

# Rendering Sensible Salient

LAWRENCE LESSIG

---

## Abstract

*In this essay, the author identifies the central challenge for democracy—crafting better ways to elicit a “we the people” that the people can respect. James Fishkin’s work has pointed the way. This essay takes a few additional steps. First, the author discusses the influence of technology on democracy and the importance of building understanding of the need for Deliberative Polling in the “post-broadcast age.” He then suggests methods to make Deliberative Polling efficacious on a national level.*

**Keywords:** *James Fishkin, Deliberative Polling, article vs. convention*

It is now twenty years since I published my first book, *Code and Other Laws of Cyberspace*.<sup>1</sup> That book, like practically every other book of mine since,<sup>2</sup> offered James Fishkin’s idea of Deliberative Polling as a promising way out of the crisis of democracy that I believed the Internet would trigger. Not everyone was convinced the Internet would trigger a crisis of democracy. (The *New York Times* review charged me with “play[ing] digital Cassandra” but insisted I had not “offer[ed] much proof that a Soviet-style loss of privacy and freedom is on its way.”<sup>3</sup>) And though I wasn’t certain myself how this critical question would be forced into the foreground, I was certain that

DOI: 10.5325/goodsociety.27.1-2.0171

THE GOOD SOCIETY, VOL. 27, NO. 1-2, 2018

Copyright © 2019 The Pennsylvania State University, University Park, PA

societies don't survive such fundamental shifts in technological contexts without reworking critical parts of their social contract.

Yet though his work has been within mine from the start, it is only in the last year, in the crafting of a new book,<sup>4</sup> that I've come to appreciate the particular urgency with which Fishkin has pursued his work, and to develop a similar sense of urgency in finding a way to make it salient to the public generally.

We've been lulled into thinking that "the people" take care of themselves. That is, we've come to accept the idea that the people's understanding of and role within a democratic government takes care of themselves, that there's little we need to do to make sure that the sovereign people can play their role well. We have been lulled into thinking like this because of two technologies and a remarkable coincidence in the timing of the two.

We have just passed through the age of what Marcus Prior calls "broadcast democracy": a period where the features of a technology, television—its addictiveness and dominance over other human activity—plus the business model of those who owned the technology—the coordinated presentation of news, the concentration in just a few sources—produced a kind of large scale democratic understanding therefore unseen in the history of human society.<sup>5</sup>

For a chunk of the twentieth century—roughly the 1950s through the 1980s in the United States—this technology radically changed how society came to understand the world and, in particular, political issues in the world. And for that part of the twentieth century, at least for the issues that the news chose to cover, that understanding was surprisingly thick and robust. As a consequence of this understanding, we see progress on critical public issues. Whether the issue was race or Vietnam or Watergate, America's understanding evolved dramatically over this period, driven in significant part by television.<sup>6</sup>

Regarding these issues and others, the nation knew something because that something was being force-fed to them by a technology they liked and a business model they could not resist, because there was no alternative. Common knowledge was wider and deeper, for a public that large, than at any point in human history—again, at least about the issues the media cared to cover.

That qualification, of course, is important. The claim is not that the news covered everything, or that it covered everything fairly, or that it was not biased, or that it was sufficient. The claim is simply that the public was exposed to a common story, and that relative to the central elements of that story, there was important progress. That progress is mapped well by Benjamin Page and Robert Shapiro's *The Rational Public*.<sup>7</sup>

Yet at the same time that broadcasting was having its effect, a second technology was also maturing. In the 1880s, James Bryce had fantasized about that technology. Writing that “a final stage in the evolution of democracy would be reached if the will of the majority of citizens were to become ascertainable at all times.”<sup>8</sup> It was almost exactly fifty years later—1935—when the modern public opinion poll made its debut. And it was in 1936—when using that technology, George Gallup predicted what every major peddler of the “people’s view” denied, that FDR would win reelection—that it proved itself as something different.<sup>9</sup> Once proven, its use spread broadly, and now we regularly seek to ascertain “the will of the majority of citizens” through this technology.

There was an important coincidence in the timing of Gallup’s “ascertaining” technology and the technology of broadcasting. Polling was born just at the moment that the people were paying attention—not because they were virtuous or because they wanted to, but because the technology forced them to. We the people had no choice but to learn; as we learned, our views were polled and reported; as we deliberated, nationally, through a medium that got all of our attention at once, we progressed. As we progressed, the idea that “we the people” could govern became more and more plausible. We had found a way to ascertain our will just at the moment there was a will worth ascertaining.

This “will,” so ascertained, was also constructed, and constructed by a radically contingent technological and commercial model. We came to understand “the people” just as the people were forced to understand the world, or at least that slice of the world that the networks sought to describe. But the technology that so constructed us was not given or permanent or reliable or necessary. For a brief moment, we were schooled because we, in a complicated way, wanted to be. And when we were so schooled, what we had to say was interesting and real.

That contingency—the fact that broadcasting arose just as polling developed—in turn helped construct the normative significance of “we the people” in the minds of the world. The age of democracy made sense because the people could be seen as coming to more and more sense. No doubt, the process was nothing like the process Fishkin crafts. But on critical issues, maybe it was, as we might put it, good enough for government work—and that’s all we need. Maybe forcing 70 percent of the nation to watch a regular nightly news program, presented in a structurally neutral way, is good enough for democracy.

But whether it is or isn’t, the point is this: Those conditions are gone. Broadcasting is over; to quote the title of Prior’s book, we have entered the

“post-broadcast age.” And whatever role television may have played in constructing a public that knew something, its role in that constructing is over. Now that technology produces fragmentation; the business model of that technology encourages polarization; and a fragmented and polarized public together have yielded an ignorant and partisan public: a public that does not inspire, but that embarrasses; a public that doesn’t commend the idea of democracy, but that provides constant fodder for its critics and saboteurs. The public of our day provides consistent evidence for those who would insist that democracy’s days are over, and that it is time to move on to the next stage of governance—whether technocracy, or elite rule, or corporate rule, or whatever.

I am a deep believer in democracy. Schooled now for twenty years on the possibilities of Deliberative Polling, I am a believer that the people properly constituted are able to govern themselves. And I believe that we could craft a regular and critical process using Deliberative Polls for constructing an informed and meaningful view of “the people,” and for using that view to inspire the work of government, or at least check it. I believe, in short, that self-governance is possible.

But the challenge now is not to craft the model. It is to build an understanding of the need for the model. The challenge is not to produce sensible views of the public. It is to convince the public that it should endorse or demand that it only be represented through such a sensible and balanced process. Thanks to Fishkin, we know what “we the people” could mean. But what would it take to get the people to understand what understanding themselves could mean?

We don’t have any good evidence yet that the people can be convinced of the value of such collective self-understanding, or that something more than a simple poll is required to achieve it. There are too many examples of deliberative-poll-like determinations being rejected by the public to make it easy to imagine that the public will yield to their logic.<sup>10</sup>

But we could imagine events that might make the idea salient and compelling. It is possible to imagine Netflix or HBO running a series of fundamental questions of American governance through Deliberative Poll—a kind of reality TV meets deliberative democracy. Indeed, even more interesting would be to run five polls simultaneously, and through the inevitable convergence in results driving a public’s recognition that it could be represented through these polls. Issues such as gun control or the corrupting influence of money in politics could well elicit significant engagement and possible interest.

Even better, we could imagine Congress following the model of Mongolia, and mandating a Deliberative Poll on any issue for which there are at least

seventeen states supporting an Article V convention. The Constitution sets thirty-four as the required number of states for Congress to call a convention; a Deliberative Poll at the half-way mark could set the stage for the public's understanding of that convention. Currently, only a balanced budget convention would clearly meet that level of support, though there is growing support for a convention to shrink the power of the federal government, as well as to address the question of money in politics.<sup>11</sup> If Congress were to convene simultaneous Deliberative Polls to address all three, that could well build awareness of Deliberative Polling as both an alternative way to understand the public, and a practical means of crafting a popular constraint on the work of any convention.

To be effective and legitimate, such simultaneous "shadow conventions" driven by Congress would have to assure that meaningful participation by ordinary citizens is possible. The process could work like this: The law could convene five simultaneous national citizens' conventions in five cities across the country. Each of these conventions would include 500 randomly selected and representative Americans. Those citizens would be obligated to attend—though their expenses would be paid, their jobs would, by law, be protected, their salaries for the week would be reimbursed to their employer, they would receive a generous stipend, and the costs of any extraordinary domestic expenses (childcare, or the care of parents) would be borne by the government. Think of it as a very generous draft, not to military service, but to civic service. These 2,500 citizens would be called to serve for a single week, to give their considered views about the question that triggered the conventions.

The rest of the process would largely follow Fishkin's model, with some technological enhancements. Each national convention would convene on the same Monday night. Delegates would travel to arrive by Monday afternoon. They would first convene that evening. Then for the next three days, the conventions would consider the question presented to them. Before they arrived, the delegates would be given an introduction to the questions. That introduction would be developed by a team to present both sides of the issue. The job of that team, or advisory board, would be to assure that the claims made on either side are based in fact. And once those claims are vetted, then a production team would turn the arguments both for and against into a video. Each delegate would be obligated to watch the video. Each delegate would have the chance to earn a supplemental stipend if he or she answers questions at the end of the video accurately. The aim of the videos would be to give the delegates a sense of the field. They would not aim to resolve the issues one way or the other.

When first selected, delegates would be polled on the issue they are to deliberate upon. They would be polled again after completing the video preparation, again when they assemble, and a final time at the end of the week. Those polls would capture any evolution in the views of the delegates. They would help the public understand how and why any evolution happened. They would also help researchers isolate the aspects of the process that people responded to, and the aspects they didn't quite get.

On each day of deliberation, the work of the delegates would bounce between small groups and large groups. The issue would be quickly introduced, as each delegate would have been exposed to the introductory videos and materials. They would then break into small groups to discuss their own views. At no point during the day would anyone poll anyone about where people stood. They would instead identify questions and share with their fellow delegates the reasons that pull them one way or another.

Each convention would be extensively documented, by documentarians and political and social scientists. Otherwise, the delegates would be sequestered. No news about the proceedings would be reported during the proceedings. And no contact with the delegates would be permitted during the time they are deliberating. Once each convention is finished, everything could be known. But while they are happening, no non-participant, aside from logistical and documentary personnel could know how the debates were going, or who they needed to sway one way or the other.

The obvious reason for this sequestering is that there could be highly motivated individuals on all sides of these debates. And as the solutions could have profound consequences for the future of America's democracy, there would be many who would be fiercely committed to pushing the conventions in one way or another. Such politicking, of course, is part of any democratic system. But during deliberations, those persuasions are not appropriate. There will be time enough for politicking, both specially interested and publicly interested, once the deliberation is done. But as with a jury deciding whether to convict a defendant of murder, or whether to hold an oil company liable for a massive oil spill, while the deliberation occurs, persuasion from the outside would be forbidden. And by schedule the deliberations simultaneously, any interaction effect by the different conventions could be minimized.

At the end of the week, the results of the conventions would be presented to Congress and to the governments of the several states. Congress would then be obligated to consider the results, and the states could then use them to determine whether to support an Article V convention or not.

All this is fantasy, of course. Such polling would be expensive; without a clear public mandate in advance, Congress is unlikely to pass the laws to implement it or appropriate the money to support it.

Then again, perhaps “fantasy” is too dismissive a characterization. The accident of electoral dominance that produced the constitutional Deliberative Poll in Mongolia suggests that the window of opportunity can open, unexpectedly, and that what matters is having a plan in place when it does.<sup>12</sup> In Mongolia, the accidental supermajority achieved by the Mongolian People’s Party created the need for an independent body to filter any constitutional reform proposals. Without that independence, the constitutional reform would have seemed purely partisan. Similarly, in the United States, we could imagine that Congress could find it useful to create a Deliberative Poll to shadow on Article V convention campaign—either to slow it, or to speed it up. Such a political opportunity could likewise become an opportunity for the objectives of Deliberative Polling more generally.

Democracy needs such a chance. True, modern societies have been threatened by authoritarian populism before. But in those moments, democracy was an attractive alternative. Global skepticism about democracy has created the urgent need for us democrats to innovate.<sup>13</sup> Our political market dominance cannot be assumed to be permanent. But I fear that our ability to innovate out of this crisis is not given. It is not even yet the priority for most of us who think of ourselves as democrats. Perhaps sound theory and ingenious design are no longer sufficient goals with which to justify the professional study of politics.

---

*Lawrence Lessig is the Roy L. Furman Professor of Law and Leadership at Harvard Law School. His latest book is They Don’t Represent Us (Dey Street Books 2019).*

#### NOTES

The ideas in this essay are expanded upon in *They Don’t Represent Us* (New York: Dey Street Books, 2019).

1. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

2. See, e.g., *Free Culture* (New York: Penguin Books, 2004): 310 n16, *Code v2* (New York: Basic Books, 2006): 332–33; *Republic, Lost* (New York: Twelve, 2011); *Republic, Lost, v2* (New York: Twelve, 2015): 361 n22.

3. David Pogue, “Don’t Just Chat, Do Something,” *New York Times*, January 30, 2000 (review).

4. *They Don't Represent Us* (New York: Dey Street Books, 2019).
5. Markus Prior, *Post-Broadcast Democracy* (New York: Cambridge University Press, 2007).
6. The development of attitudes about race driven by images of violence in America's south is well known. The most dramatic may have been "Bloody Sunday," on March 7, 1965, when marchers crossing the Edmond Pettus Bridge in Selma, Alabama, were beaten by state troopers. News about the attack interrupted the broadcast of "Judgment at Nuremberg"—a show that 25 percent of America was watching at the time. See "#Selma50: What the Media and Hollywood Got Wrong About 'Bloody Sunday,'" NBC News (March 8, 2015), available at <https://www.nbcnews.com/news/nbcblk/media-studies-selma-n319436>. The story of media and Vietnam is told in Daniel C. Hallin, *The "Uncensored War": The Media and Vietnam* (Berkeley: University of California Press, 1986). Television's impact on Watergate is analyzed in Michael J. Robinson, "The Impact of the Televised Watergate Hearings," *Journal of Communication* 24, no. 2 (1 June 1974): 1.
7. Benjamin I. Page and Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans' Policy Preferences* (Chicago: University of Chicago Press, 1992).
8. James Bryce, *The American Commonwealth Vol. 2* (London: Macmillan, 1888), 920.
9. The story is told in Peverill Squire, "Why the 1936 Literary Digest Poll Failed," *Public Opinion Quarterly* 52, no. 1 (1988): 125–33; Daniel Robinson, *The Measure of Democracy: Polling, Market Research, and Public Life, 1930–1945* (Toronto: University of Toronto Press, 2019), Kindle edition, loc. 869, n4, and compellingly in Jill Lepore, "Politics and the New Machine: What the Turn from Polls to Data Science Means for Democracy," *New Yorker*, Nov. 16, 2015.
10. Canada has had two prominent Deliberative Polls recommend one thing to the public, and the public has then rejected what was recommended. See Archon Fung, "2005 BC Citizens' Assembly on Electoral Reform," *Participedia*, September 16, 2009, available at <https://participedia.net/en/cases/2005-bc-citizens-assembly-electoral-reform>; Lawrence LeDuc, Heather Bastedo, and Catherine Baquero, *The Quiet Referendum: Why Electoral Reform Failed in Ontario*, Prepared for presentation at the annual meeting of the Canadian Political Science Association, University of British Columbia, June 4–6, 2008, available at <https://web.archive.org/web/20141111233806/http://www.cpsa-acsp.ca/papers-2008/LeDuc.pdf>. See also Genevieve Fuji Johnson, "Deliberative Democratic Practices in Canada: An Analysis of Institutional Empowerment in Three Cases," *Canadian Journal of Political Science* 42, no. 3 (Sep., 2009): 679–703. The California Forward Project had sponsored a deliberative poll through the What's Next California Project. As Fishkin describes, though the poll itself was productive, the agenda for presenting its results was skewed. Fishkin, 79–91.
11. <https://www.theguardian.com/us-news/2018/aug/11/conservatives-call-for-constitutional-convention-alec>
12. See "2016 Mongolian Legislative Election," *Wikipedia*, available at [https://en.wikipedia.org/wiki/2016\\_Mongolian\\_legislative\\_election](https://en.wikipedia.org/wiki/2016_Mongolian_legislative_election).
13. See "Declining Trust in Government Is Denting Democracy," *The Economist*, January 25, 2017.