

Deliberation in American Lawmaking

A spirited political reform movement has recently grown up around the idea of creating an "electronic democracy" in the United States. Its proponents say that by taking advantage of modern telecommunications, the American people could re-create the New England town meeting on a national scale — conducting televised debates about current policy issues, calling in their votes, and having the results instantly tabulated by high-speed computers. The aim of such an exercise would be to elicit the majority view and convey it to a government now widely seen as unresponsive to the popular will. Reformers promote electronic democracy as an innovative way of circumventing the "special interests" that appear to dominate policymaking in Washington. At the same time, they tend to see their proposal as a natural extension of the principles that motivated the framers of the American constitutional order.

Gary Tomlinson, a computer expert who has led efforts to organize electronic town meetings in Iowa, accounts for the invention of our representational form of government by observing that in eighteenth-century America, it was not feasible to institute "a direct, public feedback communication system for empowering a fledgling democracy." Technological limitations would have made such a system unacceptably slow. Given these constraints, "the Founding Fathers came up with the next best thing to direct-response opinion polling. That solution was the system of representation." Today, however, when other mechanisms are available for conducting public affairs, Mr. Tomlinson suggests that we should be guided by the founders' commitment to progress and entrepreneurship. "Do you really believe," he asks, "that if they were to travel forward in time, they would not figure out a better way for 'We, the People' to participate in government and take advantage of our light-speed communication systems and television technology?"

In what follows, I do not assume that the value of electronic democracy stands or falls with its supporters' interpretation of constitutional history. Nonetheless, it seems to me that the framers' vision of government and the lawmaking process is deeply at odds with proposals to enhance the role of "direct-response opinion polling" in American politics. I

should add that many features of our current political system may be equally at odds with the framers' conception. That is a point to which I shall return.

In a deliberative democracy, the laws will be made, in James Madison's words, in accordance with "the mild voice of reason, pleading the cause of an enlarged and permanent interest."

The Framers' Design

At the core of the kind of democracy created by the framers is the practice of deliberation. As commonly and traditionally understood, deliberation is a process in which the participants seriously consider substantive information and arguments and seek to decide individually and to persuade each other as to what constitutes good public policy. Thus, deliberation includes a variety of activities often called "problem-solving" or "analytic": the investigation and identification of social, economic, or governmental problems; the evaluation of current policies or programs; the consideration of various and competing proposals; and the formulation of legislative or administrative remedies. In any genuine deliberative process the participants must be open to the facts, arguments, and proposals that come to their attention and must share a general willingness to learn from their colleagues and others. In a deliberative democracy, the laws will be made, in James Madison's words, in accordance with "the mild voice of reason, pleading the cause of an enlarged and permanent interest."

Along with many of the leading liberal statesmen and theorists of their era, the framers believed that in order for reason's voice to prevail, lawmakers must reflect what the *Federalist Papers* describe as "the cool and deliberate sense of the community." Procedures and institutions must have the capacity to check or moderate unreflective popular sentiments and to promote the rule of deliberative majorities. In the particular type of deliberative democracy established by the

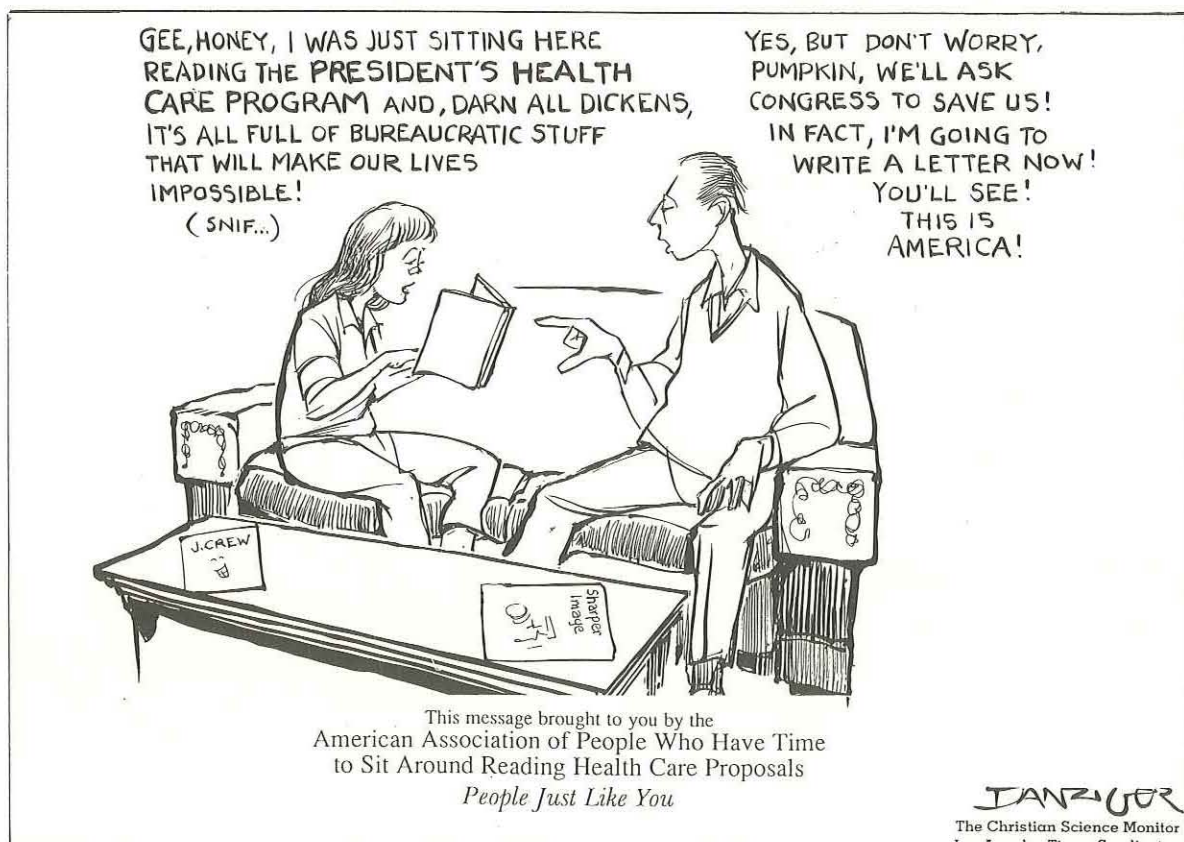
American Constitution, the citizenry would reason, or deliberate, *through* their representatives; on most issues the deliberative sense of the community would emerge not so much through debate and persuasion among the citizens themselves as through the functioning of their governing institutions.

Many structural features of the framers' governmental design are best understood as strategies for creating a deliberative democracy. For example, they created institutions and powers — such as a bicameral legislature, a Supreme Court with lifetime tenure, and an independent presidency with a qualified power to veto legislative acts — that would make it possible for the national government to oppose unwise or unjust popular inclinations. Indeed, those who wrote the Constitution of 1787 could hardly have been more explicit in making the case for moderating, restraining, or even blocking, at least for a time, some public demands on government. The people "know from experience that they sometimes err," Alexander Hamilton forthrightly maintained in newspaper essays addressed to the citizens of New York during the ratification struggle. On such occasions, when "the inter-

ests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection." Thus will the institutions of government "suspend the blow meditated by the people against themselves."

As anyone who has taught the *Federalist Papers* to college students can attest, the rhetoric of the framers is quite jarring to the modern ear; few students have ever heard a politician or government official speak so directly about the need, at times, for representatives of the people to resist public desires. Indeed, there may be a tendency to conclude, as did the Progressive historians, that the framers simply did not believe in majority rule.

Yet those who wrote the Constitution of 1787 consistently maintained that the system they set up was "strictly republican," and they recognized as "the fundamental maxim of republican government" that "the sense of the majority should prevail." The key to the reconciliation of these apparently contradictory



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intentions — to restrain popular majorities but also to effectuate majority rule — lies in the framers' broad purpose to empower *deliberative* majorities at the expense of uninformed, immoderate, or passionate ones. Thus, the genius and the particular challenge of the American system is its conjunction of deliberation and democracy.

Two Kinds of Public Voice

The democratic character of deliberative democracy is assured by its demand that the representatives of the people share the basic values and goals of their constituents; their own deliberations about public policy must be firmly rooted in popular interests. The elec-

toral connection is the chief mechanism for ensuring such a linkage between the values and goals of representatives and represented. If that linkage is sufficiently strong, then the policies fashioned by political leaders will effectively be those that the people themselves would have chosen had they possessed the same knowledge and experience as their representatives and devoted the same amount of time to considering the information and arguments presented in the national councils.

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Thus, while deliberative democracy in its American form is distinct from direct democracy, where the people themselves make the key political decisions, it is also distinct from the kind of democracy proposed by Edmund Burke, or at least some of his interpreters, in which the wise and virtuous, freely chosen by the community, rule through the exercise of their independent and superior political judgment, disconnected from popular sentiments. The deliberative democracy of the framers, it can be said, is less democratic than direct democracy but more democratic than this version of the Burkean prescription.

According to the American theory of government, there are two kinds of public voice — one more immediate or spontaneous, uninformed, and unreflective; the other more deliberative, taking longer to develop, and resting on a fuller consideration of information and arguments — and only the latter is fit to rule. (The framers also expressed this distinction when they spoke of the opposition between passion and reason, or between inclinations and interests.) Under a well-designed representative system, Madison wrote, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." The deliberations of representatives will in general better promote the public good both because representatives are more knowledgeable and experienced than their constituents and because they make decisions in an institutional environment that fosters collective reasoning about shared interests. Even so, however, Madison insists that representative institutions do not displace public attitudes with the personal views of elected officials, but rather "refine and enlarge the public views." The result can be called "the public voice" even though it is not pronounced by the people directly and

even though it may differ substantially from public attitudes prevailing at any particular time.

The Nature of Public Opinion

Applied today, Madison's argument would suggest that the public opinion registered in polls and computerized call-ins is likely to be less deliberative and less conducive to the public good than attitudes informed and deepened through the operation of representative institutions. The very term "public opinion" implies the existence of developed public attitudes. Yet when attitudes are measured by an opinion poll, they may represent little more than the aggregation of hundreds of offhand, unreflective responses to a pollster's questions.

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Consider, for example, how a national polling organization would measure "public opinion" on the relative merits of competing proposals for a comprehensive national health insurance program. It is likely that 500 to 1500 phone calls would be made to a nationally representative sample of homes. The respondents, interrupted from other activities and largely unprepared to address the subject, would be asked a series of questions. It would be surprising if most respondents had read or thought much about the details of the various health care proposals prior to the telephone call, or, if they had, if they could instantaneously recall the pertinent issues. Consequently, they would tend to voice spontaneous reactions, unsupported by any serious reasoning about the arguments pro and con. Indeed, it could hardly be otherwise. Even if we assume that most people would be fully capable of reasoning about health care legislation if they were exposed to, and given ample time to reflect upon, the relevant information and arguments, we can hardly expect them to produce a deliberative opinion instantaneously. Yet it is not unusual for a sample of such instantaneous reactions to be aggregated to portray "public opinion" on national health insurance. Replace this issue with any other of at least moderate complexity — welfare reform, environmental protection, military spending in the post-Cold War era — and the point is the same. We should not be surprised if instantaneous opinion bears little resemblance to what would result from serious reasoning on the merits.

It is true, of course, that Americans generally are in a better position to deliberate on public matters than were their counterparts in earlier periods. Most citizens today have more leisure, more education, and more sources of information about public affairs. Nonetheless, it would be a mistake to overstate the impact of these changes on the problem of citizen deliberation. The average American may now work an hour or two less each day (and perhaps one day less per week) than in the previous century, but once commuting time, meals, errands, and family responsibilities are factored in, the "leisure" available for the study of public policy is at most a few hours on weekday evenings, and a few more on weekends. Moreover, the same technologies that have given us enhanced access to news and information have also resulted in the creation of an entertainment industry that effectively competes for the attention of the citizenry. Indeed, accounts of the early nineteenth century suggest that Americans of that era, presented with fewer entertainment options to fill what leisure they had, were exposed to more serious political discussions in the form of speeches, lectures, and debates than is the case today.

Finally, even if it were true that Americans are now better educated about public affairs than ever before, the fact remains that technological advancement, the rise of the United States as a world power, and the expansion of the domestic responsibilities of the national government (with regard to social welfare and economic management, for example) have vastly increased the number, breadth, and complexity of public policy issues. Taken together, these factors present a formidable impediment to public attention, understanding, and deliberation.

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The Contemporary Role of Deliberation

Thus far I have tried to show that the founders did not create a system of representation as a "second-best option," and that they would not have preferred "direct-response opinion polling" as the basis of government even if that choice had been available to them.

It is one thing, however, to articulate the framers' design and quite another to show its continuing relevance to contemporary American institutions. Is modern American democracy a deliberative democracy in

any important respect? Do the institutions of American national government, particularly the Congress, "refine and enlarge the public views" so that what emerges as national policy approximates "the cool and deliberate sense of the community"? Our answers to these questions will determine whether we understand the campaign for electronic democracy as a misguided departure from the framers' conception of government, or as a revolt against a political system that has itself fallen away from the framers' deliberative ideal.

It is not unusual for a policy initiative to take up to a decade or more to move from a novel proposal to the law of the land.

There is reason to think that the contemporary Congress is a more deliberative institution than its detractors imagine. The most detailed and extensive policy deliberations occur by design in the committees and subcommittees of both houses. Were the members of the House and Senate to meet only en bloc to consider legislative proposals, time limitations alone would render it impossible for the legislators to gather more than the most cursory understanding of the pertinent information and arguments bearing on each issue. But the committee structure allows for an institutional division of labor; various members can develop expertise in specific policy areas, especially when they serve on the same committee or subcommittee for many years. The vitality of discussion frequently manifested in committee hearings, especially on significant public issues, and the importance that politically sophisticated actors attach to the thorough and careful presentation of testimony, indicate that the hearing process is not generally a *pro forma* exercise.

In principle, these smaller decision-making units deliberate and exercise their judgment for the institutions they serve. By submitting reports to the full body of the house to which they belong, and by defending their decisions in floor debate, the committees seek to persuade non-members of the merits of their decisions; and it is a sign of their effectiveness that on average the House and Senate endorse about 65 to 70 percent of committee recommendations without revision and pass another 15 to 20 percent of committee bills with amendments. In only about 10 to 20 percent of the cases do the full bodies simply reject committee proposals.

On some important issues, the deliberative process within Congress has extended over many years. It is

not unusual for a policy initiative to take up to a decade or more to move from a novel proposal to the law of the land. This is one reason why legislators are not reluctant to introduce proposals that have little chance for passage within the immediate two-year legislative cycle. The Senate, in particular, has been described as an incubator of public policies, making a distinctive contribution, in Nelson Polsby's words, by "gestating [new] ideas, by providing a forum for speeches, hearings, and the introduction of bills going nowhere for the moment." This "process of gestation" encourages policy advocates to "keep information up to date on . . . prospective benefits and technical feasibility." And it accustoms the uncommitted to a new idea."

Congress, in this respect, is not an isolated institution. It is necessarily influenced by the constellation of ideas that predominate in the larger social and political system. As these ideas change over time, so too does thinking within Congress. Although the correspondence is not perfect, changing congressional membership, staff turnover, and electoral considerations all ensure a degree of responsiveness to external opinion. "To a very great extent," writes Paul Quirk, "the direction of policy change depends on the state of opinion about the public interest. That opinion includes the values and attitudes of the mass public; the general ideologies of the attentive public and political elites; the more specific policy and program doctrines of practitioners in each area; and the pertinent theories and research findings of policy analysts and social scientists." It follows that those forces which shape public and elite attitudes on social and political issues will have an impact on Congress and its deliberations about public policy.

Bargaining and Group Interests

It would be naive, on the other hand, to suppose that all the work of Congress is in keeping with the deliberative model of lawmaking. For most of this century, scholars of American government and politics have understood congressional lawmaking chiefly as a bargaining process, and deliberation has seldom been the focus of their attention. The prevailing theory is that politics reduces to the play of group interests, and thus that the reality of legislating lies not in the deliberative activities I have described but rather in the orchestration of deals, the trading of votes, and the hard-headed compromises that are arranged offstage or through subtle manipulation of the formal process itself.

Interestingly enough, many of the theorists who have examined such bargaining devices defend them as a positive good; they argue that by such means, a large, heterogeneous society can aggregate the diverse and often conflicting preferences of legislators, interest groups, or geographically defined constituencies,

while mitigating the potential divisiveness of trying to reach principled judgments in Congress as to "what is good for the nation." But these arguments are not especially persuasive. Whatever the advantages of bargaining in dispersing discrete public benefits, such as water projects, throughout the nation, how could bargains among hundreds of different legislators help Congress to make wise decisions on the great issues of foreign and domestic policy? There are, after all, better and worse answers to the questions that confront us, better and worse policies that Congress might embrace. The task of the legislators is to find the better answer, to fashion the better policy. How else are they to do so responsibly but by reasoning together on the merits of proposed approaches, relying on the best information and arguments available?

Many theorists have defended bargaining devices as a positive good. In recent years, however, some forms of bargaining have often seemed to undermine the deliberative process, or even to subvert the policy goals of their practitioners.

A less celebratory defense of bargaining nonetheless portrays it as a legitimate and necessary means for reaching collective decisions. Because a succession of majority votes — by subcommittees, committees, and the full bodies — is required before a bill becomes law, majorities must be built anew at each stage of the process. This, some theorists argue, puts a premium on the techniques of coalition building. It is hardly surprising, then, that legislators should agree to trade support for one another's proposals, or accept pragmatic compromises, or assume positions with an eye to the non-policy advantages they can secure by voting with one side rather than the other.

In recent years, however, such forms of bargaining have often seemed to undermine the deliberative process, and even to subvert the policy goals of their practitioners. For example, when the Reagan administration was seeking support for its 1981 budget package, it made a series of last-minute concessions to the moderate and liberal Republicans known as the "Gypsy Moths," raising spending levels for some programs and expanding the package of tax cuts. These concessions were projected to cost nearly as much in lost revenue as the 25 percent tax cut at the heart of the original proposal; and as budget director David Stockman later observed, the dozens of private deals he made in order to build a majority for the Reagan plan "shattered the fiscal equation."

Similarly, in the days before the 1993 House vote on the North American Free Trade Agreement, the Clinton administration not only promised certain House members federal funding for projects in their districts, but also agreed to a series of special-interest tariff deals to protect a bewildering array of American products. Gary Hufbauer, a pro-NAFTA economist, estimated that these agreements could "easily cost American consumers hundreds of millions of dollars." The side agreements also gave the impression that any pretense to legislative deliberation had been abandoned. In the words of one Ohio Democrat interviewed by the *Los Angeles Times*, the outcome of the House vote was "strictly because of the buyouts. It had absolutely nothing to do with the debate. It had absolutely nothing to do with the merits of the issue."

If members of the public, and of Congress itself, find reason to believe that the deliberative ideal of the framers no longer guides the legislative process, we should not be surprised if proposals such as that for electronic democracy continue to attract support. But it remains important to judge such proposals, and the democratic character of our political system, by how well they foster the rule of informed and reasoning majorities.

— Joseph M. Bessette

Joseph M. Bessette is associate professor of government and ethics at Claremont McKenna College. Excerpted from *The Mild Voice of Reason: Deliberative Democracy and American National Government*, by Joseph M. Bessette, to be published this spring by the University of Chicago Press. By arrangement with the University of Chicago Press © 1994 by The University of Chicago. All rights reserved. Additional sources: Dan Rodricks, "Electronic Voting Excited Dreamers Before Perot," *The Baltimore Sun* (June 8, 1992); Charles Lewis, "The NAFTA Math," *The Washington Post* (December 26, 1993); James Gerstenzang and Michael Ross, "House Passes NAFTA," *The Los Angeles Times* (November 18, 1993).

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