

James Fishkin's Unconventional Challenge to Thinking about Elections and Representation

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Abstract

Jim Fishkin's important book sets out a number of challenges to the conventional wisdom of political scientists and lawyers (and, for that matter, pundits and politicians) about what would count as serious "reform" of a now much-criticized system of elections and political representation within the United States and elsewhere. Drawing from both ancient Athens and the findings of contemporary political philosophy and empirical political science, Fishkin's work is essential reading for anyone interested in the health of our polities, at home and abroad, especially as they come under ever more challenges that are calling the maintenance of liberal constitutionalism into doubt.

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James Fishkin's *Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation* is a genuinely important book, meriting wide attention (and not only from academics). It is especially timely when there is plausible concern that the international movement toward democratic forms of governance that characterized the past four decades or so is in abeyance. I am the co-editor, with Mark Tushnet and Mark Graber, of a recent book, *Constitutional Democracy in Crisis?* (2018), in which some

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forty-two authors of thirty-eight essays offer answers to the question posed by the title. A few are relatively optimistic, viewing the developments in such countries as Poland and Hungary, not to mention the United States, as indicative only of the more-or-less regular ebb and flow of political development. Others are more pessimistic. Just as Thomas Piketty has suggested that the “glorious thirty years” of more egalitarian economic distribution following World War II has now been succeeded by the far more common hoarding of wealth by the relatively few, so it might be the case that the postwar flourishing of democracy—or, at least, what apologists were willing to describe as “democracies”—is reverting to historically more typical forms of oligarchic or authoritarian governance.

Fishkin is an unabashed devotee of democracy, which he defines at the outset of his book as a “discernable connection” between public policy and “the will of the people” (2). Government “for the people” might be preferable to government antagonistic to the people, but one should recognize that that is a quite different goal from government “by the people.” The former can co-exist easily with public-spirited technocracy or, indeed, what eighteenth-century thinkers called “benevolent despotism.” It is not incongruent with Leninist dictatorships by “vanguards” of the people so long as one accepts the self-description. Fishkin, on the other hand, takes completely seriously the commitment seemingly set out in the Declaration of Independence to the importance of self-government, which requires genuine, and not manufactured, “consent of the governed.” He is concomitantly highly critical of the actuality of purported self-government within the United States (and, presumably, most other “democracies” in the world) inasmuch as ostensible “consent” is measured only by participation in elections that have, at least since the Eisenhower campaign of 1952, been well-compared to marketing campaigns carried on by increasingly sophisticated adepts in the manipulation of consumer emotions. The journalist Vance Packard wrote in 1957 about *The Hidden Persuaders* coming to exert such influence on American society: men (and some women) equally skilled in fabricating commitments to particular brands of toothpaste or particular political candidates, pushing what consumer research revealed were good catch phrases for reeling in the targeted fish, whether consumers or voters. Since then, of course, we have also seen the exponential increase in the importance of money in structuring the realities of the political process, especially in the “money primaries” that take place prior to the actual announcement of candidacies and the amassing of increasingly numerous campaign consultants and other “experts” in manufacturing consent.

There is, of course, an extensive literature on the corruption attached to the present way that Americans conduct their politics. Larry Lessig is probably the best-known critic; the title of his 2012 book, *Republic Lost*, is a true cri de coeur about the state of the American political regime. Similarly, Dennis Thompson, now an emeritus professor of government at Harvard, has been a prophet of our political woes, having written his first book in 1970, *The Democratic Citizen*, and a 2002 volume, *Just Elections*, on what is necessary to constitute genuinely just elections. All three books deserve to be read by anyone sharing their concerns (as well, perhaps more importantly, by those who are unduly complacent). But there is an important difference between Fishkin's project and most others. As suggested by Thompson's title, many critics justifiably focus on patently indefensible aspects of our electoral systems. Consider only the titles of now-Yale Law School Dean Heather Gerken's 2009 book, *The Democracy Index: Why Our Election System Is Failing and How to Correct It*, or Richard Hasen's 2013 book, *The Voting Wars: From Florida to 2000 to the Next Election Meltdown* (which many of us, of course, believe occurred in the 2016 election of Donald Trump). One can easily imagine that Fishkin shares in the specifics of the critiques offered by these various authors (and many more). What makes his book distinctive, and worth the focus of this particular symposium (and, one hopes, many more), is that he is basically offering a critique of our near-exclusive focus on the mechanics of elections themselves.

The reason is (deceptively) simple: Even an election process that gave less of a role to money or that suppressed fewer voters or relied less on patently partisan gerrymanders that allow public officials in effect to select their voters (instead of the other way around) would not solve the basic problem of the political system as Fishkin sees it. Elections (like, for that matter, standard public opinion polls) are mere snapshots at a given moment in political time. There is no guarantee at all that those participating even in what we might regard as a "fair" election process are in fact truly thoughtful or informed—or non-manipulated—citizens. Indeed, there is good reason to believe just the opposite. One important reason of course is the reality behind what is sometimes viewed as the economists' critique of voting in the first place: The likelihood of one's vote actually making a sufficient difference to justify even standing in line, let alone becoming truly informed on the issues that might divide candidates, is just too small. Richard Tuck has offered an elegant theoretical critique of such arguments,¹ but, alas, it is not really enough to overcome the perception by many of the practical pointlessness of participation. Thus to a significant extent participation

is likely to signify what economists might regard as an almost irrational commitment to one's team, so that one votes out of solidarity with one's teammates, whether or not one can really explain, save in slogans, the preference. At the very least, there is much "rational ignorance," based on the belief that it really doesn't make much sense to become truly informed even about major issues, since others make it their job to be informed for us.

So one is tempted to say that Fiskhin has greater fish to fry than the inadequacies of our electoral systems, as significant as they are. Instead, he wants to return to ancient Greece, particularly Athens, and to suggest in effect that we put too much weight on elections per se and not enough on ways of eliciting truly informed participation by the demos in the making of public policy. The Athenians knew very little about elections, but they did know a great deal about designing processes that assured a kind of active participation by those Athenians (of course, a minority) who were considered full citizens. In particular, they relied on lotteries to select what we today might call "representative samples" of the citizenry, who were expected to take their duties seriously and thus to assure the desirability (or, at least, adequacy) of Athenian laws. In particular, such lottery-based groupings were responsible first for setting the agendas of the larger Assembly and then for scrutinizing—and possibly vetoing—laws passed by the Assembly. This was the government, for at least a period, about which University of Texas philosopher Paul Woodruff has written in *First Democracy*.

Why the return to Athens? The Framers of the American political system in 1787 saw ancient Athens as a decidedly negative role model. Although the Constitution was professedly "ordained" by "We the People," James Madison made it crystal clear in *Federalist* 63 that the people were to play no role whatsoever in actual decision making. In Richard Tuck's term, itself borrowed from Thomas Hobbes, the "popular sovereign" allegedly foundational to the American government, after the flurry of initial ordination, would become a "sleeping sovereign," and, ideally, it would never awaken. Instead, the national government would be governed exclusively by elected *representatives*, never by the people themselves. As Fishkin notes, many American states, to their credit, have rejected this Madisonian disdain for popular sovereignty; all but Delaware, for example, require popular ratification of any proposed amendments to their state constitutions, and twenty-four of the fifty states have established mechanisms for popularly generated initiative and referenda, which in some extend to proposals for amending state constitutions. For whatever reason, though—including the abject ignorance at most elite law schools of the importance of state

constitutions—almost no attention has been paid to this aspect of state “experimentation” regarding how best to organize popular governance.

Why, one might ask, would anyone necessarily believe that an extremely small number of federal elected officials in a country of 325,000,000 people are “representative” of the remarkably pluralized and fragmented American demos? Los Angeles alone, with approximately 4 million residents, has roughly the same population as the entire United States in 1790. No one would have suggested then that a membership of six in the House of Representatives would have sufficed for the country as a whole. Why should we believe that the roughly six representatives assigned to the L.A. area suffice for that city? This is an especially telling question if we adopt the view that representatives in some sense should “mirror” or otherwise be conduits of the actual views held by their constituents. If, on the other hand, we adopt an extreme version of Edmund Burke’s “trusteeship” model of representation then we can even imagine reducing the number of representatives to one—such as the idealized figure in John Rawls’s “original position” who, through the raw power of reason, figures out what “justice” would require for the entire society (at least with regard to basic institutional structures). One should note in this context that some of the more idealistic defenses of the Supreme Court, with its nine members, depend on their literally fantastic capacity to discern the general good and to impose it on the rest of the country.

Far too much discussion of American government is highly ideological, designed to justify the political system foisted on us in 1787 (by what Michael Klarman has recently labeled “the framers’ coup”) rather than engage in truly detached and potentially critical analysis of fundamentals.² Fishkin, although adopting what might be called a quiet writing style, is a truly radical thinker. He would, almost certainly, not replace Madisonian representative government with a return to Athens, but he would, equally certainly, complement it by adding to our institutional structures some decidedly Athenian elements, including the reliance on lottery selection for at least some aspects of governance.

Fishkin begins by pointing to a “trilemma” that he has previously identified in other writings: Can one achieve a truly “inclusive” polity, with maximum participation, where people feel genuinely equal in terms of what Ronald Dworkin might have called the “concern and respect” accorded their views,³ and where participants in turn bring with them to the decision-making process (usually, of course, elections) well-thought-out views that have survived some kind of deliberative process? It is easy enough

to imagine systems that combine two of these desiderata. Elite models of politics focus on the role of “experts,” defined in one manner or another, who can discern the true interests of the polity without tilting unjustifiably in favor of one or another group within the whole. But the more one looks to “the people” actually to make decisions (including, for that matter, the selection of leaders), the more one doubts the presence of “due deliberation,” given the reality of “rational ignorance.” Fishkin is a strong partisan of “deliberative democracy,” and he wants to avoid a government “for the people” that scants the importance of the people as active agents in their own rule.

As already suggested, the answer for Fishkin is to rely on the insight of modern social scientists (though the Greeks seemed to have stumbled on it, albeit without theoretical elaboration) that a well-designed drawing from even an extremely large population can produce a “representative sample” of that population. This means, for example, that if that sample is willing to spend time engaged in serious deliberation about given issues of the day or even what counts as optimal design of the overall political system, then the opinions reached by the sample are highly reliable proxies—within acceptable margins of error—for what the larger population would think if it had spent the same time duly deliberating the matters in question. This is the basic theory behind what Fishkin calls Deliberative Polling, a process that he can rightly be proud of inventing and, far more importantly, carrying out in many countries around the world. I would actually prefer the term Deliberative Assemblies, though this might come too close to revealing some of the more radical edges of Fishkin’s overall argument, which is to call into question our now-near-exclusive reliance on government by elected assemblies and the desirability of at least complementing them with what might ultimately become decision-making (instead of simply policy-suggesting) randomly chosen bodies.

As I see it, there are three critical features of Fishkin’s argument. The first, already suggested, is its call for the initiation of a truly deep conversation about what we mean by “representation.” Why is it, exactly, that we are willing to refer to persons who survive the questionable procedures for election to the House of Representatives (and whose districts now typically consist of approximately 700,000 persons who are inevitably quite disparate) as our “representatives”? This is no idle question. I confess that I frequently informed my students at the University of Texas and elsewhere that I quite literally did not know the name of my congressional “representative” because Tom DeLay, then the Republican leader in the

House of Representatives, used all of his considerable influence to generate a hyper-partisan gerrymander in the 2003 session of the Texas legislature that assured that Austin (which in 2020 will be at least the 11th largest city in the country) had no Representative that it could truly call its own. Instead, the territory of the metropolitan area was distributed among five representatives in a manner designed to assure the election of four Republicans. The fifth representative, Lloyd Doggett, was given a district that extended through the Rio Grande Valley to the Texas border, with the aim of assuring his defeat by a Hispanic candidate. One of DeLay's aims was to turn the Texas Democratic Party into an all-minority Party, so far as elected candidates to the House were concerned, of African Americans and Mexican Americans. Anglos would, ideally, seek refuge in the largely white Republican Party. It turns out that Doggett has been able to survive and still is in the House, but I am not in his district. In that sense, he "represents" me in much the same way that my old graduate-school friend Barney Frank represented me when he was in Congress, through political affinity but not through any process of political selection. I would go so far as to assert that no one who "thinks like a social scientist" would regard the 435 members of the House as more "representative" than a well-chosen national sample of the same number, even given the fairly large margin of error that might attach to 435 (out of 325 million) as opposed, say, to a sample of eight or nine hundred. More important, perhaps, is the fact that Fishkin's arguments are in fact more finely textured, so that someone interested in determining the views of Austinites might well be advised to rely on the results of a well-designed representative sample of the roughly two million people who now live in the metropolitan area, and so on for each of the 435 current congressional districts (or fifty states represented the Senate).

Only fixation on the act of casting a ballot would lead one to prefer the "elected representative," at least if we focus on the relationship between the views of thoughtful constituents and those held by ostensible representatives. To be sure, one might argue that much legislation justifiably requires compromise and out-and-out log-rolling, something unlikely to be achieved even in the longish weekends that Fishkinian Deliberative Polls take. But this scarcely requires that one simply dismiss his insights in favor of embracing the systemic status quo. At the very least, one should take seriously the possibility that one can in fact walk and chew gum at the same time, that is, combine what is best in Fishkinian Deliberative Polls with more traditional Madisonian "representative government."

My principal point, however, is that there is a wide chasm between “thinking like a social scientist” and “thinking like a layperson” with regard to what constitutes the basis for feeling “represented.” The former, I suspect, would be viewed by millions of Americans as elitism run riot, inasmuch as it seems first to rely on the theories of social scientists and then secondly to justify an over-reliance on (and perhaps even decision-making by) a very small group of randomly chosen citizens (and perhaps even non-citizens, should one focus on residence instead of legal status). Many years ago Bruce Ackerman in a book on private property distinguished sharply between what he called “scientific” (basically economists’) understanding of property and that of ordinary laypersons.⁴ He cheerfully advocated the adoption of the former, with relatively little impact. Perhaps this will be Fishkin’s unfortunate fate as well. Even if one agrees with what I’m terming the social scientists’ view of representation, and its superiority to the sometimes random (in an ironic sense) outcome of even well-conducted elections, there may be no practical prospect of convincing most laypeople who have no statistical training and have developed sometimes well-founded suspicions of those who proffer statistics as the basis for their arguments. (Statistics might not lie, but those who use statistics often do!) Indeed, one might be especially despairing at the present moment in American politics, when one of the two major political parties seems in thrall to the almost complete rejection of what most scientists, social and natural, would regard as evidence, including statistically based argument.

But there is a second way in which Fishkin’s argument is distinctively important. For at least the past century, American political scientists have tended to emphasize the priority of political culture over the importance of concrete institutions. A seminal book when I entered graduate school in the 1960s, for example, was Gabriel Almond’s and Sidney Verba’s *The Civic Culture*, which suggested that the main difference between “democratic” and “authoritarian” systems was not their formal political systems (or the constitutions they might adopt),⁵ but, instead, the cultures within which these institutions were embedded. Robert Putman’s own more recent highly influential work maintains this emphasis.⁶ The difference between northern and southern Italy, for example, is traced back to fifteenth-century differences in cultural development, just as the decline of such American practices as participating in bowling leagues (to be replaced by “bowling alone”) is said to affect the quality of our polity in general. The field of “comparative politics” is thus often focused on the interplay between different cultural norms or traditions and the capacity of formal institutions to

govern effectively. Far less attention was directed at the roles played by the design of the formal institutions themselves. In the language of the trade, they were relatively rarely treated as “independent variables” in explaining the strengths or weaknesses of given political orders.

To be sure, this has changed somewhat, if for no other reason than the relative triumph of “strategic interaction” approaches to politics that advise attending to the absence or presence of other institutional actors with power to facilitate or block one’s own policy goals. Supreme Court justices, for example, must be aware of the need for basically voluntary compliance with their decisions by what the Constitution terms the “inferior” federal judiciary (with life tenure), not to mention state judges who are very likely accountable to local electorates who may not be entirely sympathetic to the Supreme Court’s arguments. And Congress can always intervene should its members be sufficiently antagonistic to a piece of statutory interpretation by the Justices. Still, as someone who has been railing now for well over a decade at the deficiencies of the United States Constitution, I am well aware of the reluctance to confront what may be the highly adverse consequences of structural decisions made more than two centuries ago and now commonly accepted as the political waters in which we are obliged to swim.

Thus in some ways I am most enthusiastic about, and grateful for, the sentences in which Fishkin indicates the importance of institutional design. “In my experience,” he writes, “it is not that citizens are incompetent, it is that institutions are not enabling” (209). This is an invitation to what is in fact a long overdue conversation—certainly within the United States and, I suspect, world-wide—about the ability of well-designed institutions to “enable” (or, equally, to “disable”) effective democracy and genuine consent by those who are governed. To be sure, we need to talk about the various pathologies of our election systems (or, to take a different example, the illegitimacy of vesting so much power in unrepresentative minorities who can easily control outcomes in the Senate, in which the roughly 550,000 inhabitants of Wyoming have equal voting power with the 39.2 million residents of California). As Robert Dahl demonstrated at the turn of this century,⁷ no system that includes the United States Senate and the electoral college should dare call itself “democratic.” But Fishkin’s great insight is that reform of such pathological features of the United States Constitution, however desirable—perhaps one should say “necessary and proper”—would not necessarily address the question of how to ensure that decisions made by public officials would instantiate the “reflection and choice” that Publius announced in *Federalist* 1 as the primary goal of the new system of

government being presented to the American people in 1787. Better election procedures are certainly both necessary and proper, but they are not sufficient to a truly legitimate democracy. Perhaps we should recognize that the latter is chimerical, save in the sense of what is sometimes called “sociological legitimacy,” that is, the possibly deluded belief by a population that it is in fact living within a “democracy.” But Fishkin, who owns up to his own “utopian” streak (208) invites us to ask if we can do better, so that beliefs in democratic legitimacy would be truly well-founded.

There is yet a third way in which Fishkin’s work is especially worth noting. It is no secret that much (though not all) work in political theory is abstract, based on thought-experiments and often devoid of reference to the work of empirically oriented political scientists. Indeed, it is no secret as well that there are often deep tensions within given departments of “political science” (or “government”) between those who are interested in the traditional materials of political theory, from Aristotle to John Rawls, say, and those who define themselves as empiricists. (Devotees of so-called “rational choice,” it should be noted, can sometimes be as maddeningly non-empirical as, say, Kant.) Fishkin is attempting to join normative and empirical political analysis. Central to his enterprise, and to this book, is the careful delineation of the methodology and measured results of his various Deliberation Polls all over the world. He is fully aware of some of the methodological problems attached to carrying out the Polls, ranging from the way the participants are selected to controlling for the excessive roles that might be played by elites, whether men in general (as compared with women) or those who are educated as against those who might even be illiterate. It is also all-important that the briefing materials received by the participants and the moderators who are in charge of managing the discussions are scrupulously neutral and not attempting to tilt the discussants toward a preordained conclusion. This is, then, one of the few books that can be described as a serious work in political theory that also contains regression tables designed to measure relevant variables with regard to explaining changes in opinion among the randomly chosen participants. His work thus presents special, perhaps nearly unique, challenges to its potential audience. I am obviously extremely enthusiastic about this book, but I must also confess that even with a PhD received almost 50 years ago from Harvard, I am incapable of assessing the empirical claims it presents. Similarly, trained empiricists may find themselves only skimming the pages on Rawls and Habermas. Neither of these observations is meant as a criticism of Fishkin’s enterprise or book, but only as an indication of how

immense is its potential to redefine the roles of democratic theorists and to challenge the thinking, practice, and worldview of those who should be reading and reflecting on it.

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NOTES

1. Richard Tuck, *Free Riding* (Cambridge, MA: Harvard University Press, 2006).
2. Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016).
3. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 176–77.
4. Bruce A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977).
5. Gabriel Almond and Sidney Verba, *The Civic Culture* (Princeton: Princeton University Press, 1963).
6. Robert Putman, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993); Putman, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).
7. Robert Dahl, *How Democratic Is the American Constitution?* 2nd ed. (New Haven: Yale University Press, 2003).