliberations create the cues and the rest of the public follows the cues that could realize a form of <i>deliberative popular control</i> ” (51; my emphasis).

Let's look at the similarities and differences between these two lines of argument. Claims 1 and 2 generally appeal to deliberative democrats of different persuasions. However, claim 3 is distinctive of a *participatory* conception of deliberative democracy, whereas claim 3' is distinctive of an *epistocratic* conception of deliberative democracy. Claim 4 concerns the most interesting feature of deliberative mini-publics for deliberative democrats, namely, that they can be helpful in determining what considered public opinion on some political issue would be if citizens had the opportunity to deliberate about it under the best available conditions. This claim can also be endorsed by deliberative democrats of different persuasions. However, even those who agree with this claim may draw different conclusions from it regarding how the conclusions of deliberative mini-publics can be used to overcome democratic deficits. Feasibility considerations are relevant here. Fishkin offers two different considerations, namely those expressed by claim 5 and 5'. According to claim 5, the key contribution of mini-publics is that they enable us to discern the reasons, views and arguments with respect to a given political issue that are likely to resonate with the citizenry at large. This is an important contribution since eliciting this information directly (e.g., through regular polling) is often unfeasible due to defective deliberative conditions in the public sphere. Hence the distinctively participatory function of mini-publics expressed in claim 6. Organizing mini-publics on important political issues could give citizens the information, reasons, views and arguments that they need to reach a considered judgment about them—a near impossibility for citizens relying on a public sphere full of manipulation, bias, polarization, and so forth. This line of argument leads to the many participatory proposals for institutional reform that Fishkin offers along the lines of claim 7 (e.g., proposals for increasing the agenda-setting capacity of the citizenry and their power to bring about constitutional change). I wholeheartedly endorse the book's participatory line of argument and the participatory proposals it offers.

However, the book contains another line of argument that is based on a different feasibility assessment. It runs as follows: Mini-publics enable us to find out the reasons, views and arguments concerning a particular political issue that are likely to resonate with the citizenry. This is important, since eliciting this information directly is often unfeasible. Therefore, a non-participatory strategy of empowering the few participants in mini-publics emerges as the second-best strategy for reaching the *same* goal of the participatory strategy: namely, realizing “a form of *deliberative popular control*” (51). This is the alternative reading of the book I mentioned before, namely,

that we can have a deliberative democracy even if the few are the only ones who are thinking—so long as the rest (who are not thinking) blindly follow their recommendations.<sup>3</sup> In my opinion this is a dangerous illusion. In order to see why, let's first analyze the problem with claim 5', the so-called *problem of the second best*.

### The Problem of the Second Best (claim 5')

The problem of the second best arises when the best strategy to achieve some goal is unattainable. As the literature on the problem has convincingly shown, in such a situation there is simply no reason to assume that the best strategy provides any information about a second-best strategy.<sup>4</sup> In particular, there is no reason to assume that an attempt to bring about some attainable elements of the best overall strategy would get us any closer to achieving our goals. The problem of the second best can be illustrated with a simple analogy.<sup>5</sup> Imagine I have been prescribed three pills against some illness but I only have two of them. In that situation, there is no reason to assume that the second-best option would be to take the two pills I have instead of doing something different (taking one, taking none, taking other pills, and so on). Indeed, depending on how the chemicals interact, taking the two available pills in the absence of the third may worsen my condition or it may even be fatal. The general lesson is that, although the possibility of realizing some feasible elements of the ideal strategy might be tempting, it may actually take us further away from the goal. The second-best strategy may require doing something completely different.

I believe that we face a version of this second-best problem with respect to those uses of deliberative mini-publics that would require the citizenry to blindly defer to the recommendations or decisions of a majority within a mini-public. A democracy ruled by the considered judgments of a few cannot be a second-best strategy for achieving a democracy ruled by considered public opinion. We can't use epistocratic means to reach participatory goals. Contrary to what the book suggests, institutional reforms geared toward empowering a few knowers, while expecting the rest of the citizenry to follow blindly, are not first steps in the right direction. They are deleterious. Instead of getting us closer to the democratic ideal of self-government, they would move us farther away. Getting the many who are not thinking to blindly defer to the few who are is not a first step toward the goal of reaching a deliberative society. To the contrary, it is a means of ensuring that the

many *continue to refrain from thinking*. As with all epistocratic proposals, such reforms would facilitate and officially sanction the maintenance of citizens' political ignorance. Epistocratic uses of mini-publics are not simply less ambitious proxies of participatory uses. Instead, empowerment of mini-publics would undermine participatory aims and thereby increase rather than decrease current democratic deficits. If deliberative mini-publics are to have a democratizing effect, citizens must somehow use mini-publics to empower themselves. Fishkin does not oppose these latter uses, yet he fails to see that his acceptance of uses that would empower the few (albeit as a second-best option under non-ideal circumstances) would actually jeopardize the chances of reaching a deliberative society. To see where the problem originates we need to look at the contrast between claims 3 and 3'.

### The Epistocratic Interpretation of Deliberative Democracy (claim 3')

To claim that there is an epistocratic line of argument in the book may seem strange in light of Fishkin's repeated criticism of elite epistocracy and his insistence on giving power to "the people"—something that would be anathema to elite epistocrats. Epistocracy, "rule of the knowers," is often associated with elite views that oppose "rule of the people" in favor of rule by experts or political elites. Fishkin decidedly rejects elite epistocracy. However, *elite* epistocracy is just one variety of a broader ruling strategy, of which *democratic* epistocracy is another.<sup>6</sup> Elite and democratic epistocrats hold radically opposed views on the question of who rightly belongs to the set of political knowers: for the former it is only experts and members of political elites, while the latter insist that the people as a whole constitute the set of knowers. Both, however, share the assumption that the set of knowers, in virtue of their knowledge, can lead the political community to reach substantively better political outcomes. Agreement on the latter assumption is what makes both approaches *epistocratic*. I find Fishkin's critique of *elite* epistocracy very convincing. As he briefly remarks,

Responsible experts and technocrats cannot make contested value decisions on hard choices without considering the values at stake. If they do not somehow take account of the people's values, and value-laden priorities, they will need to substitute their own to make decisions. However, technocrats are normally selected for their competence, not for their personal values on contested issues (70).

Fishkin's argument against elite epistocrats is that the political elites are not the proper knowers. This strikes me as correct. But it can't be the full answer against epistocracy. In fact, it is a misleading answer. For the argument that the subset of the people that elite epistocrats identify as the knowers—namely, experts and political elites—are not the proper knowers, leads Fishkin to search for and identify the subset of the people who *are* the proper knowers: namely, the people who are thinking, such as participants in deliberative mini-publics. Unfortunately, *rule of the people who are thinking* is too close to the elite epistocracy he rejects to be a second-best option for reaching a deliberative democracy.

Now, it might be replied that “the people who are thinking” is not a particular group, since any member of the people could be randomly selected to participate in mini-publics and thus be part of the group of those who are thinking at a given time. Fishkin is adamant to highlight that random selection preserves the democratic value of political equality. Perhaps this is why he uses “when” instead of “who.” He speaks of “the people *when* they are thinking.” This indicates that the set of knowers is, in principle, the people as a whole. Yet these arguments fail to address the essential problem of epistocracy. For, as Fishkin himself claims, so long as many members of the people are not thinking, we should only follow the recommendations of those who are thinking—and, specifically, thinking through mini-publics—regardless of the preferences of those who are not. The former should rule, the latter should follow. As the proposal expressed in claim 7' indicates, the citizenry should simply *follow* the recommendations of the participants in mini-publics.

### The Problem of Blind Deference (claims 6' & 7')

For all their differences, both elite and democratic epistocrats share an expectation of *blind deference to the knowers*. True, democratic epistocrats reject the elite claim that only experts and political elites can make the right decisions because the citizenry is politically ignorant (i.e. irrational, apathetic, biased, etc.). Yet, they accept the central contention of elite epistocrats that, given the ignorance of ordinary citizens, their political opinions and will *should be disregarded in order to reach better political outcomes*. As I argue elsewhere, it seems remarkably naïve to believe that a society could actually reach better outcomes

while leaving the citizenry as ignorant (i.e., irrational, biased, racist, and so on) as epistocrats claim they are. Citizens might be bypassed as decision makers but they can't be bypassed as decision takers. The assumption that most policies' intended outcomes can be achieved without the mass of citizens doing their part is all the more puzzling when made by those who, like the majority of elite epistocrats, portray themselves as realists!<sup>7</sup> Fishkin is not an elite epistocrat but his proposal that citizens should blindly follow the recommendations of mini-publics shares the naïve epistocratic assumption that democratic societies can afford to keep their citizens ignorant (i.e., irrational, biased, racist, and so on) and yet still reach better outcomes—including better approximating the goal of a deliberative society. How can we get any closer to a democratic deliberative society by *adding* institutional means to keep the majority “not thinking” and obliged to follow others?

Let's focus on Fishkin's argument (claim 6') in support of his proposal that citizens should blindly follow the recommendations of mini-publics (claim 7').<sup>8</sup> There are many ways, contexts, and venues for institutionalizing mini-publics such as Deliberative Polls. But regardless of the specific details, there is a fundamental difference between using mini-publics for *epistocratic* versus *participatory* aims. In the first case, mini-publics would be empowered to make recommendations and the citizenry would simply follow them. In the second case, instead of empowering mini-publics, the citizenry would use mini-publics to empower themselves. In such cases, the aim of institutionalizing mini-publics would be to *properly inform the citizenry* of the reasoning that led the majority of their participants to endorse a recommendation, so that others too could endorse it upon reflection or contest it by challenging the reasons provided.

Given these two options, what would be the value of the first type of use in contrast to the second? Fishkin claims that if voters used mini-publics' recommendations as cues and simply follow them when voting or accept them as binding, then we would be closer to “realizing democratic control.” (51) Fishkin's argument is that citizens have good reasons to endorse the mini-publics' recommendations because the participants are *like* them. Because proper sampling ensures that mini-publics represent a microcosm of the people, the outcome of their deliberations will reflect what the people *would* think if they *had* deliberated. Therefore, so the argument goes, in following the mini-publics' recommendations the people would actually be following themselves.

The problem with this argument is that, in pluralist societies, participants of mini-publics are likely to disagree on contested issues. This is particularly apparent in the case of Deliberative Polls where participants are

under no pressure to reach consensus. Thus, in the absence of information about the specific reasons, values, interests, and so on behind the majority's recommendation, no citizen has any particular reason to assume that either the majority or the minority recommendation coincides with what they themselves would have thought if they had deliberated.<sup>9</sup> To meet this objection, Fishkin offers a different argument for blindly deferring to the majority, unconnected to the democratic representativeness of the mini-public.<sup>10</sup> If, in a democracy, citizens who are outvoted are supposed to *accept* the decisions of the majority of the population—however uninformed or non-deliberative they may be—then surely it would be even more justified to expect them to accept the decisions of the mini-publics' majority, given that their members are better informed and have deliberated under good conditions (claim 6').<sup>11</sup> I am puzzled by this argument. For in our context the issue is not whether citizens should accept or feel bound by majoritarian decisions after they are made (when all had an equal chance to exercise their vote freely). The issue is whether in making their own decisions citizens should vote according to a recommendation made by the majority within a mini-public simply because it is the recommendation of that majority.

Let me explain. It is one thing for me to exercise my vote according to my own beliefs and then, after the votes are counted, accept the results endorsed by the majority. It is quite another to be expected to exercise my own vote according to the beliefs of someone else (e.g., the majority) instead of my own. This is not something that citizens are ever required or expected to do in a democracy. And this is so for good reasons. The fact that a majority supports a particular policy lends no reason whatsoever in support of that policy. Outvoted citizens may accept a majority decision as binding, but this is very different from asking them to vote for it themselves. In fact, depending on what is at stake, the outvoted citizens may not only continue disagreeing with the majoritarian decision but may also protest it, legally contest it, or even decide to exercise civil disobedience. Expecting them to defer to the majority of the mini-public simply because that majority has considered other reasons and reached a different conclusion would be unjustified.

These considerations not only apply to informed voters who disagree with the mini-publics' majority. They also apply to voters who are undecided or uninformed on the political issue in question. The main problem with using mini-publics' recommendations as "trusted information proxies" (to use MacKenzie and Warren's terminology<sup>12</sup>) is that this use seems to have a built-in *status quo bias*.<sup>13</sup> By expecting undecided or uninformed citizens to simply vote according to the recommendations of the mini-publics' majority, this

use of mini-publics is likely to reinforce the majority culture. Such an effect may be fine for non-contentious political issues. But, for all contentious issues about which the majority's judgments happen to be wrong, the extra boost blindly provided by uninformed citizens would give an unfair advantage to their recommendations while making the possibility of contesting such recommendations harder than it would have otherwise been. Having yet another "blind force" operating against the "force of the better argument" within the overall deliberative system would, by the lights of deliberative democrats, decrease rather than increase the deliberative system's legitimacy. It is striking that Fishkin is (rightly) concerned with protecting individual participants in mini-publics from any social pressures toward consensus with the majority (76, 84), yet not at all concerned with protecting the citizenry from pressure toward accepting the views of the majority within a random sample.

Political decision makers, whether officials or lay citizens, must be accountable to all who will be subject to their decisions. As decision makers, they owe justifications to those who will be bound by their decisions. They can hardly discharge this obligation toward outvoted citizens by appealing to the (alleged) authority of a mini-publics' majority to speak for the people. A more legitimate alternative for uninformed (but conscientious) citizens would be to *abstain* from any endorsement instead of blindly reinforcing the majority's judgments. Abstention, moreover, is just one of the alternatives that passive citizens may have at their disposal. Depending on the issue they may be able to use standard heuristics such as relying on the recommendations of groups whose political views they broadly share or of experts whose judgments they have reasons to trust.<sup>14</sup> However imperfect, this type of deference is at least not *blind*.<sup>15</sup>

To illustrate the difference, let's think of a hypothetical example regarding the right to same-sex marriage. Let's assume that mini-publics such as Deliberative Polls had been institutionalized several decades ago such that the public was familiar with their functioning, and that DPs were already in place back in the 90s. Imagine that a ballot initiative to ban same-sex marriage similar to California's Proposition 8 in 2008 had been organized back in the 1990s, before the first ban on same-sex marriage was passed in Alaska. Given what we know about the actual development of public opinion on this issue, it is likely that the majority opinion, even among participants in a Deliberative Poll, would have been against same-sex marriage. According to a 1988 National Opinion Research Center poll, 68.8 percent of Americans at the time opposed same-sex marriage, 10.9 percent of Americans supported it, 14.2 percent of Americans were ambivalent, and 6.1 percent agnostic.<sup>16</sup>

If a Deliberative Poll on this issue had been organized before the ballot initiative and if undecided citizens had *blindly* followed the majority recommendation of the Deliberative Poll, the additional support of the latter could have artificially inflated the opposition vote from 68.8 percent to up to 89.1 percent, giving the misleading impression of an extraordinarily high level of opposition to same-sex marriage among the citizenry—with potentially devastating effects. A “majority” of such magnitude is a consideration that even non-majoritarian institutions such as Supreme Courts take seriously.<sup>17</sup> Such an outcome would have added another “blind force” against the LGBTQ minority’s fight for their right to marry, negatively affecting the *Baehr v. Lewin* (1993)<sup>18</sup> ruling of the Supreme Court of the State of Hawaii that for the first time declared the ban on same-sex marriage unconstitutional, stymying rather than accelerating the national debate on the issue that culminated in the 2015 U.S. Supreme Court ruling affirming a constitutional right to same-sex marriage.

### Deliberative Democracy by the People Themselves

The example above points at a deeper normative issue that I would like to mention in closing: the book’s tendency to identify the mini-publics’ majority with “the people.” Throughout the book Fishkin is critical of populism (5, 8, 70, 135, 202). However, he seems to be critical only of unenlightened populism. It is not clear whether he would be similarly concerned with an ‘enlightened’ variety of populism, at least as a second-best option. According to Fishkin, a realistic second-best conception of deliberative democracy is one that is committed to the principles of political equality and deliberation but is agnostic about mass participation and non-tyranny (24, 169). The problem with this claim is that it ignores the connection between political equality and non-tyranny. There can be no (effective) political equality if citizens lack the means to defend themselves against violations of their rights by decisional majorities; that is, against the tyranny of the majority. Minorities might be slightly better off if their fellow citizens blindly defer to enlightened majorities than if they were to defer to unenlightened ones. But they would fail to be treated as equals either way. They can’t be political equals if they lack the means to fight for their rights against decisional majorities. In short, Fishkin fails to pursue the logic of its own critique, which focuses on the “unenlightened” character of much populist politics. The distinctive problem with populism is not that it is unenlightened but that it is exclusionary.

Populism is the failure to recognize that the majority, even when thinking, is not the people.

As I have argued elsewhere, contestatory uses of mini-publics could offer effective means of realizing political equality precisely by strengthening non-tyranny.<sup>19</sup> Whenever the recommendation of a mini-publics' majority differs from actual public opinion with respect to political decisions that touch upon fundamental rights, citizens in the minority could use that disconnect as evidence in their political and legal fights for their rights. These potential uses of mini-publics seem to me perfectly compatible with the participatory proposals that Fishkin offers in his book, which aim at empowering the citizenry. Moreover, their institutionalization seems as feasible (in terms of cost, institutional will, organization, and so on) as any of the other proposals. If this is correct, then it is not clear to me why a second-best strategy for realizing a deliberative democracy should be to institutionalize mini-publics to improve on the democratic value of deliberation to the detriment of the values of mass participation, non-tyranny and (effective) political equality. To the contrary, the second-best strategy would be to institutionalize mini-publics with the aim of improving on all four democratic values in the ways most suitable to secure each of them. Only in this way can we hope to ever reach a deliberative democracy ruled by the people themselves.

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#### NOTES

1. Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018); C. Crouch, *Post-Democracy* (New York: Polity Press, 2004); J. Brennan, *Against Democracy* (Princeton: Princeton University Press, 2016).

2. In previous works Fishkin was skeptical about the possibility of combining mass participation with deliberation and political equality. See, for example, Fishkin, *When the People Speak* (Oxford: Oxford University Press, 2009), 32–64. In his view, these core democratic values form a *trilemma*, such that implementing any two would preclude achieving the third. Although he also mentions the trilemma in this

book (7-8), he is now open to exploring and actually defends the in-principle feasibility of overcoming this trilemma and realizing the ideal of a deliberative democratic society.

3. Fishkin's argument along these lines is summarized on 168-69.

4. The so-called "problem of the second best" is a generalization of insights initially developed by R. G. Lipsey and Kelvin J. Lancaster in the context of economics. See Lipsey and Lancaster, "The General Theory of Second Best," *Review of Economic Studies* 24, no. 1 (1956): 11-32. For discussions of the problem of the second best as it applies to normative political theory see Estlund 2008; Goodin 1995; Räikkä 2000; Wiens 2016; Brennan and Pettit 2005.

5. I borrow the analogy from D. Estlund, "Approximation, Deviation and the Use of Political Ideals" (unpublished manuscript on file by author), 2.

6. I analyze the differences between elite and democratic epistocracy in *Democracy Without Shortcuts. A Participatory Conception of Deliberative Democracy* (New York: Oxford University Press, forthcoming).

7. This difficulty is compounded by the worrisome disregard for the obligation to justify the coercive imposition of laws and policies to those who will be subject to them, whether or not they are "knowers."

8. As the contrast between claims 7 and 7' makes clear, Fishkin offers both epistocratic and participatory proposals for institutional reform. I find his participatory proposals intriguing, interesting, and definitively worth taking seriously. Thus, my critique of the epistocratic proposals aims to ensure that the participatory proposals receive all the attention they deserve without the epistocratic temptations.

9. C. Lafont, "Can Democracy be Deliberative and Participatory?" 95-97, *Daedalus, the Journal of the American Academy of Arts and Sciences* 146, no. 3 (2017): 85-105, special issue on Prospects and Limits of Deliberative Democracy, ed. by J. Fishkin and J. Mansbridge. I offer a more detailed argument in *Democracy without Shortcuts*.

10. At best, this claim holds between the mini-public and the citizenry as a whole, but does not hold between a subset of the mini-public and any particular citizen or group.

11. Fishkin's argument along these lines is summarized on 146-48.

12. See Michael McKenzie and Mark Warren, "Two Trust-Based Uses of Mini-publics in Democratic Systems," in *Deliberative Systems*, ed. Jane Mansbridge and John Parkinson (Cambridge: Cambridge University Press, 2012), 95-124.

13. I offer a detailed analysis of this difficulty in "Deliberation, Participation and Democratic Legitimacy: Should Deliberative Mini-publics shape Public Policy?" *Journal of Political Philosophy* 23, no. 1 (2015), 40-63.

14. On information shortcuts and other heuristics that citizens use for making political decisions see Arthur Lupia, "Shortcuts versus Encyclopedias," *American Political Science Review* 88 (1994): 63-76, and *Uninformed: Why People Know So Little about Politics and What We Can Do about It* (New York: Oxford University Press, 2015).

15. In contrast to the former, the latter is a case of *blind* deference, given that non-participants do not have any particular reason to assume that either the majority's or the minority's recommendation is more likely to coincide with what they would have endorsed if they had been informed and thought about it. To the extent that such uses rely on blind deference they are inimical to the democratic ideal of self-government.

16. For the 1988 National Opinion Research Center / General Social Survey/ University of Chicago poll data see Tom W. Smith and Jaesok Son, "General Social

Survey 2012 Final Report on Trends in Public Attitudes about Sexual Morality, p. 12, available at <http://www.norc.org/GSS+Website>.

17. E.g., when the U.S. Supreme Court applies its substantive due process standard to assess whether unenumerated constitutional rights are “deeply rooted in American history and tradition.”

18. *Baehr v. Lewin* (1993) was the first lawsuit seeking to have the ban on same-sex marriages declared unconstitutional, which yielded a positive ruling on the question. The Supreme Court of the U.S. state of Hawaii ruled that, under the state’s equal protection clause, denying marriage licenses to same-sex couples constituted discrimination based on sex and that the state needed to justify the ban under the standard known as strict scrutiny, that is, by demonstrating that it “furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.” This finding prompted Congress to pass the Defense of Marriage Act (DOMA) and many states to pass constitutional amendments to ban same-sex marriages.

19. See Lafont 2017, 95–97.