

DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM. By James S. Fishkin.¹ New Haven, Conn.: Yale University Press. 1991. Pp. viii, 133. \$17.95.

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Debate over political reform during the last two decades has frequently pursued two different visions of governmental responsibility. On the one hand, many point to the dialogic role of governmental institutions, which in their ideal form can refine citizen goals and preferences into something like a communal vision of "the public interest." Under this view, governmental processes and institutions, and the reform of those institutions, should be evaluated according to the extent to which they further means-end rationality, a reflective analysis of normative goals, and/or a convergence on a communal vision. Civic republicanism, practical reasoning and pragmatism are some of the scholarly literatures that have focused on this value.³ At the same time, another classic approach, perhaps of an older legal vintage, has emphasized democratic accountability, the faithfulness of decisionmaking to the wishes of "the people." Institutions and their reform must come to terms, from this perspective, with (for democrats) the countermajoritarian difficulty or (for law and economic types) principal-agency theory.

As is true with most other areas of scholarship, a synthetic wave of writing specifically looks at institutions and reforms which help reconcile major views, in this case attempting to forge what Cass Sunstein has called a "deliberative democracy."⁴ Clearly, Sunstein, as well as Bruce Ackerman and others, have made insightful contributions that fall into this tradition, as has James Fishkin in his aptly titled new book, *Democracy and Deliberation*. Unlike much of this latest scholarship, which tends to be theoretical and court-centered, Fishkin's proposals are highly practical changes aimed at improving the daily mechanics of the political process; specifically, the functioning of the party nominating system. Simply put, Fishkin proposes to create a national jury of randomly selected party members who would meet and discuss issues at length with

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3. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539 (1988); Bruce Ackerman, *We the People* (Belknap Press, 1991); Michael Brint and William Weaver, eds., *Pragmatism in Law and Society* (Westview Press, 1991) ("Pragmatism").

4. Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 313 (1992).

the candidates of their respective parties during the early primaries. The result, Fishkin hopes, will be a deeper probing of proposed policies by the jury—whose votes on candidate preferences, to be reported in a separate poll, might preempt the daily opinion polls which often capture only the unreflective impressions of the unfocused public during the hectic primary season.

There is much to commend this proposal. Fishkin focuses on a serious problem—the rise of candidate-centered campaigns, the decline of reasoned debate during the nominating process, and the sometimes tyrannical power exercised by the media during the primary season, when the public's impression of individual candidates may be quite limited. While the purpose underlying this proposal is merely to affect the dynamic of primary polls and the public debate about them, it may improve the dynamic of the primary process overall, which most observers, including many winners, agree have serious drawbacks.⁵ Fishkin also demonstrates a reluctance to call for sweeping changes, presumably out of fear of the unknown—a humility that the history of past primary reforms may well justify.

Despite these obvious advantages, one is left wondering whether this type of approach should be expanded to other aspects of governmental institutions. As I suggest below, I would be very cautious about extending this model beyond Fishkin's quite limited domain. While this incremental reform would be helpful, it should not divert us from thinking and writing about more systemic reforms.

First, some background. Over the past twenty years, both students and practitioners of politics have come to recognize several drawbacks to the current primary political process. In the old days, primary candidates were chosen largely by the party leadership, with much less popular primary participation or significant public primary debate. The theory behind this system,⁶ which now would be put in terms of principal-agency theory, was that democracy—both in a participatory and a dialogic sense—best occurred between the parties, not within them; in other words, party leaders were most likely to be held accountable to the public by the threat of loss at general election day, not by primary fights within the party. Under this reasoning, the threat of an effective opposition in the general election would force parties to focus and develop the most important issues at the time when the general public was paying the

5. See Walter F. Mondale, *Primaries Are No Test of Character*, N.Y. Times, Feb. 26, 1992, at A21.

6. This is aptly summarized originally in E.E. Schattschneider, *Party Government* (Holt, Rinehart and Winston, 1942).

most attention, participation was at its highest and the issues were most clearly framed. Party structures thus allowed for an economy of participation and dialogue.⁷

This ideal of party responsibility, however, only has force to the extent there are two strong, competitive and responsive party structures and the issues coalesce along a clear right/left continuum.⁸ By 1968, with divisions in the Democratic Party over the war in Vietnam and race, many rank and file members viewed party leaders as unresponsive. The Democratic primary reforms after 1968, which substantially increased the importance of primaries, opened the process to candidates selected outside the traditional party establishment. With the increasing importance of the media and public funding, as well as the decline of party identification in the public, the nominating process has become a far more open one.

These changes have had several beneficial effects—the parties are more receptive to certain types of new ideas and there is far greater scrutiny of the primary political process than backroom dealmaking allowed. The rigidities of the party bureaucracies have also diminished in many respects. But there are several difficulties with the current system, which should not be overstated but are real.

First, making the parties directly responsive to the party primary electorate may have a tendency to advantage candidates who are at the ideological wings. Since the median voter of each party is likely to be more at either wing than the median voter of the general electorate, and more ideological party members tend to vote in primaries, the group selecting candidates in a primary is unlikely to reflect the goals of the general electorate very well. While primary voters *may* act strategically with an eye to the general election, they are probably less likely to do so than party professionals.⁹ Thus, a primary system may tend to push each party towards candidates at its wing—the left of the Democratic Party, and the right of the Republican Party.¹⁰

7. Related to this binary two-party concept of political accountability is a theory of retrospective accountability in government. Since parties “captured” government, they could be held retrospectively accountable for what had been done in government. This mode of accountability was potentially superior to popular directives to the extent the public is considered better at evaluating the past consequences of government action, rather than directing its leaders what to do. See generally Morris P. Fiorina, *Retrospective Voting in American National Elections* (Yale U. Press, 1981); V.O. Key, Jr., *The Responsible Electorate* (Belknap Press, 1966).

8. To the extent political preferences and visions are multi-peaked or stochastic, then majority rule itself may have less meaning, except as a matter of agenda control.

9. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).

10. See generally Nelson W. Polsby, *Consequences of Party Reform* (Oxford U. Press, 1983).

Second, the free-wheeling discussion characteristic of primary politics may lead to open fissures within the party that cannot be repaired for the general election. Theorists of civic republicanism and pragmatism envision public dialogue on the issues as leading toward identification of common ground and respect for difference.¹¹ Whatever may be the case in other contexts, political parties, in order to serve the functions described above at the general election, must properly frame the issues to the public, maximize participation and establish a system for managing debate and conflict. To achieve these goals, parties cannot allow all issues to be placed on the public agenda, but instead must create institutions that will manage the public dialogue. Two political parties—while clearly excluding certain issues—have it in their institutional interest to surface issues that will capture a majority of the electorate and minimize divisions that ultimately are unlikely to sway the mass public. Multiple candidates, in contrast, may not have it in their interest to focus public debate on major systemic issues that will capture the mass electorate. Indeed, the existence of visible and fractious party divisions may be one explanation for the weakness since 1968 of the Democratic Party, whose open primary battles appear to have contributed to its inability to win presidential elections in the fall.¹²

A third potential problem with the primary system is that it may make election campaigns even more candidate-centered, that is, focused on the individual personal qualities of candidates, rather than the broad public issues. While the line between issues of candidate personality and public policy is murky, primaries with a large number of candidates seeking to distinguish themselves from others of similar political persuasion often focus on issues of personality. Not only may little divide individual candidates ideologically from other candidates, but the time needed to mount an effective issues campaign which will affect the electorate is quite limited during a primary. The result is that fewer of the finite political resources of the party may be expended on creating the party political capital on particular issues, and getting out the party message and vote in November.¹³

11. See Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Thomas C. Grey, *What Good Is Legal Pragmatism?* in Brint and Weaver, eds., *Pragmatism* at 9 (cited in note 3); Sunstein, 97 Yale L. J. 1534 (cited in note 3).

12. See Martin Wattenberg, *The Republican Presidential Advantage In The Age Of Party Disunity*, in Gary W. Cox and Samuel Kernell, eds., *The Politics of Divided Government* (Westview Press, 1991).

13. This problem should not be overstated. In many cases the public, at least in the general election, may be able to sift through the symbolism and rhetoric of the campaigns to

Finally, and implicit in all of the above, primaries can diminish the organizational power of political parties, which can be valuable in stimulating political participation and election turnout within the society, getting things done in government once the primary season is over, and generally holding politicians as a group politically accountable for government action or inaction in a world of multiple actors and unclear collective responsibility. Given the changes in the primary system, and the effect of other political and social changes on the decline of parties more generally,¹⁴ politicians understand that the party leaders and organizational apparatus will be less important in choosing candidates. The media, PAC's and consultants are far more significant than in the past in helping to win nominations. The result may be a political system where individual representatives in government are less beholden to the leadership when legislation is needed or decisions need to be made or implemented.¹⁵

Of course, many of these problems can be and are overcome. Leaders can and do discuss the issues; the public votes; middle of the road political leaders get nominated and win elections; and parties do have influence.¹⁶ Yet despite its other advantages, the primary system can create a burden, a cost of political organization, which may increase some of the political problems and costs of political mediation, organization and decisionmaking.

Some of these concerns, especially the rise of candidate-centered primaries, animate the proposals outlined in *Democracy and Deliberation*. Criticizing our current focus on sound bites, daily polling data and early primaries, Fishkin calls for the creation of a national party jury randomly selected from the party electorate at the beginning of each primary season. This jury would meet with the candidates early on for an extended period to discuss the issues, and ultimately vote on their favorite. Ideally, the results would be widely reported in the public press, overshadowing the daily and often distorted polling data which has become so prominent in selecting candidates. If politically significant, such jury polls might

the substance of underlying policies. See, e.g., Samuel L. Popkin, *The Reasoning Voter* (U. of Chi. Press, 1991).

14. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567 (1988).

15. The opening up of the party may also have diminished the repeat-player qualities of political relationships when there was a hierarchically organized party structure. As a result, some might argue, there could be more of a potential for suboptimal strategic behavior. See Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 1984).

16. See D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation* (U. of Chi. Press, 1991); Gary Cox and Mathew McCubbins, *Parties and Committees in the U.S. House of Representatives* (1989) (unpublished manuscript).

force the candidates to think about and come to terms with major issues, which may count for more in an extended give and take.

There is much to be said in favor of this change. Fishkin focuses on important issues and their possible alleviation through modest, but (as a result) politically realistic reforms. The fundamental assumption of Fishkin's approach is that our current political institutions suffer from insufficient debate about public issues. The face-to-face sustained discussion of the jury would allow a deeper analysis, and hence perhaps a greater likelihood of the selection of candidates who would better deal with public problems. While legal scholars such as Frank Michelman and Owen Fiss seem to locate the greatest source of civic republican virtue in the courts,¹⁷ these institutions obviously lack sustained democratic legitimacy. Others have pointed to the Congress, or the federal bureaucracy, as other institutional facilitators of dialogue.¹⁸ Fishkin would create a new institution—a national jury, which has the size advantages of the courts yet arguably greater democratic legitimacy, at least in the eyes of social scientists steeped in the theoretical beauty of random samples. More important, this new creature would be incorporated into a part of the political process that is characterized by very little systemic dialogue—the political primaries. While a quite modest change, this may help.

Of course, the mechanics of the proposal may need to be worked out. For one, there is no good opportunity for experts to participate actively in the jury process. Candidate comments on the budget, for example, may be quite meaningless without the opportunity for, or fear of, extended scrutiny by experts in the field. Similarly, interest groups may want their input into the process. While there is much negative that comes from organized interest group influence, individuals clearly have much to gain from their knowledge of and participation in the activities of such groups. As the civic republicans have argued, “[i]nterest groups may be essential [to] civic republicanism . . . , because they consolidate people with common private interests and backgrounds, . . . streamline the input that the government receives, . . . and provide feedback to group members about how the government's ultimate decision addresses their particular concerns.”¹⁹

17. See Frank Michelman, *The Supreme Court 1985 Term—Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

18. See Mark Seidenfeld, *A Civic Republican Justification For the Bureaucratic State*, 105 Harv. L. Rev. 1511 (1992); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

19. Seidenfeld, 105 Harv. L. Rev. at 1530-31 (cited in note 18). Indeed, absent that

While these concerns are admittedly minor, especially given the limited use of the poll, there is still something disquieting to a democrat such as myself about this approach, and the direction in thinking it might reflect about political reform if it were to be generalized.²⁰ On paper, it is ingenious. If the public is incapable of sustaining a meaningful dialogue on the issues, then perhaps a randomly selected jury of political peers will. The randomness of the selection process will give it some political legitimacy, and its size and length of operation will provide the opportunity for the intellectual depth lacking in mass political institutions.

Unfortunately, Fishkin's solution to the primary problem—to create meaningful participation for only a representative sample—could run the risk of exacerbating the *systemic* problem of declining public participation, both practically as well as symbolically.²¹ In a post-industrial state, healthy political institutions ultimately need to facilitate mass participation and dialogue. Yet Fishkin's approach, if generalized, would not only avoid assimilation of the mass public, but might further diminish the influence of the traditional party structure. To the extent private juries are viewed as crucial in the selection of candidates, the importance of the party organization could be further reduced. This may be important not only on election day, when the organization may not be there to help get out the vote, but also in the running of government, when the relationships forged between the party elite are useful in getting a president's program adopted in Congress and implemented in the bureaucracy and the states. Simply put, candidates selected by jury meetings with the public may well be less responsive to party structure.

Beyond its affect on overall participation, it is also unclear how much this proposal will ultimately further the selection of institu-

public accountability, it is unclear to what extent the public will pay attention to the poll; like the public polling, it runs the risk of being dismissed as a result of the presence or slickness of particular candidates. To the extent this is true, dialogue over public issues in a small group setting may have its own limitations, which I am sure Fishkin would be the first to recognize.

20. As suggested above, *Democracy and Deliberation* is very much a part of the newest tradition of scholars attempting to synthesize democratic and dialogic principles in the construction of political institutions. Acknowledging that the current primary system does not create a meaningful public dialogue over the issues, Fishkin then turns to a different form of representative dialogue—a candidate debate judged by a randomly selected political jury.

21. The proposal is intended to confront, but does not solve directly, the problem of the massive decline in political participation. While the primaries were originally created to increase political participation in the United States, the evidence is that they have had the opposite effect. Political participation is at the lowest levels in history in the United States, probably skewing the background of the electorate that ultimately makes the decisions and perhaps diminishing the quality of the focus of those who do participate. See Walter Dean Burnham, *Shifting Patterns of Congressional Voting Participation* in Walter Dean Burnham, *The Current Crisis in American Politics* (Oxford U. Press, 1982); Sam Peltzman, *Voters As Fiscal Conservatives*, 107 Q. J. Econ. 327 (1992).

tionally responsible leaders. The assumption of Fishkin's approach seems to be that the problem with our primary system is that it does not select leaders who are aware of and willing to deal with public problems. We suffer from insufficient public debate.

I have some doubts. Given the extensive discussion of public problems in the media, think tanks and talk shows, I am less certain that our problems are a lack of cognition as much as a lack of ultimate political accountability of leaders in government, which indirectly frames the nature of debate before and after elections.²² With our frequent current state of divided and dispersed political institutions, our leaders and the public know that elected officials do not need to formulate a program dealing with all the issues, balancing off the interests of different groups, and forging a communally responsible plan, for which they will ultimately be held responsible. Symbolic stands and vague promises are successful partly because politicians and the public know that politicians are unlikely to be held personally responsible for the past or future performance of government when they were in Congress or the White House.²³ To the extent this is true, political leaders will be able to talk to the jury in private, as they talk to the rest of us in public, about waste, fraud and abuse, obfuscating ultimate choice and responsibility. Fishkin's plan should improve on the primary system we have now, but we should be circumspect, as I am sure he would be, about extending it elsewhere; it certainly will not lead to a deliberative democracy in this stronger sense. It may simply be a matter of the second best.

Thinking about political reform has ordinarily focused on the extent to which institutions in Congress, the executive branch and in political parties frame issues for political choice, stimulate and organize political participation, and/or implement communal judgments. As entities with an ongoing existence, political institutions generally are thought to perform these roles by overcoming transaction costs, facilitating systemic debate, minimizing collective-action problems and promoting collective responsibility. Political parties in particular may play a special role in overcoming the costs of collective action and responsibility, although we are only vaguely beginning to understand on a formal level how this is accomplished.²⁴

Unfortunately, whatever their other values, primaries seem to

22. See Popkin, *The Reasoning Voter* (cited in note 13).

23. For the most part, the political accountability of politicians is retrospective, as politicians are held accountable for their past actions. Dialogue in this systemic sense is not addressed by the Fishkin proposal.

24. For one insightful contribution along these lines, see David Kreps, *Corporate Culture And Economic Theory*, in James E. Alt and Kenneth A. Shepsle, eds., *Perspectives on Positive Political Economy* (Cambridge U. Press, 1990).

have undermined some of these functions by reducing the significance of political institutions to the political process. They can force individual politicians into constant direct contact with the mass public unmediated by organizations traditionally structured to further the goals outlined above. Moreover, as a practical matter, while Fishkin's proposal may well help ameliorate the decline of collective responsibility accompanying these changes, it represents—paradoxically—a somewhat similar approach. Like the primaries, it minimizes the role of institutions—organizations structured over time to narrow political choice and facilitate mass participation—from the process, both practically and symbolically.

As an incremental change, it should help. The national jury has the advantage of reducing the impact of the ten-second sound bites and weekly polls. Taken as a model of government and expanded to other contexts, however, the national jury could be viewed as undermining those institutions that historically attempted to fulfill that role—in effect, of representative government itself. Fishkin's quite thoughtful book is a valuable contribution to thinking about primaries. I would be wary, as I am sure Fishkin would be as well, about generalizing from his insight.