

in 2012 on calling a new convention (and said no). If the electorate *does* call for a new convention, one of the issues that would inevitably arise is whether a revised constitution should continue to include some measure of direct democracy or even to expand it—for example, by making Ohio more similar to California, with its initiative and referendum and the ability of the electorate to “recall” state officials, including its governor. Wisconsin also permits the recall of its governor and legislators. In 2012 Wisconsin Republican Governor Scott Walker survived a recall election even as Democrats won enough recall efforts to regain control of the State Senate.

Questions about direct democracy arise with regard to the drafting of any new constitutions, throughout the world. At the very least, in the modern world one doubts if drafters of a new constitution would be able to exclude the general public from a defining role in ratifying any new constitution. Is it fair to describe the U.S. Constitution (though not most American *state* constitutions) as hopelessly anachronistic in its disregard of any role for direct decisionmaking by whoever constitutes “We the People”? Or, on the contrary, should we be proud of the 1787 Constitution in this regard and chastise all those states and foreign countries that have chosen more democratic possibilities?

### VIII. ARE ELECTIONS NECESSARY?

We are assuming that the choice facing us is the one Madison set out, that is, between “pure democracy,” which relies on the participation of almost all citizens, and “representative democracy,” which calls on the citizenry only to select those who will actually make the relevant governmental decisions. What both of these have in common is that each involves the ballot box, whether to make first-order decisions, as in direct democracy, or only to select the representatives empowered to act. But perhaps the problem is thinking in terms of the ballot box at all, whether to select officials or to register views about particular issues.<sup>33</sup>

A number of political theorists have recently sparked renewed interest in an important feature of Athenian democracy, which is widely—and often critically—described as the paradigm of direct democracy.<sup>34</sup> That feature

is the selection of public decisionmakers by lottery. There are no elections and therefore no “campaigns” in which candidates try to persuade electors to vote for them. Selection is by chance. Anthony Gottlieb begins an excellent review of voting systems in *The New Yorker* by describing the role played by multiple lotteries in the extraordinarily complicated Venetian system, which was explicitly designed to reduce—ideally to eliminate—the possibility of corruption, which seems endemic in most electoral systems.<sup>35</sup> One need no longer worry about sleazy campaigns or the inordinate role played by campaign contributions or the ability to gain the support of powerful media. All of these are instantly rendered irrelevant if selection is in fact a function of sheer chance.

Think of the modern jury, a very important governmental body, as Tocqueville pointed out long ago in *Democracy in America*.<sup>36</sup> Decisions quite literally of life or death (in states like Texas that allow the death penalty) are made by ordinary citizens who have been called to jury service. The ballot box is wholly irrelevant, as is “appointment” by the presiding judge. Instead, jurors are initially selected through a process that emphasizes the element of chance. There is, however, a winnowing process before they are actually seated that can focus on specific attributes that render a particular person unsuitable for service.

Yale professor Akhil Amar has been one of the most important defenders of not only the jury system but also the wider vision of “lottery selection” that it signifies.<sup>37</sup> There is something satisfying about lottery selection to anyone who is a strong proponent of equality, inasmuch as almost everyone has an equal probability of being chosen for the office or duty in question. One must say “almost” because there will always be some exemptions; no one, for example, would place children in the pool (even if there might be some debate about the age at which someone is no longer a child). So consider the possibility, with regard to any given issue, that the decision is made by a group of citizens large enough to be plausibly “representative of the public” according to the norms of public opinion polling (this would usually mean five to seven hundred persons), selected at random and then given the opportunity to hear “experts” make their various pitches about how best to solve a given problem. British Columbia extensively assessed its own electoral system through a provincewide “citizen jury,” though its members weren’t randomly selected.

Stanford political theorist James Fishkin has conducted what he calls “deliberative polls” literally all over the world, including in China, in which persons selected at random have offered their views about significant public issues. None of these “polls” or “deliberative assemblies”—my own preferred description—has involved actual decisionmaking; rather they offered “advice” to those charged with making the ultimate decisions. Some of Fishkin’s critics have been very critical of his arguments on just this point. But one doesn’t have to adjudicate the disputes among various theorists trying to work out the meaning and institutional implications of what has come to be called “deliberative democracy.” Rather, the central question is whether we share the view that our present system of “representative government” accords too well with some of the critical descriptions of “faction” offered by Madison in *Federalist* 10.

Fishkin emphasizes that a robust conception of popular government in the twenty-first century cannot stop with “going to the ballot box” (and, presumably, having one’s votes counted honestly).<sup>28</sup> 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 police force and civil service, which President Obama has emphasized as a necessary supplement to the ballot box. Rather, a model of “competitive democracy” that 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.” Though this critique is especially powerful if elections “are won by manipulation or deception, by bamboozling an inattentive public,”<sup>29</sup> even “fair” and uncorrupted electoral processes have their problems. Any democratic republic worthy of the name should accord “the people” a real opportunity to “speak,” where such public speech is the product of some genuine deliberation about the relevant issues facing the given polity.

He is attempting to build genuinely new institutional structures designed to fundamentally transform both the conceptions and practical possibilities of politics within a given society. Paradoxically or not, one of his inspirations models is 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” become structurally embedded and basically impervious to change.

Although emulating Madison’s interest in basic issues of institutional design, Fishkin rejects Madison’s generally dismissive views of the capacity of ordinary Americans to exercise genuine political autonomy. He writes in a distinctly Jeffersonian spirit of confidence in ordinary Americans and rejection of a desiccated version of “elite democracy.” But there is an obvious problem with mass participation that is at the heart of this book. As the American political system has over the decades (at both state and national levels) adopted a more inclusive suffrage and various mechanisms of direct democracy (in the states), “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.”

There are, Fishkin notes, “normally strong disincentives for mass public opinion to be very deliberative.” 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) in the demands of genuine republican citizenship. Some use these economic insights to discredit the very project of popular democracy. This last issue turns us to another crucial aspect of James Madison’s thought, his defense of the possibility of the “extended republic” as against those theorists—most importantly Montesquieu—who believed that republicanism was closely correlated with the relatively small size of the territory (and presumably population)

in question. I noted earlier the problems presented by making sense of Madison's notion of the "extended republic" in our own time.

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 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 places like India and eventually China. But then we must address the justified concern about the limits of such a vision of popular government. It is one that has little or no role for deliberation or what Fishkin terms "public consultation." At best, we have a facade for manipulation by political elites; at worst, we will see the further rise of a basically plebiscitary form of politics, in which leaders rely on charisma or the talents of demagoguery to gain office and the prerogatives that come with positions of leadership.

There is also the serious problem, as many political scientists have demonstrated, of being able to discern any concrete "meaning" from elections other than the tautological selection of a winner to occupy an office. But the notion of elections as "mandates" presents its own difficulties, beginning with the simple fact that most candidates present views on a multiplicity of issues and any given voter therefore has to decide *which* given issue or set of issues is most important and vote on that basis. One may vote for given candidates *in spite of* their views on issue X because one is so impressed by their commitment to one's favored issue Y. If the winning candidate gets the bulk of support from those who jointly disdain X and prefer Y, then it is simply wrong for the winner to claim a mandate to do X.

So the question is whether we can have a more ambitious notion of popular government that doesn't fall victim to these telling objections. Fishkin himself focuses on 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, 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. The notion of democracy as government by consent almost necessarily leads to a conception of mass participation, by which literally millions of voters cast their ballots and thus "choose" their governments. Finally, there is the desideratum of some

genuine deliberation by those voting, lest the election turn into an almost mindless plebiscite empowering 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." He is no magician who can make the trilemma disappear with the wave of a conceptual apparatus. But he clearly 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." 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 refers to basic attributes that are desired in any citizen, captured in modern politics by such criteria as age or a suitable level of intellectual competence. Some 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 who would support genuinely "universal suffrage" if it meant, for example, giving a vote to a six-year-old or a severely mentally disabled adult. The real issue is how to construct a polity in which the millions of competent citizens can in fact function together as part of a "republican form of government."

As the reference to ancient Athens suggests, one 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 resulting policies. 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 assures the relative "representativeness" of the sample chosen. The deliberative assembly will look sufficiently "like America"—or the given state or locality adopting this form of governance—to provide necessary confidence 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 with regard to the social science of sampling and representativeness. Those who are comfortable with statistics may be at ease with the notion that a sample of seven hundred probable voters can predict, within a margin of error of 4 percent, the outcome of a national election or the "public opinion" on some controversial subject. However, many of our co-citizens may be skeptical of such statistically based reassurance, 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 about public opinion to those actually charged with making decisions.

If one is truly persuaded by such arguments, though, one might well prefer decisionmaking by the deliberative assemblies over decisionmaking by the elected representatives, who are less likely to be truly representative than the group chosen by lot. Consider the challenging argument presented at the 2010 American Political Science Association convention by a distinguished political scientist at a panel assessing the impact and legitimacy of filibusters in the U.S. Senate. He argued that there is no particular reason to believe that a majority of Congress or of the Senate will necessarily track American public opinion. After all, electoral success is in substantial measure an artifact of the method by which we choose representatives in the first place, not to mention the independent problems represented by the distribution of voting power in the Senate, the distorting impact of campaign finances, and the impact of differential turnout rates.

One of my favorite political dicta is John Roche's emendation of Lord Acton's famous adage: "Power corrupts, and absolute power corrupts absolutely." Roche's version was "Power corrupts, and the possibility of losing power corrupts absolutely."<sup>30</sup> One thing that almost all electoral systems do is create "ins" who wish to retain that status against "outs" who are challenging their hold on power. Perhaps term limits can control this to

some extent, though that reform also appears to have significant consequences for the actual quality of governance—as demonstrated most vividly in California. The call for term limits was a major part of American politics in the 1990s but has diminished since then. One reason may be the realization that term limits may actually reduce the practical capacity of representatives to gain a sophisticated understanding of complex issues of public policy. As a practical matter, this can put ever more power in the hands of the permanent—and obviously unelected—bureaucracy. But if the officials are loyal adherents of a given political party—what Madison might well have viewed as a faction—there will still be a strong incentive to stack the deck in favor of one's partisan compatriots even if one will not be able to remain in office. Once again, choice by lottery significantly diminishes, if it does not out-and-out eliminate, possibilities for partisan manipulation.

The most truly commendable thing about Madison and other Founders was their willingness to look unflinchingly at their political realities and to offer the "lessons of experience." In that spirit, we must first ask ourselves what these lessons are and then what kinds of changes might bring us closer to the most attractive vision of a republican form of government or constitutional democracy today. Do we like the picture of republican government sketched by Madison, with its critiques—both implicit and explicit—of democracy, or do we share a belief that more power should be placed in the hands of ordinary Americans, either through a broadened franchise or the possibility of direct citizen participation in the decision-making process? If we do find credible what I have called the "democracy project" that is embraced—at least rhetorically—by Democratic and Republican presidents alike, then we have to wrestle further with how to achieve it in a twenty-first century whose realities would truly be mind-boggling to anyone from the eighteenth or nineteenth centuries.<sup>31</sup>