Deliberating in Elections

Second-Best Deliberative Democracy and Election Law

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ABSTRACT

This article addresses the following question: Does the theory of deliberative democracy have any place in the electoral process? Decision-making through deliberation is considered to be a central value in a democracy. However, critics charge that deliberation is highly unlikely to take place during elections or in politics more generally. This article intervenes in this debate in two respects. First, it argues for the concept of second-best deliberation. Under a second-best approach, deliberation is viewed as being context-specific: that is, the norms of deliberation change depending on the actors and institutions involved. I also argue that deliberation, instead of being treated as a unified theory, should be reconceived as existing along a spectrum. Second, this article uses the concept of second-best deliberation to evaluate the deliberative possibilities within and the shortcomings of a wide range of topics in U.S. election law, including electoral redistricting, majority-minority districts, political parties and partisanship, the Voting Rights Act, campaign finance regulation, election administration, and electoral reform. Although this article focuses on U.S. election law, the concept of second-best deliberation can be applied more broadly to evaluate the deliberative strengths and limitations of other democratic systems. The article also provides an extensive discussion of the theory of deliberative democracy and its various critiques.

INTRODUCTION

Does the theory of deliberative democracy have any place in election law? Election law scholarship has not typically used the lens of deliberative democracy, focusing instead on power, politics, competition, and self-interest. This omission is curious given the centrality of deliberation in democratic theory and in republican interpretations of the Constitution. At the same time, deliberative democracy has been dogged by a wide array of criticisms that challenge its feasibility and desirability. Critics charge that deliberation is elitist and exclusionary, and that, in any event, it has proved difficult, if not impossible, to implement deliberation systematically in practice.

In this article, I develop the concept of “second-best deliberation,” and I use it to evaluate the
deliberative possibilities within—and the shortcomings of—election law. Under a first-best approach to deliberative democracy, all persons affected by a potential decision engage in reasoned discussion with one another until a consensus is achieved. A second-best approach, by contrast, relaxes the normative criteria required for a finding that “deliberation” has taken place. I define second-best deliberation as an engagement with ideas about politics. I argue that deliberation, understood in this way, takes multiple forms, including reason-giving, conversations, debates, and bargaining. A second-best approach would seek to create opportunities for “deliberative moments” across multiple sites in the democratic system. In addition, I claim that the norms of deliberation should be context-specific: that is, we should have different criteria for deliberation depending on the actors and institutions involved. Deliberation among ordinary citizens might involve informal conversations about politics, while deliberation among judges would require formal reason-giving. Instead of treating deliberative norms as fixed and universalist, I argue that we should have different standards for what counts as “deliberation” depending on the participants and the institutional context. Deliberation is thus best understood as existing along a spectrum.

In addition to proposing a normative reconceptualization of deliberation, I also use the second-best approach to deliberation to evaluate various aspects of election law, including political parties and partisanship, electoral redistricting, the Voting Rights Act, campaign finance, and election administration and reform. I argue that while there are few instances of first-best deliberation during elections, there are several opportunities for second-best deliberation in the electoral process. This article also evaluates election law doctrines to see whether they contribute to or detract from second-best deliberation. In particular, I argue that election law must protect the conditions that are necessary for deliberative democracy. These conditions include equal access and participation, equal influence, transparency, impartiality, and accountability. I show how current trends in certain areas of election law, however, have undermined both the conditions and opportunities for deliberation. Although this article focuses on U.S. election law, the concept of second-best deliberation can be applied more broadly to evaluate the deliberative possibilities within and limitations of other democratic systems.

Although it is widely acknowledged that election laws are implicitly based upon theories of democracy, much work remains to be done to bridge theory and practice. To this end, I engage in what Dennis Thompson has called “institutional political theory” for thinking about the relationship between theory and practice in democratic politics. Institutional political theory is concerned with the “mid-range of political argument—between abstract theory and concrete practice, where principles and institutions meet.” It is worth noting, however, that the relationship between deliberative theory and election law depends to some extent on how broadly the scope of each enterprise is drawn. A narrow conception of election law (which focuses primarily on electoral campaigns) combined with a highly idealistic account of deliberative democracy will likely lead to the conclusion that there are few opportunities for deliberation during electoral processes. By contrast, a broader view of election law (which considers the democratic process as a whole) combined with a nonideal account of deliberative democracy will likely lead to the conclusion that there are possibilities for deliberation within election law. The second-best approach proposed in this article falls in the latter category.

This article proceeds in three sections. Part I focuses on ideal theories of deliberative democracy, and it outlines the major lines of criticism of deliberative democracy. Part II sets forth the concept of second-best deliberative democracy. Part III considers the first-best and second-best deliberative possibilities with respect to various election law topics, including voting, campaign finance, electoral redistricting, constituency formation, political parties, and election administration.

3These conditions are required in a theoretical sense in that the theory of deliberation holds that participants should have an equal opportunity to participate. I am not arguing, as an empirical matter, that higher levels of equality lead to better deliberation.
4Chad Flanders, Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law, 23 J.L. & Pol. 147, 149 (2007).
6Id. at 192.
I. IDEAL DELIBERATIVE DEMOCRACY AND ITS LIMITS

There are several variants of the deliberative model of democracy, but they all tend to emphasize a commitment to reason-giving. In general, ideal deliberation entails reasoned discussion among free and equal participants who aim for consensus by being persuaded by the best reasons for a given position. One prominent theorist of ideal deliberation is Jürgen Habermas. Habermas argues for “communicative action,” which is an interaction in which the participants are only oriented toward reaching understanding, and are only motivated by the “force of the better argument.” Valid norms are those that are “capable in principle of meeting with the rationally motivated approval of everyone affected.” Participants are thus oriented “to achieving, sustaining, and renewing consensus,” and such consensus must be based on reasons. Crucially, Habermas rejects so-called strategic action—such as threats of sanction, coercive tactics, manipulation, and unconscious deception—from the pursuit of ideal deliberation.

According to some deliberative theorists, however, it is not necessary for every participant’s interests to receive equal consideration; instead, the participants must treat each other as equals by offering justifications that can be acknowledged by all as reasons. As James Bohman puts it, a “collective decision should in some sense be justified by public reasons—that is, reasons that are generally convincing to everyone participating in the process of deliberation.” Contemporary theorists of deliberative democracy thus tend to agree that deliberation does not require that each person’s views must be satisfied.

Deliberation is said to contribute to impartiality because individuals are expected to provide reasons that are acceptable to others, hence making it more difficult to put forward self-serving reasons. Deliberation is also associated with democratic legitimacy. As Simone Chambers puts it, a “legitimate political order is one that could be justified to all those living under its laws.” Political decision making is legitimate when citizens and their representatives reflect on the common good during the process of deliberation, and when the exercise of state power is based upon the collective decisions of those who are subject to that power.

The deliberative model of democracy is most commonly contrasted with the aggregative model of democracy. According to the aggregative model, democracy is a process by which citizens’ preferences are identified, aggregated, and translated into a selection of laws, policies, and public officials. Citizens’ preferences are viewed as being primarily motivated by self-interest rather than the public interest. The aggregative model also treats such preferences as exogenous to the political process in that they are seen to exist prior to the activity of aggregation. In contrast, the deliberative model treats citizens’ preferences as endogenous because these preferences will be transformed by engaging in democratic discussion. Finally, the aggregative model of democracy is

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8 Habermas, supra note 8, at 89.
10 Id. at 17.
11 Id. at 25, 287, 333.
12 Cohen, supra note 8, at 186. In a similar way, John Dryzek describes deliberation as requiring that “individuals must communicate about collective decisions in terms that are capable of reflective acceptance on the part of those subject to the decision.” John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations 11 (2000).
14 Ferejohn, supra note 7, at 76.
16 Chambers, supra note 7, at 308.
17 Bohman, supra note 14, at 4–5.
usually associated with competition rather than consensus or cooperation. On the aggregative view, political parties, which are also advancing their own interests to attain or retain power, compete to satisfy as many voter preferences as possible.23 Because of its emphasis on publicly justified reason-giving, deliberative democracy is often viewed as an improvement on aggregative democracy.24

Deliberative democracy, however, has been criticized on a number of fronts. Some critics have argued that deliberation is elitist and exclusionary because it favors advantaged citizens.25 Theories of deliberative democracy have also been criticized for failing to account for the pluralism of contemporary politics, and the moral conflicts that such pluralism inevitably entails.26 These moral conflicts make it difficult, if not impossible, for deliberators to reach a consensus. Other critics have argued that since the average voter is woefully uninformed about politics deliberation is simply unfeasible. Given the size and complexity of democratic institutions, decision making through deliberation is unlikely to take place. Critics have also suggested that deliberation might promote conflict by highlighting differences and widening divisions among different groups.27 Instead of producing consensus, open discussion may instead reveal just how deep the divisions among various interests actually are, thereby fostering disagreement and discord.

Many of the criticisms of deliberative democracy are focused in one way or another on the problem of equality. A basic assumption in deliberative democratic theory is that the participants in a reasoned discussion are equal. Critics contend, however, that there are inevitably economic and social inequalities among the participants in a deliberation. Insofar as deliberation favors advantaged citizens, it is elitist and therefore incompatible with democratic ideals.28 Although ideal deliberative theory would assume that all participants are equal, it is not feasible to simply bracket political and economic power.

In addition, there are subtler inequalities at work in any deliberative exercise. As Lynn Sanders points out, research has shown that there are various factors at play in terms of who is perceived as being persuasive, and these factors do not necessarily correspond to the content of the presentation. Certain individuals are more likely to be disregarded even if they follow the conventions of reason-giving.29 For example, the more a person speaks, the more he or she will be viewed as presenting compelling arguments, irrespective of the value of the contributions.30 In a similar vein, Iris Marion Young argues that inequality in speaking can also arise from “an internalized sense of the right one has to speak or not to speak, and from the devaluation of some people’s style of speech and the elevation of others.”31 Eliminating the influence of economic and political power is not sufficient because speaking power is dependent as well on social positions and cultural differences.32 Because ideal theory is based on a universalist notion of deliberation, it cannot account for social difference, the cultural specificity of deliberative speech, and the fact that power at times enters speech itself.33

Deliberation might also have negative consequences. Cass Sunstein points to the dangers of group polarization that arise when like-minded people deliberate with one another.34 As many studies have shown, the participants in a deliberating group adopt a more extreme position than the pre-deliberation position of the median member.35 Group

24Ferejohn, supra note 7, at 99.
25Id., at 349.
26Id., at 365.
27Id., at 122.
28Young, supra note 25, at 123.
29Id., at 122–23. Young argues that other kinds of speech—including greeting, rhetoric, and story-telling—should be included in a theory of deliberation to make it more inclusive. Id., at 129.
31Id., at 112.
polarization, however, has not been observed in all settings. James Fishkin’s Deliberative Polls, for instance, did not show a strong polarizing effect.\textsuperscript{36} Sunstein identifies a number of factors that could have played a role.\textsuperscript{37} Group polarization has important implications for institutional design, namely that members of deliberating groups should be exposed to competing viewpoints.\textsuperscript{38} The evidence shows that depolarization occurs when group members are offered new arguments that run in the opposite direction from the members’ predeliberation inclinations.\textsuperscript{39}

Critics also contend that there are significant limitations to deliberation in the context of electoral campaigns.\textsuperscript{40} James Gardner demonstrates that there is a considerable gap between our ideals about deliberation and the reality of electoral politics. With respect to our ideals, we expect candidates to present informed positions on public policy, and we expect voters to consider these positions, engage in deliberation with each other, and vote in accordance with their considered judgments.\textsuperscript{41} Various features of the election campaign, such as presidential debates, are based on the view that campaigns are and should be forums for deliberation.\textsuperscript{42} The Supreme Court’s First Amendment decisions have also emphasized the importance of open discussion and persuasion in election campaigns.\textsuperscript{43}

Yet the reality of electoral campaigns does not live up to these ideals. There is a distinct lack of thoughtful and rational discussion during electoral campaigns, and an over-emphasis on superficial sound bites and images.\textsuperscript{44} The available social science evidence shows that voters’ political identities are formed much earlier in life, with the result that people do not tend to change their minds during a campaign.\textsuperscript{45} In addition, Gardner demonstrates through a number of examples that election laws and the Court’s doctrines concerning them are detrimental for deliberation. For example, ballot access laws “narrow the scope of campaign discourse by restricting ballot access to candidates who support positions that already command substantial support among the electorate before the campaign has even begun.”\textsuperscript{46} According to Gardner, “deep deliberative persuasion” is unlikely to take place during an election campaign; instead, campaigns are better described as mechanisms that tabulate exogenously held public opinion.\textsuperscript{47} Gardner tempers this conclusion by arguing that democratic theory does not necessarily require that electoral campaigns be deliberative given the other sites within democracy where deliberation can take place.\textsuperscript{48}

II. SECOND-BEST DELIBERATION

Taken together, these criticisms pose serious challenges to the project of deliberative democracy. Some of the criticisms are concerned with feasibility: Can deliberation be operationalized in the context of a large nation-state with a multiplicity of institutions? Is it feasible to suggest that deliberators can reach consensus given profound disagreements on moral claims? Is it likely that voters have sufficient information or inclination to engage in deliberation? Other criticisms are concerned with desirability: Is deliberation a good thing? Does deliberation account for social and economic inequalities or does it privilege advantaged citizens under the guise of inclusion? Does deliberation enhance our openness to other viewpoints or does it lead to increased polarization?

Instead of rejecting the ideal of deliberative democracy as unfeasible and undesirable, I wish

\textsuperscript{36}\textsc{Bruce Ackerman and James S. Fishkin, Deliberation Day 62–63 (2004).}
\textsuperscript{37}\textsc{For a start, Fishkin’s deliberators did not engage in a vote. In addition, the discussions were moderated. Fishkin’s groups were also highly diverse and selected at random. Participants also were provided with written materials that presented the issues in a balanced way. Sunstein notes that Fishkin’s experiments suggest that group polarization can be diminished and even eliminated by small changes to the institutional arrangements within which deliberation takes place. Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 \textsc{Yale L.J.} 71, 117 (2000). Ackerman and Fishkin question whether there is sufficient evidence for the conclusion that there is a causal connection between deliberation and polarization. \textsc{Ackerman and Fishkin, supra note 36, at 63.}
\textsuperscript{38}Sunstein, supra note 34, at 164–65.
\textsuperscript{40}\textsc{James A. Gardner, What are Campaigns For? The Role of Persuasion in Electoral Law and Politics (2009).}
\textsuperscript{41}Id. at 13.
\textsuperscript{42}Id. at 41.
\textsuperscript{43}Id. at 45.
\textsuperscript{44}Id. at 1.
\textsuperscript{45}Id. at 86, 92–93.
\textsuperscript{46}Id. at 49.
\textsuperscript{47}Id. at 115.
\textsuperscript{48}Id. at 116.
to argue for the concept of second-best deliberation. First-best theories are those that are premised on idealized notions of democracy, constitutionalism, or justice where perfect conditions obtain. Second-best theories, by contrast, provide a way forward in the face of the nonideal institutional constraints, legal structures, and political conditions that actually exist. As Adrian Vermeule explains, “the general theory of second best generalizes easily to any legal or political theory that takes the consequences of legal structures or policy choices into account.”

In the event that some of the conditions necessary to produce an ideal or first-best regime cannot be attained, the theory of the second best holds that it is not necessarily preferable to achieve as many of the conditions as possible. Instead, “multiple failures of the ideal can offset one another, producing a closer approximation to the ideal at the level of the overall system.” The theory of the second best is based on the idea that in a complex system all the variables interact with one another. This means that even if some or all of the variables are nonideal, it does not follow that the system as a whole will necessarily be nonideal because the “interaction between several nonideal elements can produce an overall system that is as close as possible to the ideal.” In what follows, I do not attempt a full exposition of second-best deliberation; instead, I provide a basic sketch of the concept at a fairly high level of generality.

A. The evolution of “ideal” deliberation

Before proceeding with the second-best approach, it is important to note that ideal deliberative democracy has undergone an evolution. For example, the requirement that deliberation lead to a consensus has been modified and relaxed by some theorists. Amy Gutmann and Dennis Thompson argue, for instance, that when citizens disagree with one another over a public policy, they “should deliberate with one another, seeking moral agreement when they can, and maintaining mutual respect when they cannot.” In a similar vein, Jack Knight and James Johnson reject the view that deliberation requires consensus on a public policy issue. Instead, the purpose of deliberation is to establish agreement over the “dimensions of the conflict” between two sides on a given issue. 

For James Bohman, the goal of deliberation is the “continued cooperation of politically equal citizens.” He describes this ideal as being less normatively demanding than the Kantian and communitarian theories of deliberative democracy.

In the absence of consensus, some theorists would agree that the decision would have to be reached through a form of majority rule. On this view, the aggregation of preferences through voting is an inevitable feature of deliberative democracy. Certain theorists have also relaxed the requirement that participants in a deliberation have to be free and equal. Other methods of discussion that had previously been excluded, such as bargaining, have also been included in the deliberative ideal.

Recently, Jane Mansbridge and her co-authors have offered a newly reformulated ideal of

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51 For an argument about the need for consensus, see Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996).
52 Amy Gutmann and Dennis Thompson, Democracy and Disagreement 346 (1996).
53 Knight and Johnson, supra note 26, at 285. I should note that Knight and Johnson are skeptical that deliberation is feasible in the context of actual politics.
54 Bohman, supra note 14, at 238.
55 Id. at 108, 132–33.
56 Ferejohn, supra note 7, at 76.
58 Gutmann and Thompson, supra note 55, at 17. Gutmann and Thompson refrain from building in guarantees of basic liberty and equality with respect to the participants in a deliberation; instead, they emphasize the importance of maintaining mutual respect. While they acknowledge that there are differences in deliberative abilities that correspond to social and economic status, they argue that deliberation provides an avenue through which these differences can be overcome. Id. at 132–33. In a similar vein, Bohman argues that we cannot assume that citizens enjoy what he calls an “equality of political capacities.” Bohman, supra note 14, at 108–10.
59 Gutmann and Thompson include bargaining provided that it is constrained by moral reciprocity. Gutmann and Thompson, supra note 55, at 71.
deliberative democracy. This new ideal, in a departure from the classical model, includes constrained self-interest. It also includes non-coercive forms of negotiation. It is worth noting that this newly formulated ideal still retains many of the criteria of ideal deliberation: free and equal citizens are to engage in a search for fair terms of cooperation, which can include self-interest and certain kinds of negotiation, but which are constrained by “the deliberative democratic ideals of mutual respect, equality, reciprocity, mutual justification, the search for fairness and the absence of coercive power.” Citizens facing a vote must deliberate with others, seek opposing views, offer justifications for their views, and revise their views in light of the common good. When selecting how to vote, citizens ought to pick the option that best supports the common good, but may vote according to self-interest in the absence of a common good. The authors also argue that non-deliberative mechanisms, such as voting, should be justified deliberatively.

B. Second-best deliberative democracy

Contemporary theorists hold that it is possible to relax certain criteria—consensus, free and equal participants, public-regarding reasons, for instance—and still have something we call “deliberation.” The question is: how far can we relax these normative criteria for deliberation? What other criteria can we relax such that the concept of deliberation retains traction? At what point does a second-best approach to deliberation become so diluted that it can no longer be distinguished from ordinary politics? What are the bare minimum requirements for deliberation?

My aim in this article is to take the first steps in developing a second-best theory of deliberation. Under the second-best approach, I define deliberation as an engagement with ideas about politics. I argue that this engagement with ideas about politics can take multiple forms, including reason-giving, conversations, debate, log-rolling, bargaining, and conflict. In addition, I claim that deliberation should be viewed as context-specific; that is, the norms of deliberation would change depending on the actors and institutions involved. For ordinary citizens, deliberation might mean informal discussions about politics in a wide array of venues including homes and workplaces. For elected officials, deliberation might mean policy discussions that satisfy many or all of the requirements for ideal deliberation as described by contemporary theorists. For judges, deliberation might mean ideal deliberation as captured by the Habermasian version. In other words, we should have different standards for what counts as deliberation depending on the participants and the institutional context. Instead of treating deliberative norms as fixed and universalist, a second-best approach would treat these norms as flexible and dependent upon the institutional context within which deliberation is taking place.

In addition, I claim that deliberative democracy is best understood as existing along a spectrum. We can imagine that at one end of the spectrum is first-best deliberation as described by Habermas. As we move along the continuum away from the first-best end point, the theories of deliberation become normatively less demanding. The question is how we ought to characterize those “ideal” theories that depart from the classic Habermasian ideal. Should these “ideals” be viewed as “ideal” or as “second-best” given their multiple departures from the classic Habermasian ideal? Instead of definitely resolving this question, I will, for the purposes of this article, define “first-best deliberation” as the equivalent of the classic Habermasian ideal, and all departures from that ideal as

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63Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. Pol. Phil. 64 (2010). Jane Mansbridge was the primary author, and she drew on ideas from her co-authors James Bohman, Simone Chambers, David Estlund, Andreas Fisidesal, Archon Fung, Cristina Lafont, Bernard Manin, and José Luis Martí. The authors distinguish between (1) the classic ideal of deliberative democracy; (2) expansions of the classic ideal; and (3) the newly formulated ideal. The expansions of the classic ideal include a shift to mutual justifiability, plural conceptions of the common good, and the inclusion of aggregative mechanisms when consensus fails to materialize. Id. at 67–69.

64Self-interested positions provide information on the common good, and may even constitute it. Id. at 73. Self-interest must, however, be constrained by the “universal constraints of moral behavior and human rights and by the particularly deliberative constraints of mutual respect, equality, reciprocity, fairness, and mutual justification.” Id. at 76.

65Although the deliberative forms of negotiation incorporate self-interest, they end in consensus and are thus consistent with the criteria for deliberation. Id. at 70. The non-coercive forms of negotiation include convergence, incompletely theorized agreements, integrative negotiations, and fully cooperative forms of self-interest. Id. at 66, 69–72.

66Id. at 94.

67Id. at 89–90.

68Id. at 64.
“second-best.” This means that certain nonideal elements of “ideal” theories of deliberation would fall within the purview of second-best deliberation. Although a given deliberative theory may be deemed “first-best” when considered as a whole, it could contain certain second-best elements such as partial perspectives, self-interest, or aggregative mechanisms.

The second-best approach proposed here thus partially encompasses contemporary deliberative theory but extends beyond it by further relaxing some of the normative criteria for deliberation. For example, second-best deliberation would include some forms of speech that would be rejected under a first-best approach. For instance, Habermas excluded the use of force, coercion, influence, manipulation, or unconscious deception from ideal deliberation.\(^69\) Mansbridge et al. argue that coercive power, defined as the threat of sanction or the use of force, is antithetical to the deliberative ideal.\(^70\) This topic is too complex to do it justice in this article, but the basic idea is that second-best deliberation would only exclude the extremes of manipulation, sanction, and force: threats of violence, and outright lying, for instance. There are many forms of speech that present genuine difficulties in drawing lines between deliberatively acceptable and unacceptable speech. How can we distinguish between persuasive speech and manipulative speech? How do we treat the use of promises and inducements, or the use of predictions in the event cooperation is withheld? A second-best approach would include those forms of speech that consist of an indecipherable mix of what ideal theorists would call rationally motivated speech, on the one hand, and speech that is coercive, on the other, subject to the limitation that extreme forms of manipulation, sanction and force would be excluded. Second-best deliberation can also include nonideal motivations or perspectives, including those based on constrained self-interest as proposed by Mansbridge et al. As described below, I argue, in a departure from current ideal theory, that second-best deliberation should also include opinions and viewpoints based on partisanship.\(^71\)

With respect to the practice of deliberative democracy, a second-best approach would create opportunities for what I call “deliberative moments” across multiple sites in the democratic system.\(^72\) These deliberative moments would span the range from brief conversations about politics to full-blown ideal deliberation. The deliberative moments would take place in multiple sites—legislatures, commissions, agencies, courtrooms, coffee shops, the Internet, polling station lines, the media, citizens’ assemblies, and the like.

A second-best approach thus blurs the lines between the aggregative and deliberative models of democracy. It is concerned in part with providing deliberative opportunities within aggregative mechanisms.\(^73\) It recognizes that there may be moments of deliberation—however brief and fleeting—that occur during processes associated with aggregation. In addition, I suggest that we should pay greater attention to informal institutions within the public sphere, such as the workplace, the Internet, entertainment, and so forth. Although these informal venues lie outside the purview of election law in a strict sense, I suggest that because politics takes place in the shadow of the next election (and by extension in the shadow of the electoral infrastructure as a whole), the deliberative moments in informal venues are indirectly affected by the rules that govern elections.

I am now venturing on uncertain territory, but it is possible to imagine that the general theory of the second-best might well apply to deliberative democracy. That is, multiple failures of the first-

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\(^69\) Habermas, supra note 8, at 285–87.

\(^70\) Mansbridge, supra note 63, at 81. Coercive power is defined as A's preferences or interests causing B to do (or change the probability that B will do) what B would not otherwise have done through the threat of sanction or the use of force. Id. at 80. Coercive power is ideally absent, yet the authors acknowledge that this standard is impossible to achieve. Id.

\(^71\) See discussion infra Part III.B.

\(^72\) Jane Mansbridge and her co-authors (James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis Thompson, and Mark Warren) have recently argued for a “systemic approach” to deliberative democracy, which is concerned with the interactions among a wide variety of institutions. Jane Mansbridge et al., A Systemic Approach to Deliberative Democracy, in Deliberative Systems: Deliberative Democracy at the Large Scale (John Parkinson and Jane Mansbridge eds., 2012). Under a systemic approach, the focus is on the interdependence and interaction of the institutions within a larger system rather than with individual sites. Id. at 1. Although this article considers various institutions within the electoral process, it does not address the interactions among these institutions. In addition, my use of the term “deliberative moments” ought to be distinguished from Bruce Ackerman’s “constitutional moments.” See Bruce Ackerman, We the People: Foundations 6–8, 266–94 (1991). My thanks to Ron Levy for this point.

\(^73\) See Ron Levy, “Deliberative Voting”: Realising Constitutional Referendum Democracy, Public Law 555, 558 (2013) (arguing that in the context of a constitutional referendum, voting could be made more deliberative by the format, wording, and content of the referendum).
best criteria for deliberation might offset one another, thereby producing an overall system that approximates the ideal of deliberative democracy. We can imagine, for instance, that relaxing the requirement of public reason or consensus could correct for the failure of the equality criterion. By opening the deliberative exercise to partial perspectives, and by removing the criterion of consensus, the deliberative exercise would become more inclusive of those who are less advantaged in society, and the resulting discussions might be more likely to approximate first-best deliberation than if all variables but one were first-best. By the same token, allowing for nonideal manipulative speech, such as rhetoric, might help to offset the nonideal inequality among participants because it would provide the less advantaged in society with a greater range of tools with which to persuade other deliberators. Adrian Vermeule includes deliberative democracy as one arena in which the off-setting benefits of nonideal elements can take place. He points to the position of Mansbridge et al. who argue that appeals to self-interest can be legitimate when other deliberators are also appealing to their self-interest. Vermeule shows that this position can be understood from a second-best perspective: when some deliberators violate the first-best requirement of impartiality, other deliberators may follow suit in order to approximate the first-best requirement of power-free deliberation.\textsuperscript{74}

Some people might object that my description of second-best deliberation, while perhaps feasible, is not desirable. One possible objection is that the concept of deliberation as engagement with ideas about politics is so inclusive that it cannot be readily distinguished from interest group politics. There is no doubt that the expansiveness of a second-best approach is a drawback. Yet, I think there are benefits that flow from a more inclusive approach to deliberation. As a start, it should be noted that second-best deliberation falls along a spectrum and, as such, it includes some activities that are also found within ideal theories of deliberation. The other end of the spectrum—the most minimalist form of second-best deliberation—would certainly overlap with certain aspects of interest group politics. An important objective of a more expansive approach is to recognize the deliberative aspects of ordinary politics. Rather than crafting a clear line between deliberation, on the one hand, and interest group politics, on the other hand, the objective would be to identify and protect those deliberative moments that take place within ordinary politics.

A related objection is that second-best deliberation serves to redeem or cover up the failures of deliberative democracy. There is no doubt that much of contemporary politics does not meet the requirements of first-best deliberative democracy. Because of these manifest failures, some people would hold that the deliberative ideal does not have any relevance for our evaluation of contemporary democracy. A second-best approach to deliberative democracy, however, allows us to revisit the concept of deliberation and to identify ways in which it continues to be relevant as an aspiration. Instead of treating ordinary politics as a failure of deliberation, the idea would be to recognize and enhance the deliberative moments that do exist within contemporary political practice.

Another possible objection is that the most minimal form of second-best deliberation does not meet enough requirements to qualify as deliberation. Without doubt there will be considerable disagreement about the minimum requirements that must be satisfied in order for us to conclude that deliberation has indeed taken place. I would like to suggest, though, that the second-best approach, while a dilution of first-best deliberative theory, retains enough of the original impulse to qualify as deliberative engagement. Although second-best deliberation takes different forms depending on the context, the emphasis is on the importance of engagement with ideas about politics. Underlying the second-best approach is a normative commitment to a certain vision of democracy—one which prizes participation, dialogue, dissent, and debate. Such things are valuable to democratic politics because they allow for dynamism and change, and because they enhance democratic accountability and legitimacy. Under a second-best approach, engagement by citizens serves to hold public officials accountable, as does the requirement that these officials engage in reason-giving.\textsuperscript{75} But I think it is possible to agree that deliberative democracy falls along a continuum even if

\textsuperscript{74} Vermeule, supra note 51, at 32 (citing Mansbridge et al., supra note 63, at 83).

\textsuperscript{75} For example, John Dryzek argues for discursive democracy, which is “critical in its orientation to power structures, including those that operate beneath the constitutional surface of the liberal state, and so insurgent in relation to established institutions.” Dryzek, supra note 13, at 2.
there is no consensus as to how minimalist deliberation can become before it loses traction as a concept.

III. DELIBERATION AND ELECTION LAW

There are good reasons to think that election law does not, for the most part, live up to the ideals of deliberative democracy. The question I examine here is how election law measures up to second-best deliberative democracy. To what extent does election law provide opportunities for second-best deliberation? When does election law protect the conditions necessary for deliberation and when does it undermine them? Does election law, and the structures it sets up, provide multiple sites for deliberative moments?

In what follows, I examine a number of topics at a fairly high level of abstraction. One assumption I make is that it is hard to draw a line between the electoral and the political, in part because politics takes place within and is thereby shaped by the electoral infrastructure and in part because the electoral system is itself a subject of politics. In general, I find that there are several opportunities for second-best deliberation, but that some of these opportunities are being undermined by various jurisprudential shifts.

In addition, I argue that election law plays a very important role in protecting the normative requirements that theorists have identified as being necessary for deliberation. These conditions include equal access and participation, equal influence, transparency, impartiality, and accountability. It should be noted that the presence of these conditions does not necessarily guarantee deliberation as an empirical matter; rather, these conditions have been identified as necessary for deliberation at a theoretical level. These conditions are means to deliberation but they are also ends in themselves. We value these conditions on their own merits and not only because they are required for deliberative democracy.

A. Constituency formation and electoral redistricting

The creation of constituencies has important implications for second-best deliberation. The design of the constituency determines what is politically relevant. As Andrew Rehfeld observes, the definition of electoral constituencies shapes the interaction of citizens with one another. It also structures the “incentives representatives face when they deliberate on and make law.” Theorists of descriptive representation, for example, hold that representatives ought to mirror the population that they represent. The idea is that descriptive similarity between constituents and representatives will enhance deliberation in the legislature by bringing multiple perspectives to bear on a given policy discussion. One of the justifications of majority-minority districts is that the presence of minority-preferred candidates in the legislature has a positive impact on the deliberation of elected representatives. The idea is that a heterogeneity of viewpoints is required for deliberation.

Rehfeld argues that there are many dimensions along which constituencies can be organized, and one of these dimensions is heterogeneity, which refers to the “extent to which the members of a constituency share a certain feature, such as the same race or profession, territorial location, or political party membership.” As Rehfeld and other scholars have noted, institutionalizing deliberative diversity in the legislature gives rise to the following paradox: “A more inclusive or heterogeneous legislature is often achieved at the cost of greater homogeneity within the electoral constituency.” Majority-minority districts, for instance, require a relatively homogenous district in order for the minority-preferred candidate to be elected. Rehfeld argues that this creates the paradox that we “promote diversity of voice within a representative body by denying it within the constituency.” Chad Flanders observes that majority-minority districts thus present trade-offs between

76Gardner, supra note 40 (with respect to electoral campaigns).
7The electoral infrastructure exerts a more subtle influence because deliberation takes place in the shadow of the decision procedure, such as voting, by which the deliberation is concluded. Thus, the structure of the decision procedure will affect the deliberation that takes place. Ferejohn, supra note 7, at 90.
7Id.
8Hanna Pitkin, The Concept of Representation 60–61 (1967).
8Rehfeld, supra note 78, at 7.
8Id. at 26.
8Id. at 27.
deliberation at the level of Congress and deliberation at the level of citizens.85 One illustration of this trade-off takes place with respect to influence districts (such as those at issue in Georgia v. Ashcroft) which improve deliberation within the district, but which augment the likelihood that the minority-preferred candidate will lose at the congressional level.86

I claim, however, that there are important second-best deliberative benefits to be had from majority-minority districts. Majority-minority districts provide an opportunity for historically excluded citizens to engage politically with one another, thereby creating a richer sense of political community and identity. Cass Sunstein notes, for instance, that enclave deliberation might provide an important forum for marginalized groups to discuss and develop their views.87 The dangers of polarization are arguably fewer for majority-minority districts than for minority enclaves, but the general observation about deliberative benefits likely applies equally to both. As Nicholas Stephanopoulos has demonstrated, voters are less engaged in the political process when they are placed in heterogenous districts.88

Heather Gerken’s arguments about the value of second-order diversity support a similar position. Second-order diversity refers to variation among decision-making bodies rather than variation within them.89 Gerken argues that second-order diverse bodies, such as majority-minority districts, give electoral minorities control over certain decisions, providing them with opportunities to exercise the kind of power usually exerted by majorities. In particular, majority-minority districts provide racial minorities with the “dignity to decide.”90 Second-order diversity diversifies the types of views that are expressed—a kind of diversity that might otherwise be lost if every decision-making body was first-order diverse.91 It also enhances the participatory habits of minorities and majorities.92 Minority group members have to put an agenda together, forge compromises, respond to dissenters, and experience the benefits and burdens of decision making.93 Majority-minority districts offer an important source of “participatory energy” by providing opportunities for minorities to develop their views.94

Another argument for the second-best deliberative possibilities of majority-minority districts is Michael Kang’s theory of democratic contestation. Kang argues that the Voting Rights Act, by providing for majority-minority districts, generates democratic contestation that disrupts fixed and stagnant discourses.95 Minority citizens who once joined forces to withstand the white majority have the freedom in a majority-minority district to explore the differences and disagreements that exist within their group.96 Kang’s theory of democratic contestation shows that majority-minority districts energize the democratic process by fostering discourse and debate.97 Under this top-down approach, political leaders engage in deliberative competition to organize and shape the political viewpoints of otherwise disconnected and disorganized citizens.98 The theory of democratic contestation sets forth a realistic model of participatory politics that is sensitive to the limitations of politics but nonetheless provides opportunities for engagement and deliberation.99

Similar kinds of observations can be made about partisan gerrymandering. As Gardner notes, partisan redistricting has implications for how citizens choose questions to take up and how they resolve them through participation in collective decisions.100 Rehfeld’s proposal that citizens should be randomly assigned to a national permanent electoral constituency likewise illustrates the connection between electoral districts and deliberation. He acknowledges that such a plan would dramatically decrease the incentives among neighbors to deliberate with one another since they would no longer be “relevant deliberators.”101 In sum, electoral rules regarding constituency formation determine the

85Flanders, supra note 4, at 165.
86Id. at 166.
87Sunstein, supra note 37, at 76.
90Id. at 1142–43.
91Id. at 1104.
92Id. at 1145.
93Id. at 1148.
94Id. at 1151. Dissenting by deciding occurs when minorities enjoy a local majority on a decision-making body and can thus decide the outcome. See Heather K. Gerken, Dissenting by Deciding, 57 Stan. L. Rev. 1745, 1748 (2005).
96Id. at 781.
97Id. at 738, 756.
98Id. at 758.
99Id. at 759.
101Rehfeld, supra note 78, at 217.
identity of the relevant deliberators and the substance of the deliberation.

B. Political parties and partisanship

Partisanship appears to create a serious obstacle for deliberation because people’s opinions on policy issues are predetermined to some degree by their partisan identities. I suggest, however, that while partisanship likely violates the criteria for first-best deliberation, it is not necessarily an impediment to second-best deliberation. The basic proposition is that ethical partisanship is compatible with second best deliberation. As Nancy Rosenblum argues, there are three democratic values of partisanship: inclusiveness, comprehensiveness, and a disposition to compromise. Partisan inclusiveness refers to the fact that partisans seek to obtain the approval of the people as a whole in order to win elections. Partisan comprehensiveness refers to the phenomenon that partisans publicly present a comprehensive vision of their general approach to social problems; that is, they must advance a conception of the common good in order to get elected. Third, partisans have the ability to compromise within the party to select candidates and policy positions. All three virtues of partisanship have a second-best deliberative aspect to them. In the process of developing party platforms, selecting candidates, and mobilizing voters, partisans are engaging with ideas about politics.

Political parties also play an indispensable role in democratic government. As Russell Muirhead argues, parties mobilize voters, simplify choices, recruit candidates, organize the structure of government, and enable citizens to hold the governing party accountable at elections. Rosenblum points out that parties regulate rivalries, organize political involvement and issues, and create the lines of division through which politics takes place. Political parties thus provide the venue and structure within which second-best deliberation has relevance and meaning.

Partisanship does, however, have its dark side. As Muirhead observes, partisan loyalty can descend into what he calls “epistemic closure” which refers to a complete rupture between loyalty and reason. At this point, partisans become completely closed to negative evidence about the party’s positions, and partisan loyalty is akin to a deep-rooted prejudice. It is fair to say that contemporary hyper-partisanship often exhibits epistemic closure. Extreme partisan polarization significantly disrupts the possibilities for second-best deliberation among citizens and elected officials alike. In recent years, political parties have become increasingly polarized with the result that political gridlock is now commonplace. The empirical evidence shows that political parties have become more internally homogenous and more ideologically polarized from each other than ever before in American history. In addition, there is a vicious cycle of polarization in which partisan elites become polarized, thereby triggering increased polarization among citizens, which in turn fuels further polarization among partisan elites as they react to the demands of their constituents. As Richard Pildes argues, extreme partisan polarization is now the “defining attribute” of the U.S. political system.

Partisanship also impedes second-best deliberative possibilities by undermining the conditions necessary for deliberation, such as equal access and participation, equal influence, transparency, and accountability. The problems of partisan self-interest and self-entrenchment, and their manifestation in the political market, are the central preoccupations of the election law field. The principal-agent problem affects every area of

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103 Id. at 361.
105 Rosenblum, supra note 102, at 13, 119–21.
106 Russell Muirhead, Partisan Loyalties, in NOMOS LIV (Sanford Levinson et al. eds., 2013).
108 Id. at 219.
election law, including the rules that are designed to prohibit third parties. For example, the Court’s ban on fusion candidacies, its treatment of blanket political primaries, and restrictive ballot access laws serve to exclude minor parties and independent candidates. Electoral rules that are designed to prohibit the emergence of third parties have implications not only for access to the political process but also for the mix of ideas that form part of the electoral discourse. Deliberation, both first-best and second-best, is affected directly by the unavailability of certain interlocutors and viewpoints, and indirectly by the exclusion of certain groups which would otherwise have the status of political parties.

C. Campaign finance regulation

A basic premise of deliberative democracy is that citizens must have equal opportunity of access to political influence at both the agenda-setting and decision-making stages. Equal opportunity of influence is undermined when certain participants enjoy an unfair advantage. To what extent do campaign finance laws affect deliberation? Speech libertarians would argue that campaign finance regulations suppress deliberation because they suppress speech. By contrast, speech egalitarians would argue that campaign finance regulation allows for a more balanced mix of views, thereby enhancing deliberation. As Cass Sunstein observes, restrictions on campaign finance “promote political deliberation and political equality by reducing the distorting effects of disparities in wealth.”

Although second-best deliberation would not have as stringent a need for equality of influence as first-best deliberation, it would nonetheless be important to avoid profound asymmetries in influence. The Supreme Court’s commitment to ensuring equality of influence, however, has become increasingly weak in recent years. Although the Court rejected an equalization rationale in Buckley v. Valeo, the understanding of corruption, at least by some of the justices, had broadened into a commitment to antidistortion. In Austin v. Michigan State Chamber of Commerce, for example, the Court found that large expenditures have “corrosive and distorting effects” since they do not necessarily reflect public support for the corporation’s political ideas.

The majority in Citizens United, however, emphatically rejected the antidistortion justifica-

111 Pildes, supra note 110, at 40, 43.
113 Knight and Johnson, supra note 26, at 281. As Christopher Zurn puts it, “in a democratic form of government all citizens ought to have some significantly equal opportunities to influence government actions.” CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 73 (2007).
114 Knight and Johnson, supra note 26, at 293.
119 Id. at 660.
123 Citizens United, 558 U.S. at 914–16.
124 In McConnell v. FEC, 540 U.S. 93 (2003), the majority found that corruption did not simply mean “cash-for-votes exchanges,” but also encompassed the “undue influence on an officeholder’s judgment, and the appearance of such influence.” Id. at 150.
found that access and influence do not amount to corruption. Although the Court’s position on corporate speech rights did not amount to a drastic change, its decision has significant implications for democratic participation and deliberation. *Citizens United* is said to have led to nearly $1 billion in additional spending in 2012.

The Court’s commitment to equality of influence will be put to the test once more. The Court recently agreed to hear a case that is already being billed as *Citizens United II*. The case, *McCutcheon v. FEC*, involves a challenge to federal campaign contribution limits. The specific issue being challenged is the overall caps on contributions, which are currently set at $117,000 over a two-year period. Shaun McCutcheon, joined by the Republican National Committee, is arguing that his First Amendment rights are violated because the overall caps are preventing him from “engaging in political speech and associating with the candidates of his choosing and like-minded individuals.”

Mr. McCutcheon is urging the Supreme Court to revisit *Buckley’s* distinction between contribution limits and spending limits, arguing that contribution limits should also be subject to strict scrutiny instead of the less rigorous “exact scrutiny.” The plaintiffs claim that the real objective of the biennial limits is antidistortion, which has been rejected by the Court as an illegitimate government purpose. In addition, they contend that the anticorruption interest cannot be applied because the biennial limits do not apply to any particular candidate, nor do they serve any anticircumvention interest. Although the district court upheld the biennial limits on the basis of the government’s anticorruption and anticircumvention interests, the court concluded with the following: “Plaintiffs raise the troubling possibility that *Citizens United* undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us.”

If the Court does abandon the distinction between contribution limits and spending limits, it is likely that the unequal influence of money will become even more evident. In addition to raising corruption concerns, an absence of contribution limits has implications for second-best deliberation. As Spencer Overton argues, widespread participation in contributing to campaigns leads to greater democratic engagement by citizens, and it also serves an anti-corruption function because candidates are beholden to a larger group of donors. If contribution limits were lifted, however, the donations of ordinary citizens would be completely swamped by the donations of the wealthy.

D. The Voting Rights Act

A five-to-four majority of the U.S. Supreme Court recently struck down section 4 of the Voting
Rights Act (VRA) in *Shelby County v. Holder.* Section 4 sets forth a coverage formula used to determine which jurisdictions are required (pursuant to section 5 of the VRA) to seek preclearance from the federal government before changing voting rules or electoral districts. In an opinion for the majority, Chief Justice Roberts held that the coverage formula is unconstitutional because it is based on old data and eradicated practices, and hence, is not responsive to current conditions. By striking down section 4, the Court has effectively negated section 5 (at least until the unlikely event that Congress agrees to a new coverage formula). Although there is no doubt that the VRA raises various dilemmas, the preclearance process has played a central role in protecting the right to vote. As noted by Justice Ginsburg in dissent, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

The elimination of the preclearance process will likely have a significant impact on the voting rights of racial minorities. There are justifiable fears that states will enact voting regulations that make it more difficult for racial minorities to vote. Indeed, as we have seen in the recent election cycle, there continue to be concerns about access to voting and participation. In 2012, section 5 of the VRA was used to block voter identification requirements in Texas. Voter identification rules are justified on the basis that they prevent fraud, but measures that are (ostensibly) preventing voter fraud are making it more difficult for low-income and minority voters to vote. Section 5 was also used to prevent cutbacks on early voting in Florida and a redistricting map in Texas that violated the VRA. Not only will it be difficult for racial minorities to challenge these electoral rules post-hoc in court, it is a near certainty that states will continue to enact laws that undermine access to voting. Given the propensity of racial minorities to vote for the Democratic Party, Republican-dominated legislatures will have strong incentives to enact laws that depress Democratic turnout.

The Court’s decision also negatively affects the second-best deliberative role played by the Voting Rights Act. Under the preclearance process, the state has to justify its changes to the electoral process by providing reasons to the federal government as to why the proposed changes do not have retrogressive effects on racial minorities. The federal government has to consider the state’s reasons and provide a response that also must be based on reasons. In addition, much of the interaction over preclearance is conducted informally. This informal back and forth dialogue provides an important avenue for second-best deliberation. It also has the practical outcome of ensuring that covered jurisdictions exercise caution and do not inadvertently create retrogression. As Nathaniel Persily observes, the Department of Justice’s “Requests for More Information” can lead to a withdrawal of the proposed voting change. In addition, these deliberative moments are concerned with the topic of racial

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139The Supreme Court upheld the Voting Rights Act (VRA) in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Section 5 applies to Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and various parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.
140The district court held that Congress did validly extend the New Voting Rights Act in 2006 because there was considerable evidence in the legislative record of historical and current patterns of state led voting discrimination. Shelby County v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011). A divided court of appeal also rejected the challenge to the law. Judge Tatel, writing for the majority, held that Congress drew reasonable conclusions from the considerable evidence that racial discrimination in voting continues to be a serious problem in the covered jurisdictions. Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012).
142Persily, supra note 139, at 223, 237–38 (describing a wide array of difficulties, including the analytic problems in distinguishing racial and partisan redistricting); Kareem Crayton, *Reinventing Voting Rights Preclearance,* 44 IND. L. REV. 201, 202 (2010) (arguing that the preservative strategy followed by the proponents of the 2006 extensions of the VRA “essentially left in place pathologies that have plagued the system during the last few decades.”).
145In *Texas v. Holder,* the district court struck down Texas law requiring voters to present a photo ID pursuant to section 5 of the VRA on the basis that the requirement will likely have a retrogressive effect. Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012).
147In Florida, changes were made to the days and hours that counties may use for early in-person voting. The court did not preclear Florida’s early voting changes because the state failed to satisfy the burden of proving that the changes will not have a retrogressive effect on minority voters. Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012).
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Bruce Ackerman and James Fishkin propose the establishment of a new national holiday that would take place two weeks before national elections. The design of Deliberation Day is partially based on the Deliberative Polls. Groups of voters would meet to discuss the major issues at stake in the election. There would be a National Issues Debate

E. Institutional sites for second-best deliberation

Second-best deliberative democracy envisions multiple sites across the democratic system that provide opportunities for deliberative moments. This section catalogues additional sites for first-best and second-best deliberation. I have divided these sites into two categories: (1) institutions that have been established or proposed for the express purpose of providing a venue for first-best deliberation; (2) institutions that have been established for other purposes, mainly election administration and reform, but which provide opportunities for first-

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153 Richard H. Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote, 49 HOWARD L. J. 741, 743 (2005). Because the VRA model is limited to certain geographic areas and to retrogressive changes in voting rules, Pildes suggests that it is less well suited to redressing current problems.
154 If Congress took this route, it would provide yet another opportunity for second-best deliberation.
155 Deliberative polling is also connected to shifts in voting behavior.
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between the two principal national candidates, in addition to deliberative forums consisting of groups of fifteen people where every participant is given an opportunity to speak.\textsuperscript{160} Ackerman and Fishkin note that the Deliberative Polls show that “ordinary citizens are remarkably good at productive interchange— hearing out spokespersons for different sides, and changing their minds on the basis of new arguments and evidence.”\textsuperscript{161} The authors argue that the challenge is to provide the institutional contexts within which citizen deliberation can take place.\textsuperscript{162}

Ethan Leib argues for the creation of a fourth branch of government which would enable the people to engage in deliberation.\textsuperscript{163} This branch would be known as the popular branch of government, and it would have the power to enact laws that could be repealed or vetoed by the executive or legislative branches or challenged in the courts.\textsuperscript{164} The branch would consist of stratified random samples of 525 voters that would debate in smaller groups in a manner similar to Fishkin’s Deliberative Polls.\textsuperscript{165} A commission would be responsible for the administration of the fourth branch.\textsuperscript{166}

In a similar way, Archon Fung’s study shows that it is possible for urban bureaucracies, such as police stations and school systems, to incorporate “empowered participation and deliberation into their governance structures.”\textsuperscript{167} These institutional innovations allow for first-best deliberation to be brought into the structure of governance, and they respond to the objection that deliberation is simply not feasible in the context of large nation states.

2. Institutions for election administration and reform. Another avenue for second-best deliberative opportunities is presented by institutions that engage in election administration or election reform. In recent years election law scholars have focused increasing attention on the role that nonjudicial institutions can play in improving elections.\textsuperscript{168} The objective of the “new institutionalism” approach is to harness politics in order to fix politics—principally by aligning the incentives of power-holders with the public interest.\textsuperscript{169} These nonjudicial processes and institutions provide significant opportunities for second-best deliberation, in addition to protecting the conditions necessary for deliberation.

There are various initiatives that foster engagement by citizens. The citizens’ assemblies in British Columbia (BC) and Ontario, for instance, were premised on the idea that a group of citizens could deliberate and propose a new electoral scheme. The BC Citizens’ Assembly on Electoral Reform consisted of 160 citizens who convened over an eleven month period in 2004. The Assembly met with experts, consulted with the public, and engaged in deliberation.\textsuperscript{170} The Assembly proposed that the province switch from a first-past-the-post single member system to a single transferable vote system. The proposal was subject to a referendum, and approval required meeting a double supermajority threshold of 60 percent of the vote province-wide and a majority in 60 percent of the districts. While the vote passed the second requirement, it failed to meet the first, having received 57.7 percent of the vote province-wide.\textsuperscript{171} The process was not perfect from a deliberative perspective,\textsuperscript{172} but the
success of the Assembly demonstrates the legitimacy that citizens’ assemblies enjoy with the public.\textsuperscript{173}

Independent commissions provide another avenue for second-best deliberation. Bruce Cain identifies four kinds of independent redistricting commissions: advisory commissions, backup commissions, politician commissions, and independent citizen commissions (ICCs).\textsuperscript{174} The independent citizen commissions vary in terms of their separation from elected officials and their autonomy to enact district plans without legislative approval.\textsuperscript{175} In six states, ICCs are authorized to draw state and congressional lines. While independent redistricting commissions do buffer redistricting from partisan influence they do not eliminate it completely.\textsuperscript{176} Cain argues that the most important feature of ICCs is their “capacity to negotiate to meet supermajority vote thresholds and agree on reasonably imperfect plans (i.e., good redistricting deliberation).”\textsuperscript{177} Independent commissions provide a site for second-best deliberation among a wide array of actors.

Chris Elmendorf argues for the establishment of a permanent advisory commission that could propose election law reforms.\textsuperscript{178} After engaging in a comparative study of commissions in Australia, Canada, the United Kingdom, and the United States, Elmendorf concluded that an advisory commission was preferable to either a constitutional court (which would override the legislature) or a regulatory commission (which would supplant the legislature). The advisory commission, which would place its proposals on the legislative agenda or a referendum ballot, would help to prevent partisan self-entrenchment.\textsuperscript{179} The advisory commission would also be able to engage in the long-term monitoring of reforms, and offer criticisms and suggestions with respect to the government’s actions.\textsuperscript{180} An advisory commission would engage in deliberation both internally and externally.

President Obama has recently established a new presidential commission to look at election administration. The commission is charged with finding new ways to improve the voting process and to reduce the long lines at polling stations. There are some worrisome examples—for instance, almost 200,000 voters in Florida reportedly gave up without voting.\textsuperscript{181} The commission has a bipartisan leadership with Robert Bauer and Ben Ginsberg at the helm. But because elections are based on local and state laws, there is some doubt about how much can be fixed through a presidential commission or through Congress.\textsuperscript{182} In any event, the commission is yet another site for second-best deliberation.

One recent innovation that fosters debate and deliberation about the health of the electoral system is the Pew Research Center’s study of election administration in the fifty states. This study was inspired by Heather Gerken’s book \textit{The Democracy Index}.\textsuperscript{183} The Elections Performance Index (EPI) provides the first comprehensive analysis of election administration across the country. The EPI is based on 17 indicators including polling location wait times, percentage of voters with registration or absentee ballot problems, voter turnout, accuracy of voting technology, and availability of voting information tools online. The EPI includes data from the 2008 and 2010 elections. As an example, Mississippi received the low EPI score of 42\% while Wisconsin received the highest score of 83\%. The EPI will measure performance over time, and will enable states and citizens to track progress on these issues. The EPI is important for improving the conditions, such as access to voting, that are needed for deliberation, but the EPI also fosters deliberation about the electoral system.

Finally, the Internet is another possible arena for deliberation. Some people argue, however, that the Internet undermines deliberative democracy.

\textsuperscript{173} Heather K. Gerken, \textit{The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics}, \textit{6 Election L.J.} 184, 198–99 (2007). The members of the Assembly were chosen through a combination of initial stratification and random selection such that the final group was more or less descriptively representative of the population of the province. Mark E. Warren, \textit{Citizen Representation}, in Warren and Pearse, \textit{supra} note 170, at 50, 58–59.


\textsuperscript{175} \textit{Id.} at 1817–19.

\textsuperscript{176} \textit{Id.} at 1842.

\textsuperscript{177} \textit{Id.} at 1843.


\textsuperscript{179} \textit{Id.} at 1371.


\textsuperscript{182} \textit{Id.}

\textsuperscript{183} Gerken, \textit{supra} note 173.
because it permits selective exposure to ideas. Cass Sunstein, for example, argues that the Internet can lead to polarization because users will tend to engage only with like-minded individuals. In contrast, other people argue that the Internet can strengthen deliberative democracy. The Internet provides equal and unrestricted access to information. In addition, various scholars have argued that the Internet enables people to encounter opinions to which they would not ordinarily be exposed. The Internet also provides opportunities for interaction.

For example, the Internet is used as a public platform by civil organizations and non-governmental organizations (NGOs) to foster discussion on topics of interest. Communication on the Internet often has a dual character: it simultaneously provides information and interaction. John Maynor argues, for instance, that “blogging has the potential to develop into a dynamic deliberative community consistent with the main theoretical ideals of deliberative democracy.” In contrast to traditional media, blogs not only provide a greater variety in the viewpoints presented, but they also allow for interaction between and among authors and readers.

Social media are playing an increasingly important role in elections. Blogs and twitter accounts provide deliberative opportunities for a wide array of actors including citizens. As Peter Dahlgren notes, there are “literally thousands of Web sites having to do with the political realm at the local, national, and global levels; some are partisan, most are not.” Dahlgren identifies different types of net-based public spheres, including e-government sites, advocacy and activist sites, civic forums, pre-political or parapolitical domains, and the journalistic and media domains. Empirical research shows more citizens have visited e-government websites than have sought information about finances, travel, or sports scores online. Citizens who are specifically interested in democratic politics have developed initiatives to foster online deliberation. For example, the Minnesota E-Democracy was established in 1994 to provide citizens with an “online commons.” There are also opportunities for citizens to comment on elections and electoral structures through various websites such as the Public Mapping Project. Although there is a wide variety in terms of the quality of deliberation in virtual public spaces, the Internet does provide an important forum for both first-best and second-best deliberation. Rather than being exclusively advantageous or disadvantageous, the Internet’s contribution to deliberative democracy is dependent on the context in which it is being used.

CONCLUSION

This article argues for a second-best theory of deliberative democracy. Second-best deliberation is defined as an engagement with ideas about politics. It can take multiple forms, such as reason-giving, conversations, debate, log-rolling, bargaining, and conflict. In addition, I claim that the criteria for deliberation should change depending on the actors and institutions involved. Deliberation among ordinary citizens might mean informal conversations about politics in a wide array of venues, while deliberation among judges would require

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186Antje Gimmler, Deliberative Democracy, the Public Sphere and the Internet, 27 Phil. & Soc. Criticism 21, 32 (2001).
187Lincoln Dahlberg, Rethinking the Fragmentation of the Cyberpublic: From Consensus to Contestation, 9 New Media & Soc. 827, 830–31 (2007).
188Gimmler, supra note 186, at 32 (2001).
189Id.
193Dahlgren, supra note 190, at 149–50.
194Id. at 153.
199John Street and Scott Wright, Democracy, Deliberation and Design: The Case of Online Discussion Forums, 9 New Media & Soc. 849, 850 (2007).
reason-giving. For this reason I argue that deliberation should be viewed as context-dependent rather than as a fixed and universalist ideal. Deliberation is thus best understood as existing along a spectrum. At one end of the spectrum is first-best deliberation, while at the other end of the spectrum is the most minimalist version of second-best deliberation. Although there may be disagreement about whether a particular ideal theory of deliberation is “first-best” or “second-best,” there will likely be agreement that certain theories are normatively less demanding than others. The concept of second-best deliberation focuses attention on the fact that some versions of “ideal” deliberation contain several nonideal elements.

The concept of second-best deliberation offers a way forward with respect to the distinctly nonideal aspects of contemporary democratic practice. In particular, I argue that second-best deliberation provides a useful standard against which to measure the deliberative possibilities and shortcomings of the electoral process. Although the electoral process does not live up to the ideal of first-best deliberative democracy, I show that it does, in certain respects, meet the requirements of second-best deliberation. Under a second-best approach to deliberative democracy, the goal would be to protect and create opportunities for deliberative moments across multiple sites in the democratic system. This article shows that there are many sites for second-best deliberation in the democratic process including political parties, majority-minority districts, independent commissions, citizens’ assemblies, and Internet sites. At the same time, election law does fall short of second-best deliberation in certain ways. Not only can electoral laws and the judicial decisions concerning them reduce the opportunities for deliberation, they can also undermine the normative conditions required for deliberation. In addition to creating opportunities for first-best and second-best deliberation, a central task of the election law field should be to protect these conditions—including equal access and participation, equal influence, transparency, impartiality, and accountability—that enhance the deliberative dimension of democratic politics.

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