

DEMOCRACY AS MEANINGFUL CONVERSATION

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I

Much discussion of democracy in the United States, popular as well as scholarly, employs simple, descriptive models of that democracy. The most commonly encountered of these is what I call the “vote-centered” model of democracy. Under this vote-centered model the public policy outcomes produced by legislatures are traceable to equally weighted voter inputs. Another model that makes frequent appearance in the literature about democracy is an “interest group” model, under which democratic outcomes are depicted as “equilibrium” states in struggles among competing powerful, organized groups. For a variety of reasons, I do not think that either of these models¹ does a very satisfactory job of integrating the phenomena of American democracy. I will have something to say later about the interest group model, but the deficiencies in the dominant vote-centered model are particularly glaring and, because of its dominance, particularly important. The vote-centered model will be my principal foil in this Comment, as I advance another possibility, what I call “democracy as meaningful conversation,” under which the citizenry is engaged by ongoing public conversation

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1. Democracy can be and has been modeled in a large variety of ways. See generally, David Held, *Models of Democracy* (Stanford U. Press, 2d ed. 1996). I will mention a few other models in passing, but my purpose is not to exhaustively catalogue the strengths and weaknesses of each extant model, but rather to criticize the dominant one and open up the power and possibilities of a new one.

about public policy, and it is this engagement that is the stabilizing force in the system.

The existing descriptive models are not typically referred to as "models." They are not in any sense formal models. Indeed, they are usually implicit in discussions of democracy, rather than explicit. Even if implicit, however, they are models in the sense that they encapsulate American democracy by reference to certain central features. And they are simple models by virtue of the fact that the features they employ are few in number. As these simple models are made explicit, certain difficulties in the modeling process come into focus that are probably best highlighted from the outset.

Models can be descriptive or normative, or even both at once. While the line between the two is in principle tolerably clear, it is also difficult to heed. Descriptive models describe what is, frequently ascribing causal connections among parts of what is modeled, and even predicting results to be expected if changes are made.² In contrast, normative models provide an ideal to be strived for, or perhaps only dreamt of, but that need not now exist, or even be attainable. Still, models advanced as description are often likely at least to insinuate normative judgments. For all descriptive models are selective. They choose some features of the system they purport to model to the exclusion of others. The simpler the model, the more selective it will be. And if what a model identifies as encapsulating the modeled system is seen as a desirable feature rather than an undesirable or a normatively neutral one, then the model perforce has a normative twist.

Holding the line between descriptive and normative models is additionally complicated by the fact that models consciously designed as normative are seldom greatly divorced from the reality they seek to instruct. If the distance is too great, the task of bridging it will likely seem too substantial to justify the bother. For this reason there will typically be a high degree of correspondence between normative models and the portion of the real world in view, so that even normative models may easily be mistaken for description—by the consumers of commentary based on models, but also on occasion by the commentators.

2. It is possible to have a descriptive model that carries no predictive implications, and also to have a model that predicts while not containing anything that might plausibly be called "description." Most descriptive models do, however, have pretensions of predictive power, and the model I propose is of that sort.

The difficulty of holding the line between description and prescription is especially acute when modeling democracy,³ probably because the appeal of democracy in the modern day is at once so great and so badly in need of explanation. Whatever the reasons, the descriptive and the normative are thoroughly intermixed in existing uses of the vote-centered model. My criticisms will largely be on a descriptive plane, but it may occasionally be that the criticisms unjustifiably mistake for description what was intended as prescription. And while the inspiration for the conversational model is description, the prescriptive pull has proved irresistible for me as well. What democracy as meaningful conversation purports above all to describe and explain is stability in the system, which it traces to widespread conversational involvement of the citizenry. Stability is usually viewed as a desirable feature of political systems, especially when, as with the conversational model, it is not the product of coercion. For that reason I will often ascribe virtue to conversational phenomena. But I want to be clear that any normativity in the conversational model is decidedly limited. Stability is surely not the only, or even necessarily the highest, virtue in systems of government, nor do I claim that the conversational model identifies the only source of stability in democracies.

Even on a descriptive level, simple models of complex things can easily mislead, for they will inevitably fail to account for a good deal of the complexity. For large scale social phenomena like democracy in the United States, controlled experimentation is unavailable, so that ascribing causal connections must always be done cautiously and tentatively. If two models describe and explain different things, moreover, there will be no common metric by which to judge one more "accurate" than the other, and also no objectively verifiable basis for saying that the one rather than the other has described the "right" thing. Despite these difficulties—or perhaps because of them—the more complex a phenomenon of interest, the more inevitable and useful simple models will be. They break the complexity down into a more useable form, one that can facilitate understanding and discussion. In such a setting the appeal of a model will necessarily rest not on some systematic basis for choice, but on informed intuition about whether the model identifies important things and provides a measure of coherence in its account of diverse phenomena. It is on this basis that I believe that democ-

3. See Held, *Models of Democracy* at 8 (cited in note 1).

racy as meaningful conversation succeeds. The description it provides is by no means comprehensive, but the model does point the way to connections among important features of American democracy that the vote-centered model, its most prominent competitor, misses or muddles.

I begin in Section II with some sounds of silence that got me thinking about deficiencies in the vote-centered model and about alternatives to it. I begin with the almost unquestioning acceptance of the apportionment of the United States Senate.

II

The absence of controversy over the apportionment of the Senate is striking. In the Great Compromise of 1787 that opened the way for agreement on the Constitution, the House of Representatives was apportioned among the states by population (with the significant qualification that each state is entitled to at least one representative), while the Senate was apportioned by states, with each entitled to two Senators. This equal Senate representation of the states is declared by the Constitution to be unalterable without a state's consent.⁴ The obvious consequence is that populous states have less representation per capita in the Senate than thinly populated ones (while citizens in territories and the District of Columbia have none at all). In 1787 the disparity in population between the more and less populous states was already significant⁵—that is what necessitated the compromise—and it has grown over the years. Today the ten most populous states have more than fifty percent of the nation's population. California alone has more than sixty-five times the population of Wyoming, while each has the constitutionally prescribed two Senators.⁶ Suggestions are occasionally

4. U.S. Const., Art. V.

5. In Federalist 22 Hamilton lamented the equal state suffrage in the unicameral Congress under the Articles of Confederation. He noted that a "majority of States . . . [could comprise] a small minority of the people of America." Federalist 22 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 143, 146 (Mentor, 1961). In a footnote he calculated that at the time "New Hampshire, Rhode Island, New Jersey, Delaware, Georgia, South Carolina, and Maryland are a majority of the whole number of the States, but they do not contain one third of the people." *Id.*

6. See Robert Famighetti, ed., *The World Almanac and Book of Facts 1997*, at 384 (World Almanac Books, 1996) (relying on the Bureau of the Census, U.S. Department of Commerce, 1990 Census). According to the 1990 census, the ten least populous states—providing 20 percent of the total number of Senators—contain just over 3 percent of the nation's population. *Id.* For a discussion lamenting the situation on the basis of data from the 1980 census, see Peter Suber, *Population Changes and Constitutional Amendments: Federalism Versus Democracy*, 20 U. Mich. J.L. Ref. 409 (1987).

advanced with apparent seriousness that California be split into two states, but to the best of my knowledge the focus of concern is exclusively intrastate, asserted antagonisms or incompatibilities of north and south, and not at all dissatisfaction with the state's apportionment in the United States Senate.⁷

This seems all the more remarkable given the reapportionment decisions of the United States Supreme Court, especially the 1964 decision in *Reynolds v. Sims*.⁸ In *Reynolds* the Court decided that *both* houses of bicameral state legislatures were required to be apportioned by population. In doing so the Court was naturally called upon to explain how it was that the national legislature—most importantly the Senate—is not only allowed but required to deviate from that pattern. There is, of course, specific constitutional language governing the apportionment of the Senate, while the Constitution is basically silent on the structure of state government, save that the states are guaranteed a “Republican Form of Government”⁹—the framers’ term for what we would be more likely to call “representative democracy.”¹⁰ The Court based its decision not on that “guarantee,” which had long been held non-justiciable,¹¹ but on the Equal Protection Clause of the Fourteenth Amendment. And the Court in *Reynolds* provided an explanation for the difference in constitutional treatment of the Congress and state legislatures that on its own terms seems persuasive enough:

The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution . . . con-

7. See Katherine Bishop, *California Dreaming, 1991 Version: North Secedes and Forms 51st State*, N.Y. Times, 7 (Nov. 30, 1991). Perhaps even more striking is the apparent disinterest in the possibility suggested by a provision attendant to the annexation of Texas and its admission to the union as a state: “New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution.” Joint Resolution for Annexing Texas to the United States, 5 Stat. 797 (1845). (I am indebted to Vic Rosenblum for this reference.) For a few lonely (law professor) voices decrying senatorial representation based on states, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1070-71 (1988); William N. Eskridge, *The One Senator, One Vote Clause*, 12 Const. Comm. 159 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 Const. Comm. 213 (1995).

8. 377 U.S. 533 (1964).

9. U.S. Const., Art. IV, § 4.

10. See, e.g., Federalist 10 (Madison) in *The Federalist Papers* at 77 (cited in note 5).

11. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); see generally *Baker v. Carr*, 369 U.S. 186, 217-25 (1962).

ceived out of compromise and concession indispensable to the establishment of our federal republic.

* * *

Political subdivisions of States—counties, cities [on which legislative districts were often based], or whatever—never were and never have been considered as sovereign entities. . . . [T]hese governmental units are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,” and the “number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.” The relationship of the States to the Federal Government could hardly be less analogous.¹²

Persuasive as this distinction might be as a matter of law, it does not explain the absence of controversy surrounding the Senate. Indeed the Court’s rationale for the basic holding of *Reynolds* compounds the puzzle. According to the Court, population-based apportionment of State legislatures—the Court’s famous shorthand formula was “one man one vote”—is necessary to give each citizen an “equally effective voice in the election of members of his state legislature,” as part of an “inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”¹³ If “full and effective participation” requires population-based apportionment in the state context, however, no reason appears from what the Court had to say in *Reynolds* why the Senate apportionment would not be defective as well, in which case one would expect to see agitation about its apportionment, or at least some substantial sign of dissatisfaction, even supposing that the obstacles to constitutional change are insuperable.¹⁴ Also striking is that

12. 377 U.S. at 574-75.

13. *Id.* at 565 (emphasis supplied).

14. An argument could be made that, despite the attempted entrenchment of the equal Senate representation by Article V, representation could be changed without a State’s consent by first amending Article V to eliminate the entrenchment and then amending the senatorial representation provision. See remarks of Senator Bigler, (quoted in Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 *Ariz. L. Rev.* 717, 729 n.67 (1981)). Whatever the theoretical or practical possibilities of such a two-step process (about both of which I am dubious), change with the consent of over-represented states is in any event not foreclosed. As a practical matter the obstacles to splitting California into two states, which would yield doubled Senate representation for the people of the old California, are surely as great, yet that has not prevented the idea from gaining a degree of prominence. See text at note 7.

the Court's requirement of population-based apportionment for state legislatures has itself been relatively uncontroversial, even while coexisting in apparent ease with a Senate apportionment it seems—with its talk of “inalienable right”—to brand as *in principle* foreign to the central tenets of American democracy.

The more I puzzled about popular acceptance of a malapportioned Senate, the more it became clear to me that the notion the Court articulated in *Reynolds* of what is central to democracy in the United States is pretty far off base. Many difficulties with what the Court had to say have been noted over the years. Thus, as public choice theorists repeatedly tell us, in itself the vote is a decidedly ineffective means by which an individual citizen participates in politics. Demographic and other groupings of voters may tend to vote alike, and *as groups* they may prove decisive in candidate elections. The Court's emphasis in *Reynolds*, however, was on the individual's right, and in any reasonably populous district no individual voter has any significant chance at all of having his vote determine the outcome of an election.¹⁵ In that sense, the vote of each individual was already (more or less) equally (in)effective in virtually all state electoral districts, essentially regardless of malapportionment.

If the Court was really striving to equalize the degrees of (in)effectiveness of the individual's vote, moreover, it was on a fool's errand. In the tallying of votes in each district each person's vote was already given the same weight. Each “person” (that is, “voter”) already had “one vote.” Beyond that, “effectiveness” of the vote as an instrument of electoral decision in the district or state (putting aside for the moment matters other than the vote that might make an individual citizen's voice “effective,” or “participation” in legislative processes “full and effective”) would be dependent on the distribution of politically salient sentiment. Holding size of the electorate constant, a vote in a district that is politically homogenous stands a much smaller chance of affecting the outcome in the district election than does a vote in a district where contending forces are about evenly balanced.¹⁶ And insofar as “effectiveness” in the state legisla-

15. One commentator estimates that an individual's chance of having his vote determine the outcome of an American presidential election is “about [the] same order of magnitude as . . . [the chance] of being killed driving to the polls.” Paul E. Miehle, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 *Am. Pol. Sci. Rev.* 11 (1977); see Anthony Downs, *An Economic Theory of Democracy* 244-47, 267 (Harper & Row, 1957); Dennis C. Mueller, *Public Choice* 120-24 (Cambridge U. Press, 1979).

16. See Richard A. Posner, *Overcoming Law* 204-05 (Harvard U. Press, 1995).

ture is associated with representation there of a voter's favored political party, nothing that happens in a district election matters one whit unless the state legislature comes to be close to equipoise in party representation. These matters the Court did not purport to address, and if it had attempted to do so, perhaps by requiring that each district reflect the political complexion of the state as a whole, it would have risked sinking the federal courts (and the country) in a quagmire of apportionment litigation. Being essentially powerless to produce either effectiveness or equal effectiveness of the individual's vote in candidate elections, what the Court did was impose a *formal* equality of individual voting power in the state as a whole on top of the *formal* equal distribution of voting power in a district election that already existed.¹⁷

III

As I got more deeply into these matters, increasingly it seemed that the conceptual problems with the Court's rationale in *Reynolds* run deep. The decision appears to be rooted in a traditional model of representative democracy in the United States that emphasizes the vote for representatives as its defining and dominating characteristic, as the essence of self-government in our "republican" form of government—a model I call "vote-centered."

In this vote-centered model, there are two discrete stages by which important choices of public policy are made, first election of representatives, and then public policy decisions by those representatives in the form of legislation. The electorate has its decisive say through the vote in the first stage. This vote in candidate elections is advanced as the mechanism within the model of popular sovereignty and self-governance, and it is associated with political equality through equal weighting of votes, and with majoritarianism, often taken to be a corollary of political equality.¹⁸ Separately and together these elements are often ad-

17. In Section XI, I discuss an alternative rationale for the Court's decision in *Reynolds*.

18. The connection is not a necessary one. Drawing straws with each person entitled to the same number of draws, or having certain things dealt with administratively without any vote at all, also treats each person "equally" (assuming in the latter case that the administrator is sufficiently under control, that he can be assumed to a mere functionary). So arguably does a supermajority requirement (say for constitutional amendments) where each voter is treated identically in determining whether the supermajority requirement has been satisfied, or the common practice in the United States of

vanced in a normative spirit. Popular sovereignty, self-governance, political equality, and majoritarianism are taken to be elements of what a political system should be. At the same time, however, they are taken to constitute a basically accurate description of contemporary American democracy.

Under this model, the electorate's active role is largely completed in the first stage. Despite this, popular sovereignty, self-governance, political equality, and majoritarianism are assumed to carry through descriptively to the second stage as well, to characterize the entire system and the decisions it reaches. If the people as a whole are "sovereign," and that sovereignty is distributed equally, then the legislative decisions are theirs too, and theirs equally, which means that each voter exercises an equal portion of influence in the eventual decisions of democratic government, those taken by the representative assembly.

The mechanism by which this is accomplished under this vote-centered model is that the interests of the electorate are "re-presented" in the second stage by the representatives voted into office in the first. In this view representative democracy is adopted as an admittedly inferior substitute for bringing the entire people together to make the decisions of government, as the only efficient way in a large scale democracy to provide sovereign decisions by the sovereign people. The accuracy of the representation of the interests of the electorate by representatives is aided by open competition among candidates in the candidate elections, so that the most faithful re-presenters are chosen. Free speech and free press are important then, and also between elections, to shore up the information base of the re-presenters about the interests of the electorate. Still, the process between elections is in the nature of things imperfect, because most people remain silent then. It is the vote where virtually all adult citizens have the opportunity to speak, and it is the vote through which the sovereign people rule. Under the vote-centered model, the process is taken systematically to turn citizen preferences into "majoritarian" legislation. Votes are the crucial inputs in the vote-centered model, but much of the appeal of the model is in its depiction of public policy outputs as referable rather directly to equally weighted input of votes. Under the model citizen respect—and the stability it engenders—is gar-

allowing plurality decisions to govern in candidate elections with more than two candidates. See text at notes 73-74.

nered because outputs are systematically related to inputs in this way.¹⁹

I do not claim that any single theorist of American democracy has explicitly embraced as descriptively accurate all the elements of such a vote-centered model.²⁰ To the contrary, the

19. While Madison, the most influential of the constitutional framers, did not usually talk in vote-centered terms, see text at note 44, other Federalists at the time did. Thus "Philanthrop" to the Public wrote: "[A]re not the Congress and Senate servants of the people, chosen and instructed by them, because the whole body of the people cannot assemble at one place, to make and execute laws?" "*Philanthrop*" to the Public in I *The Debate on the Constitution* 325 (Bailyn ed. 1993); see Max Farrand (ed.), I *The Records of the Federal Convention of 1787* 132 (Yale U. Press, 1986 revised ed.) ("The Govt. ought to possess . . . the *mind or sense* of the people at large."); Farrand, IV *Records*, supra at 265 ("a representative body should serve as . . . the most natural substitute for an assembly of the whole") (quoting John Adams); "*An American Citizen*" II, in I *Debate*, supra at 25, 27 ("*the house of representatives*—a body so pure in its election, so intimately connected by its interests and feelings, *with the people at large* . . ."); "*Americanus*" III, in I *Debate*, supra at 437, 440 ("By this simple expedient [of representation] can the sense of the people of an extensive Empire be collected with ease and certainty"). Even Madison would on occasion use rhetoric with a vote-centered tinge when engaged in political debate, as he so often was. See, e.g., Federalist 52 (Madison) in *The Federalist Papers* 325 (cited in note 5); Federalist 54 (Madison) in *The Federalist Papers* 336 (cited in note 5); Federalist 57 (Madison) in *The Federalist Papers* 350 (cited in note 5); Farrand, I *Records* 472 ("If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all"). In the ratification debates many antifederalist arguments can be seen as expressing doubt that vote-centeredness could be achieved in the "extended republic" of the United States. See generally, Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 Nw. U. L. Rev. 12 (1989) ("Anti-Federalists regarded representation as a second-best substitute for local self-government—a potentially dangerous attenuation of personal responsibility and assent. Their vision of representation would have required representatives to know and like their constituents, share in the community's deliberations, and appreciate local opinions and feelings.").

20. The constitutional framers besides Madison who are quoted in note 19 were essentially predicting that at least the House of Representatives would function after the fashion of the vote-centered model. With regard to moderns, the tendency to mingle the descriptive and the prescriptive makes it difficult to point to purely descriptive vote-centered commentators. Robert Dahl, for instance, perhaps America's preeminent democratic theorist, seems pretty clearly to think that an ideal democracy would hark to vote-centeredness. See, e.g., Robert A. Dahl, *Democracy and Its Critics* 97 (democracy associated with people governing themselves), 100 (democracy associated with equal weighting of interests), 109 (democracy associated with equal weighting of votes "[a]t the decisive stage of collective decisions"), 138 ("the strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves"), 144 (discussing a "utilitarian justification for majority rule"), 215 ("representation . . . as an application of the logic of equality to a large-scale political system"), 322 (stressing importance of participation "in political life pretty much as equals") (Yale U. Press, 1989). On a descriptive level, however, Dahl coined the term "polyarchy" to describe a set of procedural characteristics focusing on electoral choice, id. at 221, and he insists that "so far no country has transcended polyarchy to a 'higher' stage of democracy." Id. at 223. That would seem to exclude vote-centered outputs from any descriptive account of modern democracies, but Dahl also occasionally discusses contemporary electoral systems in terms of their realization of degrees of vote-centered outputs. See, e.g., id. at 149 (discussing virtues of systems of "proportional representa-

problems with it are many and to a great extent both apparent and noted.²¹ The vote-centered model is rather something that I have fleshed out from what others say. But something like such a model in both a normative and a descriptive mode seems to have a substantial hold on those who theorize about, and those who just seriously discuss, contemporary American democracy.²²

tion," see text at note 40, *infra*, as producing legislative majorities that replicate electoral majorities and thus do not "weaken the translation of majority preferences into law and administration.") Dahl, *supra* at 149. Arend Lijphart sees Dahl's "polyarchies" (presumably including the United States) as "democratic regimes . . . characterized not by perfect [vote-centered] responsiveness but by a high degree of it." Arend Lijphart, *Democracies 2* (Yale U. Press, 1984). Among other commentators, Joseph M. Bessette, while insisting on the importance of deliberation in democracy, see text at notes 49-51, betrays a fixation with vote-centeredness: "The electoral connection is the chief mechanism for ensuring . . . 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 considering the information and arguments presented in the national councils." Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government 2* (U. of Chicago Press, 1994); see also Benjamin I. Page, *Who Deliberates? Mass Media in Modern Democracy* (U. of Chicago Press, 1996). Thomas Christiano is a contemporary commentator who comes close to advancing a vote-centered model as what a "legitimate" democracy must be. See Thomas Christiano, *Political Equality in Nomos XXXII* at 151, *Majorities and Minorities* (John W. Chapman & Alan Wertheimer eds., New York U. Press, 1990). As sophisticated a commentator as Ronald Dworkin recently characterized *Reynolds* in the following way: "The Court . . . struck down state schemes for drawing boundaries of electoral districts whose effect was to deny *equal electoral impact*, citizen by citizen, on a one-person one-vote basis." Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Rev. of Books 44, 47 (Aug. 8, 1996) (emphasis supplied).

21. See Section IV.

22. Some prominent commentators take the vote-centered analysis a step further, insisting that the point of democracies, including the United States variant, is to effectuate, or at least approximate, utilitarianism. See, e.g., Dahl, *Critics* at 143 (cited in note 20); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L.J.* 399, 405-08 (1978); cf. Ronald Dworkin, *Taking Rights Seriously* 276 (Harvard U. Press, 1977):

Representative democracy [presumably absent court enforced constitutional rights] is widely thought to be the institutional structure most suited, in a complex and diverse society, to the identification and achievement of utilitarian policies. It works imperfectly at this, for the familiar reason that majoritarianism cannot sufficiently take account of the intensity, as distinct from the number, of particular preferences, and because techniques of political persuasion, backed by money, may corrupt the accuracy with which votes represent the preferences of those who have voted. Nevertheless democracy seems to enforce utilitarianism more satisfactorily, in spite of these imperfections, than any alternative general political scheme would.

See also, e.g., David A.J. Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 *U. Dayton L. Rev.* 295, 298-99 (1979). The idea is traced to Jeremy Bentham in Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, in 20 *Nomos XXXII* at 44, 47-48 (cited in note 20). I am among those who have found the utilitarian description beguiling. See Robert W. Bennett, "Mere" Rationality In Constitutional Law: Judicial Review and Democratic Theory, 67 *Calif. L. Rev.* 1049, 1062-69 (1979). Among the many brave assumptions

It is through use of such a vote-centered model, with its projection of the election stage ideology onto the system as a whole, that I am able to make some sense of the Court's quest for "full and effective participation" in "political processes of . . . [a] State's legislative bodies," under a banner of "one person one vote" in candidate elections. John Rawls also seems to be working basically within a vote-centered model when he describes a "principle of (equal) participation" requiring that "all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply."²³ Rawls' theory, like the Court's, has a normative thrust, but each must also think that its normative vision is within shooting distance of the way in which representative democracy actually operates. The spell of the vote-centered model as description is probably most apparent in the repeated characterization of the American system of government and the results it reaches as "majoritarian."²⁴ Leg-

required for the effectuation of utilitarianism by representative democracy would be that the legislature would somehow recreate in equal measures the desires not only of electoral majorities in their districts, but of the entire electorate, and then trade among them to achieve the maximum total satisfaction. While requiring additional assumptions beyond simple majoritarian decision making, the suggestion that democracy serves utilitarian ends also seems rooted in the vote-centered model, for it too assumes that the function of the representative assembly is to serve as a vehicle for transmitting voter sentiments into legislation, and to do so with a form of equal treatment. See generally, Neil K. Komisar, *Imperfect Alternatives* 67, 261 n.40 (U. of Chicago Press, 1994).

23. John Rawls, *A Theory of Justice* 221 (Belknap Press of Harvard U. Press, 1971); see Frederick Rosen, *Majorities and Minorities: A Classical Utilitarian View in Nomos XXXII* at 24, 32 (cited in note 20). There is a measure of ambiguity when Rawls uses the term "right" to denote what is held equally, rather than contribution to outcomes, but he does seem to have actual effect on outcomes in mind as at least one thing that is to be distributed equally. He says, for instance, "[t]he liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation." *Id.* at 225.

24. Both the Court and a broad spectrum of commentators describe the American system in this way. See, e.g., Robert H. Bork, *The Tempting of America* 139-41 (Free Press, 1990); Frederick Schauer, *Free Speech: A Philosophical Enquiry* 40 (Cambridge U. Press, 1982); Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 191 (Harvard U. Press, 1995); Eskridge, 12 *Const. Comm.* at 159 (cited in note 7); Michael J. Gerhardt and Thomas D. Rowe, Jr., *Constitutional Theory* 3 (Michie, 1993); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in Sanford Levinson, ed., *Responding to Imperfection* 89 (Princeton U. Press, 1995); David R. Dow, *The Plain Meaning of Article V*, in *Responding to Imperfection* supra, at 117; Federalist 22 (Hamilton), *The Federalist Papers* (cited in note 5); Alexander M. Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962); cf. Douglas J. Amy, *Real Choices\New Voices: The Case for Proportional Representation in the United States* 27 (Columbia U. Press, 1993) ("The notion that legislatures should reflect as accurately as possible the political desires of the public is central to most Americans' conception of democracy.").

islative bodies generally take action by majority vote, of course, but that cannot be what is meant when the American system is characterized as “majoritarian,” for so do other bodies like the United States Supreme Court that are said by some of the same commentators to be “countermajoritarian.”²⁵ If the system is said to be majoritarian that must mean that it produces some (more or less) systematic translation of the interests or sentiments of societal majorities into legislation in the image of the vote-centered model.²⁶

IV

The problems with the description of the American system of government as “majoritarian” are legion. In the national government of the United States—unlike a number of individual states²⁷—not a single decision is entrusted to a majority vote of

The identification of majoritarianism and democratic (including in these cases, constitutional) legitimacy is common to the otherwise very different projects of constitutional theorizing by John Ely and Bruce Ackerman. Compare John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press, 1980) with Bruce Ackerman, *We The People: Foundations* (Belknap Press of Harvard U. Press, 1991). See Schauer, *Deliberation About Deliberation*, review of *We The People*, 90 Mich. L. Rev. 1187, 1189 n.4 (1992). Both Ely and Ackerman think that present day American democracy is basically majoritarian, even if imperfectly so.

A few of the many references to the United States’ system as “majoritarian” in opinions of the United States Supreme Court are *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Schweiker v. Wilson*, 450 U.S. 221, 243 (1981) (Powell, J., dissenting); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting); cf. *Gordon v. Lance*, 403 U.S. 1, 5-6 (1971) (confusingly appearing to equate a societal and a legislative majority).

Many of these sources, of course, also often manifest recognition that the “majoritarian” characterization is inaccurate to one degree or another. For explicit and sustained attention to the limitations, see Komesar, at 67 (cited in note 22); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 77-83 (1989).

25. The term was apparently coined by Alexander Bickel, see Bickel, *The Least Dangerous Branch* at 16 (cited in note 24), and has now become standard fare, particularly in scholarly discussion of the Court’s role. See Gerhardt and Rowe, *Constitutional Theory* at 3-4 (cited in note 24); Geoffrey R. Stone, et al., *Constitutional Law* 37-40 (Little Brown and Co., 3d ed. supp. 1996); William B. Lockhart, et al., *Constitutional Law* 15-17 (West, 1996); Gerald Gunther, *Constitutional Law* 19-20 (Foundation Press, 12th ed. 1991); *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

26. This leaves ambiguous whether the relevant majority sentiment is for each separate item on the public agenda, or for the entire package. The problems with the characterization are largely independent of which meaning is intended. See note 35 and accompanying text.

27. The states generally elect their governors and a varying number of other officials statewide and by majority vote. In addition, approximately half the states provide for a limited degree of lawmaking through different forms of direct vote of the elector-

the electorate.²⁸ Nor is there any basis for finding an effective majoritarianism in the process.²⁹ Even apart from the apportionment of the Senate³⁰ (and also putting aside the role of constitutional rights as “trumps” over legislative decisions, and of the Supreme Court in elaborating and enforcing those rights), any translation of majority sentiments of the electorate at the candidate election stage into majority sentiments of the electorate at the stage of legislating is frustrated in a large variety of ways.

To begin with, the vote for a candidate is a terribly blunt instrument for expressing sentiments on particular issues of governance. It is cast in the secrecy of a polling booth,³¹ so that those elected do not know much for certain about the identity of the large majority of their supporters or about the motivations behind their votes. In virtually all elections for the national legislature in the United States, a candidate represents a bundle of positions, and even if he only campaigns about one or a few he will be called upon to vote on many. The vote for a candidate is

ate. See generally Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1508-48 (1990).

28. Akhil Amar has recently suggested that a majority of American voters could now require Congress to convene a constitutional convention by submitting a petition to that effect “and that an amendment could be lawfully ratified by a simple majority of the American electorate.” Amar, *Popular Sovereignty and Constitutional Amendment*, at 89 n.1 (cited in note 24). See also Amar, 55 *U. Chi. L. Rev.* (cited in note 7); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994). Those familiar with Professor Amar’s other works will not be surprised that he presents an argument in favor of all this with great skill. But there is not a word in the Constitution that would support such a procedure. As suggested in the text, moreover, such a procedure is thoroughly at odds with the most fundamental assumptions of our constitutional order, including importantly the role of the states. For instance, qualification to vote in federal elections was originally and remains to a degree within the discretion of the states, see *U.S. Const.*, Art. I, § 2, cl. 1; Art. II, § 1; Amend. XVII, so that there are not even uniform national qualifications that would seem necessary to give coherence to the notion of a “simple” national majority.

29. I will not attempt to trace each of the majoritarian limiting points to the individual states, but apart from the population based apportionment of state legislatures, limited statewide balloting on certain issues, and the popular election of many state judges, the limitations on the “majoritarian” character of the national government basically apply in state contexts as well.

30. Before ratification of the Seventeenth Amendment in 1913, when Senators were chosen by state legislatures, and those bodies in turn were often malapportioned in population terms, it was not unheard of to have Senators who, by party affiliation at least, were quite unrepresentative of the states they served. See George H. Haynes, I *The Senate of the United States: Its History and Practice* 92 (Houghton Mifflin Company, 1938).

31. The secret or “Australian” ballot became common in the United States only after the presidential election of 1884, which was characterized by “widespread charges of voting frauds.” Dahl, *Critics* at 234 (cited in note 20).

thus opaque with regard to most of the actual decisions that legislatures will make.³² Indeed in most elections the vote is probably cast as much with an eye on the past and the present as on the future, when there are still decisions to be made. To be sure, there is communication between voters and their representatives between elections, and the contemplation of a future is always providing incentives for the here and now. But it is entirely unrealistic to think that the members of the legislative body collect the sentiments of majorities in their districts as the basis for decision on many, or perhaps even any, of the votes they will cast. They do not have the ability to do so, but they also do not have the motivation.

The principle reason for the absence of motivation is associated with what is called "the interest group theory of legislation."³³ The basic insight of interest group theorists is that relatively small numbers of voters with large individual stakes in some issue or set of issues will have the motivation to wade in politically on those issues, while voters with smaller individual stakes will not, even if they are more numerous. Interest group theorists emphasize the political use of organized groups by those with the larger stakes. We will return in Section XI to the political role of organized interests. For present purposes, however, it is important to appreciate the force of the interest group insight even when organized groups play no special role.

The private effects of essentially all public decisions are distributed differentially. This is so regardless of the root motivation behind the decision, be it self-interest or public-spiritedness (assuming we can make coherent the distinction between the two). Thus not only do tobacco growers benefit from tobacco subsidies while most people do not, but military contractors (among others) benefit more than the rest of us from expenditures for national defense, and manufacturers of air and water purification devices (among others) benefit disproportionately from efforts to clean up our common environment.

The differential distribution of effects is not limited to large ones like those felt by defense contractors, nor to persons who

32. To say the least, "[e]lections are clumsy tools for setting policy." Garry Wills, *What Happened to the Revolution?*, N.Y. Rev. of Books, June 6, 1996, at 11. (Vol. XLIII, No. 10).

33. For an interesting discussion see Komesar, *Imperfect Alternatives* at 54-81 (cited in note 22); see also William N. Eskridge, Jr., and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 49-51 (West, 2d ed. 1995) ("*Legislation*").

supply rather than consume goods and services. The most mundane of public programs—highway construction, police protection, provision of libraries (and taxation programs to pay for any or all of these)—have differential effects on consumers as well as suppliers, for some of us drive, read, or require police services (and pay taxes) more than others. Nor need the effects be narrowly material, rather than ideological, as the ongoing American dispute about abortion dramatically illustrates. Engagement on that issue ranges from the extraordinarily passionate on both sides to the ambivalent or indifferent.

This differential distribution of effects is then associated with differential interest in the political realm. These differential political interests can be expressed through support of groups that pursue the interests politically, but even if the interests do not justify that degree of involvement, they can be expressed through voting behavior. We are more likely to vote at all when there is an issue at stake that matters especially to us, and we are more likely to have our votes swayed by a candidate's stand on such an issue.³⁴ Since candidates for public office understand all this, the politics of interests is everyman's politics and not just that of organized groups. To the extent that candidates' positions are designed to attract votes and can be targeted to do so, those positions will be geared not to majority sentiments on particular issues but, issue by issue, to sentiments of those whose votes are in play.³⁵

34. For a discussion of why people vote at all, given the ineffectiveness of the individual's vote as a determinant of policy, see text at notes 100-101. Whatever the explanation, it is unarguable that people do vote in large numbers, and, it seems to me, virtually as unarguable that an individual's vote is significantly responsive to candidates' positions on particular issues.

35. Most of the rhetoric of "majoritarianism" seems to assume that it applies issue by issue. This is reflected, for instance, in the constant public opinion polling to determine what a "majority of the American people" feel about this or that. But the "majoritarian" label seems no more likely to be an apt description of sentiment for the complete package of public policies adopted in some constrained time frame. If candidates had even rough and ready information about voter sentiments on the entire range of issues *and* the tradeoffs those voters would make among those positions (voter A, for instance, would be willing to sacrifice a modestly more pro-choice position on abortion for greater combat readiness of our armed forces), then the package of positions the candidates espouse might conceivably be seen as reflecting estimates of electoral sentiment of their constituents summed over the entire public agenda. And if elected legislators then traded their votes in order to maximize the satisfactions captured in the programs that got them elected, the eventual public policy package might with a straight face be depicted as a summed majoritarianism. But candidates and legislators have neither anything remotely approximating the information base about electoral sentiment nor the incentive structure within the legislature that might justify such a characteriza-

In other respects the discontinuity or slippage between majority sentiments and outputs in the legislative stage was built in at bedrock to the American system of government. Perhaps most fundamentally (though not much discussed³⁶), in the United States members of legislatures are typically chosen in geographically defined districts, with a single representative for each district (two in the case of the United States Senate). This raises the real possibility that the legislature may not mirror the political complexion of the legislature's constituency as a whole. Thus a country of sixty percent Libertarians and forty percent Vegetarians divided into three "fairly" apportioned (*i.e.*, by population) single member districts for a unicameral legislature could elect a Vegetarian majority if one of the districts contained only Libertarians and the other two districts split the remaining Libertarians evenly between them.³⁷ And even if geographically based single member legislative districts do not produce a legislative majority for a minority party, the geographical clumping of voters can easily yield less dramatic deviations in the legislature from the distribution of political sentiment in the electorate as a whole.³⁸ In addition such districts probably provide important incentives for a system of two major political parties³⁹ which tends to clump the legislature as well, effectively excluding from representation in that body even quite significant pockets of popular sentiment that might otherwise have found expression in additional parties.

The possibility of large scale slippage between the candidate election stage and the legislating stage is not inevitable. In a number of democracies, at least a part of the legislature is chosen from party lists or through other mechanisms that assure that political parties are represented in the legislature in rough

tion—even before we get to the difficulties to which the text (supplemented by footnote 46) now turns.

36. In the legal literature at least. The subject is discussed by political scientists. See, e.g., Jonathon Riley, *American Democracy and Majority Rule*, in *Nomos XXXII* at 267 (cited in note 20).

37. See *Thornburg v. Gingles*, 478 U.S. 30, 85-87 (1986) (O'Connor, J., concurring).

38. See *Davis v. Bandemer*, 478 U.S. 109, 130 (1986).

39. This is often called "Duverger's Law." See Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* 217 (Barbara North & Robert North trans., Wiley, 2d ed. rev. 1959). It is usually accepted as accurate, even if its causal underpinnings are debatable. See Andrew Reeve and Alan Ware, *Electoral Systems: A Comparative and Theoretical Introduction* 9 (Routledge, 1992); William H. Riker, *Duverger's Law Revisited*, in Bernard Grofman and Arend Lipjhart, eds., *Electoral Laws and Their Political Consequences* 19, 41 (Agathon Press, 1986).

proportion to their national support. A whole-hearted system of “proportional representation” like this would be likely to be characterized by multiple parties and to yield a legislature that reflected, more or less, the genuine political complexity of the jurisdiction as a whole.⁴⁰

In the debates surrounding the ratification of the United States Constitution, there was little explicit attention paid to the “distorting” effect of geographically based districts, perhaps because they were used in England⁴¹ or, even more likely, because the integrity of the states, themselves geographically defined, was an unchallengeable assumption in the deliberations. But given this setting, political “representativeness” of the legislature may not have seemed important, for it was not uniformly assumed that the job of members of the legislature was to transform electoral sentiments into legislation as the vote-centered model with its talk of “majoritarianism” assumes.

Recall that political parties did not become a fixture of American politics until later⁴² and that neither the Senate nor the President was to be directly elected under the original Constitution. Even with regard to the House of Representatives, there was no shared assumption that it would simply recreate what the electorate would have wanted had it been possible to bring it together in one large voting assembly. Some made that assumption,⁴³ but according to James Madison, our chief constitutional architect, “the delegation of the government . . . to a small number of citizens elected by the rest” would serve to

refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the

40. See generally Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* 7-10 (New York U. Press, 1994); see Dahl, *Critics* at 110, 149 (cited in note 20) (characterizing the electoral systems of the United States, along with those in Britain, Canada, Australia, and New Zealand, as “highly defective” for not adopting proportional representation).

41. See generally, Reeve and Ware, *Electoral System* at 45-48 (cited in note 39); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77, 161-62 (1985).

42. See James MacGregor Burns, *The Vineyard of Liberty* 134 (Alfred A. Knopf, 1982); see generally Joseph Charles, *The Origins of the American Party System* (Institute of Early American History and Culture, 1956).

43. See the comments of Philanthrop, Wilson, Adams, and Americanus III, cited in note 19.

representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.⁴⁴

In any event, other elements were consciously included in the national government to assure that there was no simple translation of electoral sentiment into legislation as the vote-centered model assumes—a bicameral legislature with the two houses of different sizes chosen in different ways from differently configured districts⁴⁵ and for different terms, sharing power with two other branches independent of it, and all superimposed on, and dividing governmental powers with, a preexisting system of various state governments. In such a setting the characterization of the United States system as “majoritarian” fundamentally misapprehends what is going on. *Strongly committed, durable, and large supermajorities* in the United States will almost surely prevail through the political system (here *including* the judicial system) over the medium to long run. Beyond that, however, given the layers of “distorting” influences,⁴⁶ we are

44. Federalist 10 (Madison), *The Federalist Papers* at 77-82 (cited in note 5). Elsewhere Madison was more colorful—and harsh—in his characterizations of direct democracy. Thus in discussing the optimal size of the legislature in Federalist 55, Madison said “[i]n all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.” Federalist 55, *The Federalist Papers* at 341, 342 (cited in note 5). A variety of additional models of democracy emphasizing the independence of officials pretty clearly trace their lineage to the Madisonian vision. See generally Eskridge and Frickey, *Legislation* at 123 (cited in note 33) (discussing “agency” and “trustee” models of democratic representation, drawn from the conceptualization in Hanna Fenichel Pitkin, *The Concept of Representation* (U. of California Press, 1967)).

45. The “districts” are identical when a state is entitled to only one representative, or, as sometimes happens, elects at large one or more members of a multi-member House delegation. The latter practice has long been disfavored by Congress. See *Whitcomb v. Chavis*, 403 U.S. 124, 158 n.39 (1971).

46. The “distorting influences” are nowhere near exhausted by those mentioned in the text. Largely unnoted among the distortions is that children are not allowed to vote. If one assumes that children are to be taken into account in the majoritarian calculus, then this represents a large potential distortion. Even if we engage in the assumption that parents are acceptable surrogates to represent the interests of their children, those parents do not receive the extra votes that might be thought to do the trick. Among the other distortions are that many of those eligible do not vote in candidate elections, and that just who of those eligible does turn out to vote may be affected, among other things, by the weather; that not all legislators may vote, with abstention caused, for instance, by illness; that ballot position may swing candidate elections; that third party candidacies may affect outcomes, especially given the plurality selection norm, see text at note 73-74, *infra*, that when there are more than two choices, the problem of circular voting may mean that there is no choice that can be said to be that of a majority; that non-majoritarian control of the agenda (necessitated, *inter alia*, by the circular voting problem) can determine outcomes; that the rhetoric in which issues are debated may be highly influential; and that dramatic developments in the world (and the way they are

surely kidding ourselves if we believe that *any* sustained and even approximately systematic correlation—majoritarian or otherwise—exists between electoral inputs into a policy-making mix and legislative outcomes.⁴⁷

V

The ready acceptance of the Senate's apportionment helps bring into focus a more fruitful way of thinking about democracy in the United States—what I call “democracy as meaningful conversation”—under which essentially the entire electorate is engaged on an ongoing basis by meaningful public conversation about public policy. The conversation in the model is the totality of public conversation about public policy, about what actions government should take and refrain from taking. In this expansive sense, the democratic conversation seems to be everywhere in the United States. It is obviously seen on the electoral hustings, but it is also ongoing between electoral campaigns, on radio and television, and in newspapers and barber shops and the routines of stand-up comics. As far as I can tell, to one degree or another it is also ubiquitous in other genuine democracies, while nothing quite like it exists in non-democratic countries.

I advance this conversational model as fundamentally descriptive and explanatory, rather than normative, as a tool to help “us to understand what is going on by enabling us to organise our thoughts.”⁴⁸ I believe that the conversational model provides a coherent account of diverse phenomena of democ-

reported in the press) closely preceding an election or legislative vote will often be influential. On top of all these, and in part no doubt because of at least some of them, citizen preferences are not necessarily stable in a way that would provide integrity to the process of translation of those preferences into policy outcomes at what will necessarily be a later time.

47. Cf. Russell Hardin, *Public Choice Versus Democracy*, in *Nomos XXXII* at 185, 195 (cited in note 20) (“Even on the most favorable accounts of voter sophistication and the quality of voter decisions, however, one cannot make strong claims that the outcome of democratic voting procedures is a coherent mapping of citizen preferences onto policies”); Rosen in *Nomos XXXII* at 33 (cited in note 20) (“The phrase ‘majority rule’ or the ‘majoritarian principle,’ once removed from the context of direct democracy, becomes misleading and even dangerous if it implies a measure of direct popular control over government”).

48. R. H. Coase, *How Economists Should Choose* in *Essays on Economics and Economists* 15, 16-17 (U. of Chicago Press, 1994). In addition, “by unifying apparently diverse phenomena . . . [models] can change the way we look at the empirical world . . .” John Ferejohn and Debra Satz, *Unification, Universalism, and Rational Choice Theory*, in Jeffrey Friedman, ed., *The Rational Choice Controversy* 71, 72 (Yale U. Press, 1996).

racy in the United States—including its most fundamental elements and extending to more surface phenomena like the absence of controversy surrounding the apportionment of the Senate. One of the reasons democracies are useful things to understand better is that they have proved enduring, and it is the endurance, the stability of democracies, that is at the core of what I seek to describe and explain. The conversational model posits that the backbone of democracy, the source of much of the popular respect it commands, and hence of much of its strength and stability, is to be found not in popular sovereignty expressed through voting, nor in some pattern of results at the end of the legislative process, but in involvement of the electorate in the democratic conversation.

The model carries no pretense of complete depiction of democracy in the United States, or even of explaining completely what makes that democracy stable. The model ignores the level of economic well-being, as well as the distribution of that well-being, each of which may well have an impact on the stability of any democracy. It does not include any special role for political parties, which are surely important “mediating institutions”⁴⁹ that contribute to the effective functioning of the system as a whole, to its appeal and to its stability. It does not include the role of “rights” that define the boundary between public power and individual prerogative, though any full description of American democracy would have to take account of the role of rights. And, a related point, democracy as meaningful conversation does not include any searching integration of the role of the Courts as constitutional policy makers.⁵⁰ What the model does posit is that the engagement of the electorate in the democratic conversation is an important cause of the stability of democracies, or at least of the United States’ variant on the theme, a cause decidedly more important than the sense of involvement in majoritarian “self-government” that comes from periodic candidate elections.

If one believes, as I surely do, that, other things being equal, stability in political systems is a good thing, then a model that

49. See Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1522-30 (1994); Jonathan R. Macey, *Packaged Preferences and the Institutional Transformation of Interests*, 61 U. Chi. L. Rev. 1443, 1460-65 (1994).

50. I will touch on the role of the courts, see notes 85-88 and accompanying text, but the touch will be only a light one, for any full exploration of their role would take me far afield from my present ambitions for examining democracy as meaningful conversation.

explains stability will invite normative judgments. In this limited sense democracy as meaningful conversation has normative purchase, as a byproduct of any descriptive and explanatory persuasiveness it may hold. Still I want to be clear that democracy as meaningful conversation is not a normative model in any fuller sense. The conversational model is perfectly consistent with "democratic" reforms in the spirit of any number of different *normative* models of democracy, including the vote-centered model that I described in Section III, if advanced in a normative rather than a descriptive spirit.

A number of political philosophers and democratic theorists have noted a connection in one way or another between democracy and popular involvement in conversation about public policy.⁵¹ Thus the importance of public "deliberation" is a major theme of contemporary proponents of "civic republicanism."⁵² The focus of these efforts is avowedly normative, the charting of a way to make democracy better through pursuit of a vision of the good and full citizen. Among these civic republicans some seem quite often to be charting that better future with a vote-centered compass, suffusing their vision with an emphasis, something like that of the Supreme Court in *Reynolds*, on equalizing the effective voices of all voters in a "deliberative democracy."⁵³ The inspiration for the conversational model is, as I have said, quite different. It is to order and explain the way

51. See, e.g., John Dewey, *Liberalism and Social Action* 24 (G. P. Putnam's Sons, 1935), in 2 *The Later Works*, quoted in Sandel, *Dewey Rides Again*, N.Y. Rev. of Books 35, 36 (May 9, 1996); Post, *Constitutional Domains* at 185-87, 273-75 (cited in note 24); Hans Kelsen, *General Theory of Law and State* 284-88 (Russel and Russell, Anders Wedberg trans. 1961), quoted in Post, *Constitutional Domains* at 185 (cited in note 24); James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale U. Press, 1991); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Belknap Press of Harvard U. Press, 1996); F. A. Hayek, *The Constitution of Liberty* 108-09 (U. of Chicago Press, 1960); Ackerman, *We the People* (cited in note 24); Richard H. Pildes and Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2193 (1990); Bessette, *The Mild Voice of Reason* (cited in note 20); Page, *Who Deliberates?* (cited in note 20); see generally William Rehg, Translator's Introduction to Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* ix (MIT Press, 1996).

52. See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 19 (1986); Sandel, *Democracy's Discontent* (cited in note 51); Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press, 1993). See also, e.g., Thomas Christiano, *Deliberative Equality and Democratic Order* in Nomos XXXVIII at 251, *Political Order* (Ian Shapiro & Russell Hardin eds., New York U. Press, 1993).

53. I discuss some of these matters in a review of Cass Sunstein's book, *The Partial Constitution*, (cited in note 52). See Robert W. Bennett, *Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution*, 11 Const. Comm. 395, 409-17 (1994).

things are, rather than as they might be or should be. Its normative implications are incidental rather than central, in contrast to the centrality of normative considerations to the civic republican effort and others that have heretofore laid stress on deliberation.

VI

Democracy as meaningful conversation pivots on the incentive structure provided to elected officials by the prospect of elections. Because I call the contrasting model "vote-centered," some might think that the electoral process must be peripheral at best to the conversational model. To the contrary, while I want to emphasize the role of the democratic conversation in inducing fidelity to democracy, and de-emphasize voting *as governance*, the conversational model nonetheless posits that elections are important to democracy in two different ways. First, the act of voting is itself part of the democratic conversation. As conversation, voting is not very directed, but it occasionally can bring the satisfaction of having sent a "message," however muted, and however uncertain the sender must typically remain that the message was received. Second, and more importantly, elections shape incentives that provide *the* essential support for the broader conversation. There does not seem to me to be any plausible explanation for the democratic conversation, including the time and energy devoted to persuasiveness in it, save that periodic, genuinely contested elections, make the conversation matter.

The incentive posited for candidates is the desire to be elected and then reelected. This is the same incentive assumed by public choice theorists, at least since Anthony Downs' classic work, *An Economic Theory of Democracy*.⁵⁴ The real world complex of motivations will, of course, vary from one candidate or official to another, and typically be much richer than unadorned ambition to be elected or reelected.⁵⁵ But models depend on such simplifying assumptions, and this one seems plausible enough. Starting with this motivation of officials, I think it can be shown that meaningful public conversation about public

54. Downs, *An Economic Theory of Democracy* (1957) (cited in note 15).

55. See Daniel A. Farber and Philip P. Frickey, *Law and Public Choice* 21-33 (U. of Chicago Press, 1991).

policy involving a very large proportion of the electorate is all but certain to follow.⁵⁶

I want to be clear about what I am using “meaningful” to mean. There are two interrelated components to the concept as applied to the democratic conversation. First, an element of the conversation is *politically* meaningful when what is said in it has a real, even if only vanishingly small, chance to influence public decision makers in public policy choices. There is no assumption under the model that any individual’s views will end up changing a result, nor of systematic transformation of electoral sentiment into legislation. To have had a real chance to influence does not even mean that the element of the conversation must have come to the attention of a decision maker, but rather that it have genuinely entered into the process of give and take that eventuates in a decision.

Second, the democratic conversation is *personally* meaningful to a member of the electorate when the political meaningfulness of one or more of its elements stimulates a sense for that member of respectful engagement in the decision making process, a sense that the conversation included those politically meaningful elements in part at least because that member’s opinions on those elements mattered. Political meaningfulness feeds the sense of personal meaningfulness, and it is the latter that is the stabilizing force within the model I propose.

This personal meaningfulness has broader ramifications, for like all sustained conversational interactions, the individual’s involvement in the democratic conversation becomes an integral part of a set of relationships that the individual has with other conversants and with the social and political system in which the conversational activity is embedded. The conversation then becomes significant to the individual not solely, and perhaps not even mostly, because of some possibility that it will persuade, but because it is a part of that individual’s sense of self. This in turn brings the conversant back for more conversation—to persuade and be persuaded and just to converse.

There is no requirement of logical coherence for an element of the conversation or of grounding in truth or in well-established factual premises. Much less need the conversation be acceptable according to all or any theories of morality. The conversational appeal to voters can be on whatever level en-

56. See notes 64-67 and accompanying text.

gages them. History is replete with examples of "meaningful" public conversation in this latitudinarian sense which is also demonstrably false or morally repugnant. Such moral repugnance, or even more minor conversational sins, will often alienate some voters as it engages others. The fact that the conversation is public surely has the salutary effect of dampening some appeals to pure self-interest and to baser emotions that might otherwise be politically tempting.⁵⁷ The fact that it is politically meaningful provides incentives for those who think they spot error to wade in with rebuttal of the false or scurrilous. And the net effect of the social heterogeneity of the United States probably serves to contain the mischief that appeal to baser instincts might produce. This last was an article of faith for James Madison, and we will explore it and related points below.⁵⁸ In any event, while there surely is an enormous volume of well-reasoned argumentation on a vast array of subjects in the totality of the democratic conversation, there is nothing in the concept of meaningfulness as I am using the term that excludes error, repugnance, or the disengagement of some voters that these can bring.

Unlike the vote-centered model, democracy as meaningful conversation attempts no explanation of substantive outcomes in terms of electoral inputs. Obviously many people are passionately concerned with substantive outcomes, some quite often, and more on certain occasions. For many the prospect of influencing outcomes, or at least enjoying them, surely intensifies the sense of involvement in the democratic process, including in the democratic conversation. And thanks to the extensiveness of the public agenda, the great majority of people see their favored positions on public questions emerge triumphant on occasion.⁵⁹ But one of the interesting things about democracy is that substantively disappointed voters are so readily reconciled to their losses. In genuine democracies, where elections are truly competitive, votes on many public issues are likely to be close, yielding large numbers of voters who are more than occasionally disappointed with outcomes. The easy reconciliation of the disappointed is thus important to democratic stability. Some posited relationship of voter inputs to policy outputs over the larger public policy agenda is altogether too abstract

57. "[The] dialogic enterprise always has built-in moral features or commitments that constrain the conversation." Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 Chi.-Kent L. Rev. 123, 129 (1989).

58. See Section XI.

59. See text at notes 63-66.

and too tenuous to look to it for explanation of the reconciliation.⁶⁰

The reasons for the loyalty of electoral losers are surely complex, and much of the explanation is just as surely to be found outside the confines of the conversational model. The lion's share of what matters to most of us proceeds through private channels, not public ones. If we find abundant private fulfillment, we may more easily adjust even to persistent disappointment in public affairs. Precisely for this reason, a large field of private opportunity in a polity—of both the economic and more personal sorts—may help account for the stability of many democracies. In addition, particularly in large and heterogeneous democracies like the United States, electoral losers one day may look forward to whatever joy victory, and its promise of different substantive outcomes, might bring another day. For local issues at least, electoral losers might even contemplate moving to a more congenial location. Or they may identify with winners in other districts and the part those winners can play in the eventual decisions that are made. In part, outcomes are not so purely a function of electoral winners and losers. They are often compromises, again induced partly by the fact that no sooner is one election over than another one is in contemplation in which the votes of yesterday's losers will count again. And not all electoral losers—or non-participants—are easily reconciled. But democracy as meaningful conversation posits that a centrally important part of what commands the loyalty of losing electoral minorities most of the time is that they are nonetheless engaged by meaningful democratic conversation, and it is that fact that matters more than some felt equality in voting privileges, patterned outcomes of the process, or even the prospect that the future will provide victory to make up for the defeats of the past.⁶¹

It might be thought that no conversational involvement by a member of the electorate could be any more politically "meaningful" than that person's vote, which, as we have seen, is close to zero. This is both wrong and beside the point. It is wrong because there is a very large conversational agenda, with no individual interested in anything approaching all of it. Just as with the vote, the average member of the electorate is unlikely to be decisive on any given item of that agenda. Still, as a simple

60. See Section IV.

61. Cf. Tom R. Tyler, *Why People Obey the Law* (Yale U. Press, 1990).

mathematical matter, a typical democratic citizen will be likely to find conversational topics where he can have an appreciably greater influence on outcomes than he would with a vote in a candidate election. Of much more significance, however, the conversation is ongoing, multifaceted and nuanced. A member of the electorate can to a great degree adjust his conversational involvement to his schedule, his level of interest in a particular topic, his taste in commentators, and his personal interest in active involvement. The vote in candidate elections is in contrast a rather sterile form of political involvement.⁶² For these reasons the conversation has the capacity to involve a member of the electorate in the ongoing process of government and thence into a web of relationships in a way that the vote standing alone does not. If members of a democratic electorate do have a real sense that they are engaged in something appropriately called "self-government," that sense is more likely produced by the democratic conversation than it is by the opportunity periodically to cast a vote in candidate elections.

There is no way conclusively to prove the political meaningfulness of any part of the democratic conversation, and hence no way to be sure that any sense that it generates of personal meaningfulness is not grounded in self-delusion. There are stories, of course, about the power of ideas, and anecdotes to be told about the marginal views of one generation becoming the accepted wisdom of the next. We need look no further for examples than the history of women's role in contemporary American society, or of public policy toward smoking. In the final analysis, however, with controlled experimentation unavailable, the political meaningfulness of the bulk of the democratic conversation can only be surmised. For myself, the principle basis for believing that the great bulk of the democratic conversation is politically meaningful is the enormous time and energy devoted to it, including by a large number of sophisticated participants. If self-delusion there be, it is both widespread and terribly stubborn.

62. I do not doubt that elections "remain an important part of the nation's legitimizing myth" and serve to a degree "to create and maintain a sense of national solidarity and community." Kim Ezra Shienbaum, *Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics* 123, 125 (U. of Pennsylvania Press, 1984). The fact that many non-democratic countries adopt the form of elections suggests that they see such symbolic power in elections, but as such countries regularly learn the form without the substance is eventually seen to be empty, even as symbol. The "substance," I am suggesting, is to be found, at least in the United States, in meaningful conversation about public policy.

VII

The democratic conversation is not exclusively, nor even mostly, a simple two-way exchange between representatives and their constituents. Nor is it confined to the time frame of election campaigns, where the vacuousness and frequent insincerity of much of what is said may well produce as much alienation as engagement. The personal meaningfulness of the conversation is no doubt in general heightened for a voter when he has a sense of direct communication flowing to or from a candidate or elected official. This might be called "primary" democratic conversation. But participation by candidates or officials is not required. In any count of verbiage, the volume of "secondary" conversation would surely dwarf that which takes place more directly between candidates or representatives and their constituents. This secondary conversation involves non-elected officials, and professional and amateur commentators employed or given exposure by innumerable media of communication. Secondary conversation includes much give and take among ordinary voters, or even non-citizens, expressing their views on public issues in all manner of public forums. The conversational model posits that even the secondary conversation is to a very great extent an outgrowth of the candidate election process and the relationships and incentives that it defines.

An important distinction should also be drawn between active and passive involvement in the conversation. In both primary and secondary conversation there are numerous active participants. But most direct involvement in the conversation is passive. Members of the electorate are much more often consumers of what is being said than active participants. Given the number of members of the electorate and the possibility of multiple listeners for each speaker that is a feature of communication by mass media, it is to be expected that much more time will be spent listening than speaking. For most elements of the democratic conversation most members of the electorate will likely not even be listening. Any individual member of the electorate will be out of the range of most of the conversation, for in addition to lots of disinterest, there is simply too much of the conversation. But universal, or even widespread, attention to any particular part is not required for conversational engagement, for the conversation is so varied and so ubiquitous that

the vast majority of members of the electorate will find something engaging in it.⁶³

To see why this should be so, it is instructive to take a closer look at the incentive structure of active participants in the conversation, starting with the elected official or candidate for elected office.⁶⁴ Given the incentive posited to be elected or reelected, the candidate seeks to find a way to command a plurality of those voting at the next election. Votes are interchangeable in the count,⁶⁵ and, to some extent at least undependable, in the sense that candidates never know for sure who may vote for them. Indeed, thanks to the secrecy of the ballot, candidates have no terribly reliable way even to find out who has done so after the fact. As a first cut, candidates thus have an incentive to communicate with each and every member of the electorate, since each one represents a potential vote in an uncertain count.

It will often be efficient for a candidate to communicate a single message to a broad segment of the electorate, since mass media may make it little more expensive to reach a broad audience than a limited one. But there is also the possibility of targeting messages to discrete audiences, and an extended public agenda is a great aid in attempting to do so. The electorate is varied, and its members vote not *en masse* but one at a time. This opens up the possibility that some voters can be addressed on certain issues and others on different ones, to the basic satisfaction of each. Indeed because of the differential interest in issues, a candidate's combined stance on two issues can on balance satisfy each of two groups of voters even though each of the groups disagrees with the candidate on one of the issues. With an extensive public agenda, it then becomes possible for candidates to reach and appeal to a large part of a segmented electorate.

63. Benjamin Page seems to me to miss this point when he moves from the observation that active participation in deliberation cannot be available to the entire electorate to the conclusion that we therefore "delegate deliberation." See Page, *Who Deliberates?* at 4 (cited in note 20).

64. To avoid constant repetition, I will refer only to the "candidate" in the discussion of these incentives. I choose that word to make clear that non-incumbents running for office play a very important role as participants, and as stimuli for the conversation. I want to be clear, however, that much of the conversational behavior under discussion occurs outside the time frame of an election campaign.

65. The sole important exception to this in the United States is in presidential elections, where by virtue of the electoral college apportionment by states, a vote in one state is not the equivalent of a vote in another.

This incentive to reach out to all voters is qualified in at least three ways. First, some districts will be reasonably safe for the incumbent or the nominee of one party or another, in which case there will not be much incentive for that candidate to reach out to groups of voters perceived as unnecessary for election. Nor will there be incentive to address voters whose views are so highly idiosyncratic across the range of politically salient matters that resources will be better spent sowing in more fertile electoral fields. And most importantly, the various interests among the electorate may conflict with one another, so that what pleases one will simultaneously displease another to the point of alienation and opposition. This produces an incentive to mute or entirely avoid contentious elements of the conversation⁶⁶ and when avoidance won't suffice, to disavow positions that might drive into opposition more voters than it would attract.

The power of each of these qualifications is in turn limited by a variety of considerations. Of crucial importance is the possibility of electoral challenge in both party primaries (where they are held) and general elections. Voters neglected or alienated by one candidate will be especially appealing targets for engagement by a challenger. In addition, even a dominant candidate is faced with one degree or another of uncertainty on a number of fronts. He is uncertain about just who his supporters are, about why they have been supporters, about what may recently have come to matter more to even known supporters, or less, about the identity and thrust of electoral challenges that may be in the offing. Some information will be available on some of these matters, but uncertainty will remain, and that uncertainty will counsel even a dominant candidate to err on the side of extending rather than limiting attempts broadly to engage the electorate. Uncertainty also creates an incentive in a dominant candidate to gather information—to listen as well as speak—and not just to state positions that may appeal but to convince, to provide argumentation about what items should be on the public agenda and about what should be done about them.

No single candidate, moreover, nor even a set of competitors, can control the shape the conversation will take. Third parties—media, commentators, and more casual kibbitzers—play an important role in defining the nature and reach of the conversation, and they have all manner of incentives that do not

66. See Downs, *An Economic Theory of Democracy* at 135-37 (cited in note 15).

necessarily map onto those of any candidate. Specialized media have incentives to target audiences and expose them to public policy issues of importance to them, even when candidates do not. Mass media have incentives to maximize their audiences. They will often do so by reaching out to a large variety of audiences, adopting the stance of reporters of developments rather than advocates. What is embarrassing to candidates is at least as fit for their purposes as what is pleasing. And commentators will comment about anything that moves them, limited to be sure by their capacity to find media to give exposure to their views. These various third parties will exert constant pressure on candidates to be drawn into conversation they might otherwise have neglected.

Also important in extending the democratic conversation is the variety of offices open to popular election. These vary greatly along lines of public policy coverage. And they vary in geographical coverage, in the United States from the President, through Senate and House districts, on down to representatives to local school boards. The large variety of elected officials in the United States may on occasion be conversationally counterproductive if it strains the voters' conversational stamina.⁶⁷ But it does enrich the conversational possibilities in at least three ways. It adds a further measure of competitiveness into the conversational incentive structure. Even a candidate for local dog catcher can challenge the President of the United States on some issue or other. It slices issues and constituencies up in a variety of ways that can then appeal to different grouping of voters and in different ways. And it provides multiple focal points for the especially intense conversational involvement that comes from the direct participation of the candidate or official. The net result of these incentives is what we observe, a sprawling, unwieldy—and politically meaningful—public conversation about public policy, characterized by diversity and flexibility in its capacity to engage the citizenry.

VIII

Under democracy as meaningful conversation the apportionment of the United States Senate is basically unproblematic, so that its failure to generate controversy presents no puzzle. The "weight" of a person's vote is essentially irrelevant, since in

67. See text at note 80.

virtually all elections in a polity of any significant size, no person's vote weighs enough to matter. Under the model, it is not the vote cast for an official, but the conversation instigated by the prospect of elections that matters to members of the citizenry, and in that respect the Senate and the House of Representatives are basically equivalent.⁶⁸

The choice of geographically based candidate elections over a system of proportional representation may, however, be of great importance. Systems of proportional representation seem ready made for a vote-centered model of democracy, since, allowing for the admittedly substantial simplification that allegiance to parties requires, they transmit sentiment in the electorate intact into the legislature.⁶⁹ In contrast, geographically based candidate elections, as we have seen, open up the real possibility of disparity between electoral sentiment—even as gauged by party allegiance—and the makeup of the legislature. They also raise difficult questions under the vote-centered model of whether a representative represents all the constituents of the district, or just those who voted for him. By the light of democracy as meaningful conversation, however, geographically based candidate elections serve a very real purpose. They define a special relationship between those elected (and those seeking to be elected), on the one hand, and their constituencies on the other, directing the focused concern of each to the conversational involvement of the other. Freed from the vote as the focal point for popular involvement in governance, this relationship is ongoing, and it can then transcend partisan electoral politics. Thus we typically find that representatives in the United States speak of “my” constituents and members of the electorate of “my” Senator and “my” Representative, regardless of what may have taken place in the secrecy of the election booth.

There may, however, be subtle differences in methods of districting that can affect the personal meaningfulness of the democratic conversation for members of the electorate. Personal meaningfulness will likely be fostered if voters find it easier to keep track of who is representing them, at whom their par-

68. Even the complete absence of representation in the Senate for the electorate in the District of Columbia and American territories leaves occasion for a measure of democratic conversation (albeit an impoverished measure, see text at note 676), on account of other offices that remain subject to popular election.

69. See Sartori, *Comparative Constitutional Engineering* at 58 (cited in note 40) (the “undisputed merit . . . [of systems of proportional representation] is fairness in representation”).

ticipation in the conversation is ultimately aimed. Because House districts are usually less populous than states,⁷⁰ House elections more frequent than those for the Senate, and because most individuals have two Senators but only one Representative, the voters might be thought to find it easier to keep up with the identity of their representative in the House, rather than that of their Senators. That must have been the original constitutional assumption, when Senators were to be chosen not in popular elections but by the state legislatures. But apportionment of the Senate by states means that district lines for the Senate are stable,⁷¹ while district lines in the House of Representatives shift as population shifts.⁷² Combined with the fact that senatorial tenure is more sure, if only by virtue of the longer term of office, the stability of senatorial "districts" may actually lead to easier identification of and with Senators than Representatives, and hence to more personally meaningful conversation. Democracy as meaningful conversation may thus suggest that despite its malapportionment, the Senate is the more "democratic" of the two houses of Congress.

In democratic elections in some countries, particularly for the chief executive where that official is elected, there is an insistence that the eventual winner be chosen by a numerical majority of those voting, so that a runoff is employed if there are more than two candidates and none obtains a majority in the first round.⁷³ Since the ideology of American democracy associ-

70. Or, more precisely, never more populous. See note 45.

71. The Constitution provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const., Art. IV, § 3, cl. 1.

72. This is due in part to the Supreme Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), applying the one person one vote rule to intrastate House districting. Subject to that constraint, the "shifting" of district lines can be done by state legislatures even when population has not shifted, but in practice the one usually follows the other.

73. France provides the prime examples of such "two ballot" elections. The French president is chosen in the manner described in the text, while members of the French legislature, though chosen with "two ballots" if no candidate receives a majority in the first round, may still emerge with only a plurality, because more than two candidates may make it into the second and final round. See Sartori, *Comparative Constitutional Engineering* at 11-12 (cited in note 40). A variation on the two ballot theme (not including the majoritarian aspect) is found in election of the American President and Vice-President, with the second round conducted under special rules in the House of Representatives (or in the Senate, in the case of the Vice-President), if no candidate wins a majority of the electoral college in the "first round." U.S. Const., Amend. XII. Recourse to the House for election of the President has been required twice in American history, in the elections of 1800 and 1824. See Drinan, *House of Representatives*, *Encyclopedia of the American Constitution* 252 (Supp. 1, 1986). (In subsequent textual

ated with the vote-centered model attaches so much significance to majority rule in candidate elections, one might have expected to find such runoff elections the norm in the United States. In fact, except for the contorted procedures for presidential and vice-presidential selection, even the possibility of runoff elections is unusual at any level of American government. Instead a plurality usually suffices for election to public office, and this is perfectly satisfactory under democracy as meaningful conversation.⁷⁴ Little is to be gained by additional election rounds, as a single round can serve perfectly well as stimulus to the ongoing democratic conversation.

American history has seen the gradual extension of the electoral franchise, until it is now close to universally available in the adult population. The appeal of broad extension of the franchise is obvious under either the vote-centered or the conversational models. In conversational terms, personal meaningfulness of the conversation is the stabilizing force, and that meaningfulness is ultimately dependent upon the incentives of candidates to garner votes. The more broadly those incentives extend, the greater the stabilizing influence the conversation brings.

That children are not accorded the vote is understandable in either vote-centered or conversational terms, because as a group they likely have insufficient maturity for either self-governance or political conversation. But the conversational model also explains why their parents or guardians need not be accorded extra votes on account of their children, an omission that presents a real puzzle for the vote-centered model.⁷⁵ As a stimulus to conversational involvement, the single vote accorded adults is entirely satisfactory.

There has also been a gradual movement in the United States toward direct election of the most important public officials. In many democracies, some centrally important policy making officials are elected by bodies which are themselves elected. This is the way in which the chief executive—typically called a premier or prime minister—is chosen in most democracies. In the United States, Senators were originally chosen by

discussion of the electoral college, I will omit mention of the procedure for selecting the Vice-President.)

74. See *Davis v. Bandemer*, 478 U.S. 109, 130 (1986).

75. See note 45.

state legislatures,⁷⁶ and the President was chosen by an electoral college, the members of which were chosen as each state decided, and hence did not even have to be popularly elected.⁷⁷ In the case of the Senate, the states gradually introduced popular election on their own, and the Seventeenth Amendment now requires that Senators be chosen directly by the electorate.⁷⁸ In the case of the President, the original electoral college scheme is still basically in place as a formal matter, but the states (working in conjunction with political parties) have all (more or less) effectively constrained their electoral college members to follow a popular presidential vote in the state.⁷⁹ By making more clear—to these public officials and to their constituencies—with whom the constituents are ultimately conversing, these changes likely foster more personally meaningful conversation.

At the same time, there are surely limits to the conversational stamina of voters. Federal elected offices are few, but in some states the ballot contains a laundry list of candidates for a large number of state and local offices. In my home state of Illinois (by no means extreme in this regard), in addition to the Governor and Lieutenant Governor, statewide elections are held for a Secretary of State, an Attorney General, a Comptroller, and a Treasurer,⁸⁰ in addition, of course, to members of the (bicameral) state legislature and a varying but often large number of local officials, including judges. Such a proliferation of elected offices does have the virtue in conversational terms of multiplying the possibilities for intensive engagement that comes from personal involvement of the candidate. But the duties of many of these officials are decidedly peripheral to the concerns of very large numbers of voters, with the result that they are urged into conversations that hold little interest for them. This seems at least as likely to alienate as engage. In conversational terms it seems that the biggest conversational bang for the general election buck is obtained by election of a

76. U.S. Const., Art. I, § 3, cl. 1.

77. U.S. Const., Art. II, § 1, cl. 2.

78. See Riker, *The Senate and American Federalism*, 44 *Am. Pol. Sci. Rev.* 452, 467 (1955).

79. See generally William C. Kimberling, *The Electoral College* in 1 *Essays in Elections* 1 (National Clearinghouse on Election Administration, 1992); Ronald D. Rotunda, *The Aftermath of Thornton*, 13 *Const. Comm.* 201, 203-06 (1996). Most states award their entire electoral college delegations to the state's winner of a presidential popular vote, but Maine and Nebraska employ more complicated systems. See Kimberling, *supra*, at 8. See also *Ray v. Blair*, 343 U.S. 214 (1952).

80. See Ill. Comp. Stat. Ann. §§ 5/2A-5-6 (Michie, 1996).

relatively small number of generalist public officials like legislators and chief executives.

The conversational model comfortably accommodates the sweeping protections afforded to speech and the press by the First Amendment, and particularly the emphases on “the widest possible dissemination of information from diverse and antagonistic sources” and on assuring “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁸¹ This is not a particularly telling basis on which to favor the model over its vote-centered competitor, since the vote-centered model also accommodates open political communication.⁸² Still, free speech and press are “mere” means to the end of faithful decisionmaking under the vote-centered model, while the conversational model places them pretty close to the core of American democracy. In this sense, the conversational model may be more hospitable to the central role that the First Amendment protections of communication have come to play in contemporary constitutional law. In any event, neither model would seem to provide a compelling explanation of the substantial First Amendment protection that is in fact accorded in the United States to non-political communication.⁸³

More telling, perhaps, is that the conversational model is hospitable to the allocation of significant areas of public policy to officials who are neither elected nor directly answerable to those who are. This is a common and important feature of American (and other) democracies that seems anomalous from a vote-centered perspective, since it strains the connection between the members of the electorate and their re-presenters. In the United States, such allocation is found by degrees, reaching significant proportions with delegations to “independent” administrative agencies, subject in practice to varying regimens of congressional and executive oversight or overruling. With the Federal Reserve Board in the United States, for example, there remains the possibility of control by elected officials, but that possibility is hemmed in by very substantial legal and conventional restraints.⁸⁴ Policy-making by non-elected officials takes its most extreme form with the constitutional power of the fed-

81. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam).

82. See note 19 and accompanying text.

83. See Stone et al., *Constitutional Law* at 1249-1322 (cited in note 25).

84. See A Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 Yale L.J. 787, 810 n.146 (1987).

eral courts effectively to veto state and federal legislation upon a finding that it is unconstitutional.

While the sounds of silence about such constitutional review cannot compare with those about the Senate's apportionment, public opinion polls suggest that policy-making by courts is not particularly unsettling to the American body politic.⁸⁵ At the same time, however, constitutional decisions with regard to *particular matters* can become quite controversial. These are typically matters like abortion, racial preferences, and rights of the terminally ill as to which strong and contradictory opinions are widespread in the electorate.

The vote-centered model has little to offer in making sense of this complex of attitudes toward judicial review. Its account of the controversy that greets some court decisions relies on a "countermajoritarianism" of the courts that assumes a "majoritarianism" in the rest of the system that does not exist.⁸⁶ And the model offers no explanation of the general receptivity to judicial review, which should be troublesome if vote-centered "self-government" is at stake.

Judicial review by the light of the conversational model is a large subject that I cannot do justice to here, but it is at least clear that the conversational model provides a good deal more suitable framework than the vote-centered model for accommodating the constitutional role of the courts, as well as other assignments of policy-making to unelected officials. Unlike the vote-centered model, democracy as meaningful conversation contains no suggestion that every member of the electorate need be involved with each item on the public agenda. What matters instead is that to one degree or another a sense of real involvement with public matters be widely dispersed among the electorate. Assignment of authority over areas of public policy to non-elected officials—even relatively irretrievable assignment as in the case of judicial review in the name of the Constitution—does not necessarily interfere with such widely dispersed popular involvement.

Nor is there anything particularly anomalous under the conversational model about the political controversy that occasionally greets particular court decisions. The conversational model need not posit that topics of conversation are entirely

85. George Gallup, Jr., *The Gallup Poll: Public Opinion 1995* 71, 73 (Scholarly Resources Inc., 1995).

86. See Section IV, *supra*.

fungible for voters, that if they cannot be involved in conversation about abortion, the placement of a new schoolhouse will do instead. People do care deeply about particular public issues, and for those who care deeply a substitution of topics will not do. And while the courts are not entirely unconversational, theirs is not conventional conversation. They hear from litigants, of course; and unlike legislatures, appellate courts feel an obligation to explain in detail and in writing the bases for their decisions. The “democratic” problem with the courts under the conversational model is that they insulate themselves from conversation with the broad range of people who may have a pressing interest in certain issues before them.⁸⁷

The insulation is not solely the product of appointment rather than election of the judiciary. As every first year law student learns, the courts necessarily perform two different functions—adjudication of past disputes and policy formation (*i.e.* announcement of rules of law) for the future—that are in substantial tension with one another. While democratic conversation might be appropriate for the latter, it is decidedly ill-suited to the former. As a result, ongoing democratic conversation by judges is disapproved by professional norms of judicial conduct.⁸⁸ For this reason it should not be surprising to find that constitutional judicial decisions on controversial issues breed a degree of resentment as “undemocratic” even in jurisdictions where judges are elected.

IX

Democracy as meaningful conversation can also shed light on less foundational features of American democracy. It suggests, for instance, that, other things being equal, stability of electoral district lines is a good thing.⁸⁹ The conversational perspective simultaneously raises a cautionary flag about the currently popular proposals for legislative term limits,⁹⁰ and about

87. Cf. Robert H. Burt, *The Constitution In Conflict* (Belknap Press of Harvard U. Press, 1992). Dare I suggest that the “difficulty” with the courts as constitutional policymakers in a democracy might better be dubbed “counterconversational” than “countermajoritarian”?

88. See Model Code of Judicial Conduct, Canon 5(A)(3)(d)(ii) (1990) (“A candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” (emphasis supplied)).

89. See notes 69-72 and accompanying text.

90. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

the substantial advantages that incumbents appear to have in electoral contests. Each in its own way may threaten the meaningfulness of the democratic conversation, by dampening the incumbent's incentive (and, in the case of the incumbent advantage, that of challengers as well) to engage the electorate in that medium. Another problem—one to which the Supreme Court has been attentive—is that of obstacles placed in the way of ballot access for candidates.⁹¹ There are surely legitimate interests that are served by requiring some significant showing of political support for a candidate seeking a place on the ballot. But access that is too onerous is troublesome. If candidates who do have some significant following are excluded from the ballot, their followers may come to doubt that their concerns are taken seriously in the democratic conversation.

The conversational model also brings into focus some of what is at stake in current debates (and litigation⁹²) about racially gerrymandered legislative districts. From a vote-centered perspective, it might seem puzzling that members of racial minorities seem to attach great importance to having members of their race as their representatives. As individual voters they have essentially no influence on eventual legislative outcomes, no matter who represents them. But even as groups, in vote-centered terms members of racial minorities might be thought to combine their voting resources more effectively by having them spread out over several districts, rather than concentrating them in a few in a way that ensures election of one of their own.⁹³ The emphasis of the conversational perspective, on the other hand, is on conversational involvement rather than on legislative outcomes. For members of the electorate able to experience it, the ability to identify with a representative may well cause the democratic conversation to be more personally meaningful. This provides a quite general argument for districting along lines of politically salient interests, but, given the history of race relations in the United States and the consequent destabilizing potential of minority disenchantment, racial minority groups may be especially appropriate candidates for such conversation-enhancing districting.⁹⁴

91. See Stone et al., *Constitutional Law* at 786-91 (cited in note 25).

92. See *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Bush v. Vera*, 116 S. Ct. 1941 (1996).

93. See Charles Cameron, et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am. Pol. Sci. Rev. 794 (1996).

94. See Section XI. Needless to say, conversation enhancement through districting cannot be made broadly available, since the number of racial, religious, ethnic, occupa-

Democracy as meaningful conversation can also help frame useful questions about campaign finance reform. Does commercial dominance of the airwaves by one side in an electoral campaign seriously jeopardize the meaningfulness of the democratic conversation for those out of sympathy with the dominating message? Or does the secondary conversation leave the overall effect robustly meaningful still? If campaign contribution limitations divert resources from primary to secondary democratic conversation, does that affect the overall meaningfulness of the conversation? And then, quite apart from financing, does the drumbeat of short political advertisements around election time produce more meaningful conversation or more cynicism?

These could easily be multiplied, but it is important to emphasize that even if these questions are answered in conversational terms, public policy conclusions do not necessarily follow. It is quite possible, for instance, that some phenomenon relevant to the meaningfulness of the democratic conversation also touches other significant aspects of the system. Some item of campaign finance reform, for instance, might simultaneously increase the meaningfulness of the conversation but make it more difficult to attract honest or intelligent people into public office. In such a situation one might well conclude that the meaningfulness of the conversation was of secondary significance, either because the quality of public servants is itself stability enhancing, or because that quality is independently important. In similar fashion, the existing limit of two terms for the President might be thought desirable despite the anti-conversational incentives provided in the second term, because excessive presidential power is more to be feared. But if the conversational model does not answer all or even any of the many pressing questions about American democracy, it certainly suggests different, and I hope fruitful, ways of framing a great many of those questions.

tional, and other politically salient groupings far exceeds the three national legislators representing most members of the electorate, or even the larger number of public officials for whom the typical American citizen is eligible to vote. Indeed the Constitution forecloses such personal identification with members of the House of Representatives for voters under the age of twenty-five, and for recent citizens, because it makes members of such groups ineligible to serve in the House. See also U.S. Const., Art. I, § 2, cl. 2. For the Senate the ineligible population is defined along similar but more restrictive lines. U.S. Const., Art. I, § 3, cl. 3. In addition to an even more restrictive age qualification, no person is eligible to be president who is not a "natural born citizen." U.S. Const., Art. II, § 1, cl. 5.

X

Democracy as meaningful conversation can also provide interesting insights on more general issues of democratic governance. It may, for instance, suggest that representative democracy is more “democratic” than direct democracy. As we have seen, Madison thought that representative democracy was superior to direct democracy, because it would yield results “more consonant to the public good.”⁹⁵ Others have defended representative democracy as the only efficient way to conduct democratic government—conceived in vote-centered terms—on a large scale.⁹⁶ But if meaningful democratic involvement is achieved more through conversation than through voting, we may well have a greater measure of such meaningful involvement with the two-stage ongoing process of representative democracy than we ever might hope for with any but the most intimate examples of direct democracy.

Even if large direct democratic gatherings needn’t degenerate into “mobs,”⁹⁷ the individual’s vote in any such gathering would be very unlikely to affect any outcome, and the assembly as a whole would have to do its business in a short time frame and severely limit the items on its agenda, the number of speakers, the length of speeches, and likely all three at once. In a direct democracy of any size and degree of heterogeneity (to say nothing of a hypothetical gathering of an entire nation state), it would then be quite likely that no speaker would address any matters in a way congenial to significant segments of the electorate. Most representative democracies, in contrast, limit the size of legislative chambers so that each member has a real chance of affecting outcomes.⁹⁸ They employ full-time “professional” legislators meeting in extended sessions and dealing with an extensive public agenda. This combination vastly extends the potential for broad electoral involvement in conversation that can play a meaningful, even if indirect, role in the decisive legislative stage.⁹⁹

95. Federalist 10 (Madison), *The Federalist Papers* at 82 (cited in note 5).

96. See remarks of “Philanthrop” and “Americanus III”, in *Debate* cited in note 19.

97. See note 44.

98. The present 435 member House of Representatives may be testing the upper limits of the size of a legislative chamber where each member has a fair chance of having his vote affect ultimate decisions.

99. Cf. Amar, *Popular Sovereignty and Constitutional Amendment* at 111 (cited in note 24).

Direct democracy might, of course, stimulate an extensive secondary conversation that could serve as a vehicle for conversational engagement of the citizenry. And one could imagine that direct democracies might come to accommodate a larger agenda and more extended debate by scheduling frequent meetings and choosing those who speak because of their representativeness of some electoral point of view. Any movement in this direction would, of course, be limited by the fact that the citizenry at large has other things to do. Putting that constraint to the side, such moves might cause some give and take to develop between the representatives and their constituents. This might further stimulate a secondary conversation, and the net result could be a robust sense of engagement for members of the electorate. Direct democracy would then have become democratic in the spirit of the conversational model, but it would have done so by introducing elements of representative democracy that make it congenial to democratic conversation.

The conversational model may also help resolve the democratic puzzle referred to in the public choice literature as the "paradox of voting."¹⁰⁰ The paradox is rooted in the "free rider problem" produced by the ineffectiveness of any individual's vote to determine the outcome of an election. Given this ineffectiveness, each voter, if he is assessing things "rationally," should conclude that he might as well stay home (or do something more worthwhile) on election day and leave the voting to ("ride free" on the voting of) others. The paradoxical fact that people do vote in large numbers has led to contorted attempts to understand voting as having "consumption value" or "entertainment value" for the voter.¹⁰¹ In this way of thinking about things, a voter votes not to affect the outcome of the election, but because he derives pleasure or satisfaction from performing his "civic duty" in participating in the selection of public officials.

Democracy as meaningful conversation helps to dissolve the paradox. If voting is not *the* quintessential act of self-government, but rather a pivotal stimulus for, and a part of, an ongoing conversation—indeed one where the sense of personal meaningfulness is heightened by a connection between representative and constituent—then it is more natural to think of in-

100. See generally Dennis C. Mueller, *Public Choice II* ["Mueller II"] 348-69 (Cambridge U. Press, 1989).

101. *Id.*; Mueller, *Public Choice* at 122 (cited in note 15).

dividuals as valuing voting as part of what gives meaning to a sustained activity that is a component of their everyday lives, of their senses of self. To be sure, the average individual's participation in democratic conversation will not likely be decisive in policy making. The chance of being conversationally influential on some discrete issue is perhaps greater for many individuals than the chance of determining the outcome of a candidate election, since there are lots of such issues. But the personal meaningfulness of the democratic conversation does not depend on discernible influence on ultimate decisions. And even beyond personal meaningfulness in the sense that I have been using the term, we do not actively engage in ordinary conversations—even those with an element of dispute—solely because we hope to persuade. And we do not passively observe discussions by others solely because they will educate us better so that we can then take some concrete action on firmer ground. Rather both active and passive involvement in conversation give meaning to relationships to other individuals and more generally to the environment in which we function. There seems every reason to think that the democratic conversation functions in much the same way. This is, I suppose, a “consumption value” account of why people vote (and could appropriately be called a response to “civic duty”), but it is an account that gains plausibility because it frees the act of voting from the ineffectual isolation into which it is cast by the vote-centered model.

Democracy as meaningful conversation also can help us appreciate why representative democracy seems to thrive on a large scale, such as that found in the United States and other populous democracies. At the time that the United States Constitution was adopted, the Antifederalists argued that a legislature made up of a tiny proportion of the population, such as that which made sense for an extended republic, could not sensitively represent the interests of a large population.¹⁰² From a vote-centered perspective they certainly had a point, for voting, even when supplemented by open communication thereafter, cannot make the legislature into a mechanism for processing the sentiments of a large population. Indeed if the vote is taken as the mechanism of self-government, then, other things being equal, the degree of the individual's self-governing power necessarily

102. In Volume I of *The Debate on the Constitution*, supra note 19, see, e.g., *Centinel I*, at 60; *Letters from the “Federal Farmer” to “The Republican,”* at 269; *“Brutus” III*, at 320, 321, 323; *Richard Henry Lee to Governor Edmund Randolph*, at 467; *Dissent of the Minority of the Pennsylvania Convention*, at 533.

diminishes as the size of the electorate grows,¹⁰³ approaching the vanishing point with an electorate of any substantial size. The democratic conversation, in contrast, has attributes of a “public good” in the economist’s sense, where participation by one person does not correspondingly diminish the capacity of others to participate—as long as it is appreciated that by far the largest portion of participation will be passive rather than active.¹⁰⁴ To the extent that the democratic conversation is the linchpin of the system, and participation in it by the electorate is largely passive, there is no obvious maximum size for districts in a stable democracy, nor for the democracy as a whole.¹⁰⁵

XI

Our Madisonian constitutional system was designed in significant part to deal with the politics of interests that we encountered in Section IV. Madison urged an extended republic encompassing all the states, for instance, as a corrective to what he called “factions,” which he defined as “citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and ag-

103. Operating from a vote-centered perspective, Robert Dahl seems to acknowledge the point. Dahl, *Critics* (cited in note 20). He associates democracy with “one of the most fundamental of all freedoms, the freedom to participate in the making of the laws that will be binding on oneself and one’s community.” *Id.* at 78. But then, recognizing that the degree of “participation” understood in vote-centered terms must diminish as the size of the electorate increases, he suggests that “the greater scale [found in representative democracies] probably stimulates a concern for rights as alternatives to participation in collective decisions.” *Id.* at 220.

104. This point is basically missed in Sartori, *Comparative Constitutional Engineering* at 56 (cited in note 40). In discussing an alleged virtue of single member geographically based plurality systems as creating “a direct linkage between the elector and its elected representative,” Sartori asks whether the linkage can be “meaningful” in populous districts, and says that those who vote for the loser “simply lose their vote . . . [are] not represented at all.” *Id.* Once the possibility of passive but real participation in conversation is recognized, however, it is not clear that there need be a loss of “linkage” in large districts. Indeed since the largest part of the democratic conversation proceeds without the representative, deals with a multitude of different subjects, and contemplates eventual rather than immediate effect on the representative, see Section VII, it is not even clear that *active* participation by one member of the electorate does that much to crowd out *active* participation by others.

105. This point should be qualified by the recognition that smaller districts may yield more engaging conversations, if the smaller size brings homogeneity along racial or other conversationally salient dimensions, which then allows more personally meaningful involvement. See notes 92-94 and accompanying text. In that sense the Antifederalist point retains some force. But large districts can be homogenous and small districts need not be. Without that homogeneity, the conversational advantages to smaller districts seem likely to be modest.

gregate interests of the community.”¹⁰⁶ “Extend the sphere [of the country],” Madison urged in Federalist 10, and:

[y]ou take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.¹⁰⁷

Despite the Madisonian correctives, concern with a politics of interests has hardly abated. While Madison made no specific mention of the coalescence of factions into organized groups, the modern concern is more likely to be expressed in such terms. There is perhaps no more common lament from all sides of the political spectrum in the contemporary United States than that of the untoward operation of “interest groups,” which are often referred to derisively as “special interests.” There is even widespread doubt that there is such a thing as the “permanent and aggregate interests of the community” or the “true interest of . . . [the] country”¹⁰⁸ as opposed to some “equilibrium” in the bargaining process among organized groups. Indeed it is fair to say that an interest group “model” of democratic politics has gained substantial currency, in which democratic outcomes are seen as the result of bargaining among organized groups. In the most extreme versions of the model, it is such groups alone that play significant roles in the production of legislation or other important public policy choices. Legislators and other public officials are taken to act only as brokers among those groups, and unorganized members of the electorate are basically irrelevant in the production of democratic outcomes.¹⁰⁹

As a way to characterize actual democratic outcomes, the interest group model probably has more plausibility than does the vote-centered model, with its insistent and unrealistic egalitarianism. Still, as might be expected with any simple model, the available empirical work suggests that there is a much richer set of inputs into democratic outcomes than those of organized interest groups.¹¹⁰ Nor is this surprising from a theoretical per-

106. Federalist 10 (Madison), *The Federalist Papers* at 78 (cited in note 5).

107. *Id.* at 83.

108. See notes 33-35 and accompanying text.

109. See Earl Latham, *The Group Basis of Politics* 35 (Cornell U. Press, 1952); Landes and Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 877 (1975).

110. See Farber and Frickey, *Law and Public Choice* at 29-33 (cited in note 56).

spective. Even apart from the insulation from constituent pressure that was Madison's aim, the interest of candidates and officials in election and reelection makes unlikely any exclusive concern on their part with constituents who have coalesced into organizations. There is no reason to think that issues that matter to voters either lead them to support organizations devoted to those issues or not to care much at all. In between those extremes is the likelihood that some sentiments of large numbers of voters will matter enough to affect voting behavior, though not enough to justify support of groups organized around those sentiments. To the extent that elected officials understand this, they will seek to attract that class of unorganized voters. Candidates will remain disproportionately attentive to organized groups, both as sources of information and as efficient mobilizers of votes, but that does not suggest anything like ignoring the rest of us.

Interest group theorists have not focused on issues of stability. An interest group model might suggest instability, for the outcomes it posits leave entirely unsatisfied those voters in between the extremes of organization and disinterest, those who seriously care about certain issues but not enough to support groups organized around those issues. But by hypothesis that middle group of voters is disorganized and hence is likely to be insufficiently powerful or insufficiently concerned to act on its dissatisfaction in destabilizing ways. The recurrent grouching that one hears about "special interests" might then under the interest group model represent a resultant low level of dissatisfaction.

The concern with interest groups is readily understandable in *normative* vote-centered terms. Any disproportionate influence of organized groups necessarily compromises the vote-centered equality of inputs. In these terms, however, ordinary politics is deficient as well.¹¹¹ Disproportionate interest in issues is pervasive and makes everyman's politics a politics of interest. There may well be problems in the outcomes of a politics of interests—"rent seeking" legislation and the like, the societal costs of which exceed the benefits—and organized groups may produce more of such outcomes than ordinary voters. But the root of the problem is in differential interests, not in the fact that

111. As Madison's Federalist 10 discussion, see notes 107-108 and accompanying text, seems implicitly to recognize, with its concern with common interests or passions, but with no mention of any special role of organizations in pursuing those interests or passions politically. See Federalist 10 (Madison), *The Federalist Papers* (cited in note 5).

those interests find expression through organized groups. This makes any vote-centered descriptive account of the dissatisfaction with interest groups in politics ring somewhat hollow, since there is little hint of such dissatisfaction with the politics of the unorganized.

The conversational model provides a far more satisfactory explanation of the pattern of dissatisfaction. It is public decisionmaking outside the conversational ambit that in conversational terms has the potential to be problematic. The clearest case of such decisionmaking that proceeds heedless of the democratic conversation is the proverbial "back-room deal," an understanding reached between interest groups and decisionmakers outside the public eye. What is problematic about interest groups from the perspective of democracy as meaningful conversation is thus not some disproportion of influence on certain outcomes, but rather that organized groups have the capacity denied to most of us to engage in such back-room deals—leaving meaningless any public conversation about the subject matter of those deals. Even when the secret favors the interest groups receive take otherwise legitimate form, deal making outside the ambit of the democratic conversation thus drains democracy of what the conversational theory posits as the taproot of public support. Groups are, of course, no different in this respect from individuals with the interest and the resources for private lobbying, but they are quite different from the interested but unorganized voter, for whom public conversation (including the vote) is the exclusive means of democratic participation.

Conversely, within the conversational model, interest groups are essentially unproblematic when they engage in the democratic conversation. Indeed they may serve a salutary purpose if they facilitate the public expression of the views of some voters. The disproportionate attention to what organized groups have to say may cause some concern when there are both organized and unorganized groupings of voters who care passionately about an issue. Still, within the conversational model this has no seriously dispiriting effect if the democratic conversation nonetheless remains meaningful for the unorganized, if, that is, the unorganized view is given voice *and* the conversational stance of the interest groups and the public official is not taken to be a sham that masks a decisional process that is really proceeding in private and heedless of what is being said publicly.

The possibility of a sham is, however, impossible to dispel, for organized groups have the capacity for back-room dealing,

even if in fact they operate completely in the open. Both groups and officials can lessen such concern by engaging in the democratic conversation. But the mere capacity of organized groups to operate outside the ambit of the conversation, combined with the difficulty of tracing the causation of democratic outcomes, probably condemns American democracy to chronic concern about the political operation of interest groups.

There is a converse problem to the disproportionately large political influence of organized interest groups. This is the problem known to American constitutional law as that of "discrete and insular minorities." The idea is that some groups of voters (whether organized or not) are *disdained* by others and hence shut out of the political give and take. The phrase "discrete and insular" is not a particularly good choice, because widely dispersed groups may be even more politically ineffectual than insular ones.¹¹² In any event, in conversational terms the problem is the existence of voters for whom the democratic conversation has no personal meaningfulness, because it is clear to them that their conversational participation is not politically meaningful.

It is probably inevitable that there will be categories of voters that are perennially excluded from the democratic conversation, and within bounds this is unavoidable and unproblematic. Any society will treat certain behavior and certain aspirations as beyond respectable bounds. This is true in the United States, for instance, of polygamists, of those who would employ minor children in hard labor, and, to cite a couple of recently prominent examples, of Texas secessionists, and of those who practice female circumcision—to say nothing of the society's thieves and murderers. Even in such cases, arguments that the behavior should not be disdained will occasionally be heard and even heeded. There are few more reviled persons in the United States today than "drug dealers," but there is also a lively debate about whether and to what extent the sale of certain prohibited drugs should be legalized. In addition, members of such excluded groups may find conversational engagement on other matters. An advocate of polygamy may also be intensely interested in whether the city council subsidizes a new football stadium or logging is allowed in national forests. But even if some disfavored persons find little in the way of conversational alterna-

112. See Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 Nw. U. L. Rev. 978, 996 (1981).

tives, social living dictates that certain matters remain more or less indefinitely outside legitimate conversational bounds.

The more serious conversational problem—the one that takes on constitutional dimensions—arises when there are no plausibly acceptable grounds for conversational exclusion. Thus Black Americans were long notoriously excluded by both formal and informal means from most avenues of political participation in large parts of the country. Because of this history they are usually cited as the quintessential “discrete and insular minority.”

The problem of malapportioned state legislatures can be conceived in terms of the exclusion of some from the conversational give and take. Neither Madison nor the Constitution he did so much to craft addressed the interest group problem at the state (and local) level, where, as Madison put it, “the fewer probably will be the distinct parties and interests . . . the more easily will they concert and execute their plans of oppression.”¹¹³ The “oppression” he had in mind, of course, was political disdain and exclusion of those who were opposed to the majority, and resultant disregard of their interests. It was Madison’s central argument for the new Constitution that in a large and heterogeneous country such factional oppression would be difficult. But on a state level he saw it as a problem of serious dimensions. If this Madisonian analysis of the state situation is accepted, it is also reasonable to conclude that the interest group problem at the state level was substantially exacerbated by malapportionment of state legislatures prior to *Reynolds*.¹¹⁴

Prior to *Reynolds*, apportionment was strictly up to the state legislatures themselves, with the result that any dominant factions had substantial leeway to perpetuate that dominance. State legislatures were thus importantly different from and more troublesome than the Senate in both presenting more of a problem of interest group sway in the first place and in tending to entrench it. The result of such entrenchment, of course, would be effectively to exclude (or at least substantially disfavor) others in the political give and take. By leaving the only effective mechanism for stirring the political pot under the control of those who had an interest in keeping its contents still, the

113. Federalist 10 (Madison), *The Federalist Papers* at 83 (cited in note 5). Justice Scalia’s dissent in *Romer v. Evans*, 116 Sup. Ct. 1620, 1634 (1996), graphically depicts in interest group terms struggles at the state and local level in Colorado.

114. *Reynolds v. Sims*, 377 U.S. 533 (1964).

malapportionment of state legislatures may thus have bred cynicism about the meaningfulness of the democratic conversation not just for conventional discrete and insular minorities like Black Americans, but for even more substantial portions of the electorate in affected states.

In this sense, requiring periodic reapportionment of state legislatures might have been a mechanism by which to unsettle factional tyrannies in the state context, and thereby to shore up the democratic conversation at that level. On these assumptions *Reynolds* may be seen as a mechanism for strengthening American democracy, albeit in a very different way than the Court claimed, or perhaps even realized. And if this is accepted, there is not much of a puzzle about the popular embrace of *Reynolds*, and its comfortable coexistence with a malapportioned Senate. For *Reynolds* may have required state legislatures to become more like the United States Senate in the conversation-enhancing way that the conversational model takes as important to a stable democracy.

XII

There are plainly some phenomena of American democracy for which the vote-centered model provides a better account than does democracy as meaningful conversation. For one thing, consider the repeated depiction of the system as “majoritarian” and the fixation with what popular majorities think. I have treated these as aberrations and discounted them, but they are also phenomena which a model might seek to explain.

Potentially there is a good deal more than the rhetoric of American democracy at stake. Consider a hypothetical tale. Under the convoluted procedure that the United States Constitution establishes for selection of the President, if no person commands a majority in the electoral college, the House of Representatives chooses among the three candidates with the largest number of electoral college votes. In that House election each state delegation has one vote. With the Perot candidacy in 1992 there seemed for a time to be the possibility that no candidate would command a majority of the electoral college. Now suppose that there had been an electoral college standoff, and that in the House the less populous states had joined together to produce a choice for President of the candidate who had come in (a distant) third in the popular vote.

Such a turn of events is not particularly far-fetched.¹¹⁵ I have little doubt that if it had transpired it would have presented the country with an important crisis, and possibly a seriously destabilizing one. If I am right in this speculation, it must be because selection of a President traceable to a relatively small popular minority runs against some part of the grain of American democracy. It is irrelevant to that part of the grain that the hypothesized turn of events would have been accompanied by the most searching and serious public conversation—as it almost surely would. Only history can account for how we got the constitutional procedure for selection of the President, and only considerations outside the conversational model—considerations such as the stabilizing force of egalitarianism and majoritarianism in the system—can account for the trouble into which that history just might have led us in 1992, and might lead us yet.¹¹⁶ In this sense the electoral college route to selection of a President, which I have mentioned as evidence that our democracy is not so insistently majoritarian, also suggests that the system likely has important majoritarian strains.

But if democracy as meaningful conversation paints only an incomplete picture of a complex system, it colors in a good deal more than its chief competition. Among the features of American democracy that the conversational model accounts for decidedly better than the vote-centered model are bicameralism and satisfaction with the Senate; election of a President independent of the legislative branch; the electoral treatment of children and their parents; the constitutional role of the Supreme Court, and its popular embrace; the comfortable use of single (or dual) member geographically defined legislative districting; the plurality selection norm in legislative elections; the pervasive suspicion of the political activity of interest groups; and the appeal to minority group voters of districting likely to send members of their groups to serve in legislatures.

115. After imagining the above I came across a variation on the drama in Lawrence D. Longley and Neil R. Peirce, *The Electoral College Primer* 1-15 (Yale U. Press, 1996) (chap. 1, titled "The 1996 Election is not Quite Decided: A Fantasy"). Chapter 3, entitled "Recent Crisis Elections" documents the regularity with which we court trouble because of the electoral college scheme. *Id.* at 37-88. The authors quote former Senator Kefauver as saying, "Every four years the electoral college is a loaded pistol aimed at our system of government. Its continued existence is a game of Russian roulette. Once its antiquated procedures trigger a loaded cylinder, it may be too late for the needed corrections." *Id.* at 124.

116. My own hunch is that the House would likely avoid such a move against the grain, but even if I am right that only serves to emphasize that the grain is there.

I do not, however, want to exaggerate the power of the conversational model. There is plenty of disengagement and cynicism about government in the United States—with attendant implications for stability—despite the ubiquity of the democratic conversation. And there are undoubtedly explanations for the stability of American democracy that have little to do with conversation—or with vote-centeredness. The prosperity of the country would be high up on my list if I were asking what it is about American society rather than about American democracy that causes stability. (And the maldistribution of that prosperity would be high on my list of causes for concern about instability.)

I am sensitive about the possibility that the conversational model may be uncritically rooted in American democracy. I have intentionally left a degree of ambiguity about whether the power of the model extends beyond the United States. On the one hand, I have identified certain features of American democracy that seem especially suited to conversational engagement. In this connection, it is at least suggestive that democracy in the United States is the longest lived in the world despite the fact that it has ethnic, racial, and religious “cleavages” that, not surprisingly in the United States and elsewhere, have been associated with instability.¹¹⁷ On the other hand, wide ranging public conversation about public policy is found in democracies beyond our borders, and may well have stabilizing effects in those contexts as well. It may just be that the United States is a basically conversational democracy (with elements of vote-centeredness), while some other democracies are basically vote-centered (with elements of conversationalism).¹¹⁸ In this sense it might be appropriate to think of democracy as meaningful conversation not so much as a model of democracy, but as an interpretation of the version found in the United States.

All this suggests an agenda for comparative research. The constituent states in the United States vary in a number of ways that might be relevant to the nature and quality of the democratic conversation, like sizes (and, thanks to Nebraska, the

117. See Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in *Nomos XXXVIII* at 175, 189 (cited in note 52).

118. It is common currency among political scientists that political parties in the United States are “less disciplined . . . than European-style parties.” Norman Schofield, *Rational Choice and Political Economy*, in Jeffrey Friedman, ed., *The Rational Choice Controversy* 189, 202 (Yale U. Press, 1996). The discipline referred to is faithfulness to party programs, and there should be some substantial tradeoff between party discipline and openness to meaningful public conversation.

number) of their legislative chambers, ratio of legislators to voters, use of term limits for legislators, regulation of campaign finances, the nature and extent of popular balloting on issues, and the number of public officials who must stand for election. Because the states are embedded in the United States there is no varying degree of stability with which these features might readily be correlated. But it still might be possible to compare the different states along some measure of a popular sense of involvement in the process of governing.

Foreign democracies, of course, differ from those in the United States in quite fundamental ways. Those democracies characterized by proportional representation might be treated as vote-centered, with the United States as a conversational democracy. The two might then be compared for the nature and extent of a sense of popular involvement in governance and of stability.¹¹⁹

While there could be some payoff in such comparative research, the results are unlikely ever to instill the kind of confidence that attends modeling in the natural sciences. There is simply no substitute for the controlled experimentation available in hard sciences. Nor will it necessarily do to wait. Models of democracy that we carry around in our heads affect actions that we take here and now. They affect, for instance, contemporary debates in the United States about term limits, incumbency advantages, campaign finance, initiatives and referenda, the role of the courts in constitutional review, ballot access, ballot designation of candidates with multiple parties,¹²⁰ and lots of other issues. As I have been at pains to say, I do not advance democracy as meaningful conversation as resolving any such debates, but I do think it can clarify them, and that is a contribution not to be gainsaid, or even to await completion of an ambitious agenda of comparative empirical research.

119. Compare G. Bingham Powell, Jr., *Contemporary Democracies: Participation, Stability, and Violence* (Harvard U. Press, 1982); Dahl, *Thinking About Democratic Constitutions* at 191 and n.32 (cited in note 52).

120. See *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997).