Making Deliberative Democracy Practical: Public Consultation and Dispute Resolution

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I. INTRODUCTION

Deliberative democracy is a form of alternative dispute resolution. Consulting the public in a thoughtful and representative way can lead to consequential public policy outcomes that might otherwise have been difficult to achieve. However, some recent literature appears to treat deliberative democracy and alternative dispute resolution as rivals.[1] While there are differences in emphasis and in theoretical preoccupations between the two, there are also some overlapping aims and methods.

In this article I will first consider methods to consult the public and discuss some criteria that might be applied to distinguish among these methods. I will argue that there are good reasons to favor an approach anchored in deliberative democracy. Second, I will offer some ways of distinguishing deliberative democracy from other democratic approaches. Third, I will respond to some of the confusing claims at issue between deliberative democracy and alternative dispute resolution. Finally, I will discuss a particular policy area to illustrate how deliberative democracy can have a demonstrable impact. Using that illustration, I will show how some of the practices common in alternative dispute resolution find a natural ally in the deliberative democracy approach.
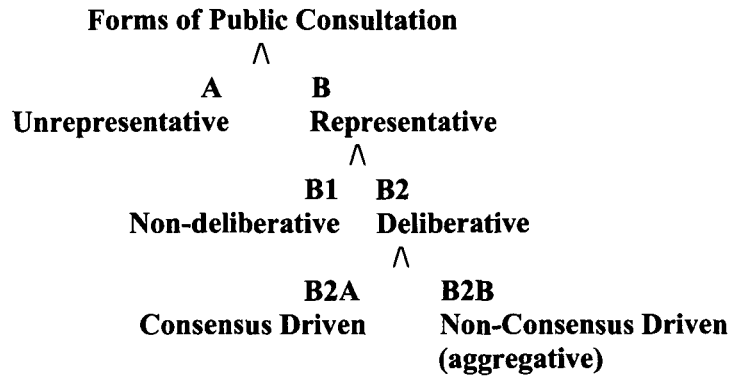
II. REALIZING DELIBERATIVE DEMOCRACY

Consider the following simple classification of forms of public consultation. To clarify the basic issues, I have posed a series of dichotomies. First, public consultation may or may not consult people representative of the broad population. Second, some forms of public consultation provide the option to use a deliberative process. Third, some forms of public consultation are consensus driven, while others are not (leaving the possibility that their views can be aggregated or counted in some way). The latter divisions might

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[1] *See, e.g.*, Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 395 (2009).

also be subdivided further, but I will focus on just one of the non-consensus seeking alternatives.

Forms of Public Consultation
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A	**B**
Unrepresentative	**Representative**

∧

B1	**B2**
Non-deliberative	**Deliberative**

∧

B2A	**B2B**
Consensus Driven	**Non-Consensus Driven (aggregative)**

In each case, I will contend that there is a compelling argument to be made for the right-hand option above. Taking the right-hand option in each case will drive us to some variant of what I will call deliberative democracy. As the argument unfolds, I will argue that a design I call "Deliberative Polling"[2] provides a practical method for realizing that conception of democracy for particular policy issues.

Consulting the public can serve as a form of dispute resolution because it can invoke a norm of democracy, thus providing the basis for what is perceived as a legitimate solution. The first two questions to ask about any consultation are: (1) who is being consulted, (2) and how were they chosen? If the group is not representative of the public, then there are strong grounds to question why others should be interested in its views. In communities of hundreds of thousands or states involving millions or hundreds of millions, mobilized groups, even when seemingly large in absolute number, can hardly presume to speak for the people as a whole, unless there is some systematic method of selection.

Superficially, a norm of openness might be invoked to allow participation from anyone interested in a topic. But the result is almost inevitably an unrepresentative group of participants, usually open to capture by organized interests. Norman Bradburn coined the term "SLOP" to refer to "self-selected listener opinion poll" for public consultations where anyone

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[2] "Deliberative Polling" is a registered trademark of James S. Fishkin. Any fees from the trademark support research at the Center for Deliberative Democracy at Stanford University.

can volunteer to offer an opinion.[3] SLOPs have been open to capture by presidential candidates ranging from Alan Keyes to Ron Paul (in both cases mobilized groups showed that these candidates were supposedly leading contenders at the same time that they each had only tiny levels of support).[4] SLOPs were also used by the Obama transition, "Citizen's Briefing Book."[5] In the midst of two wars and the economic crisis, self-selected national online consultations gave the highest policy priority to measures that would legalize marijuana and legalize online gambling.[6]

The representative approach proposed by this article calls for public consultation via scientific random samples. Self-selected groups cannot mobilize to capture a random sample because they cannot invite themselves into the process. Deliberative Polling was developed explicitly to combine random sampling with deliberation. It offers everyone an equal chance to participate in a process designed to provide transparently good conditions for considering an issue. It attempts to employ social science to uncover what deliberative public opinion would be on an issue by conducting a quasi-experiment, and then it inserts those deliberative conclusions into the actual public dialogue or, in some cases, the actual policy process.

This brings us to the second divide in the classification above. Do the opinions solicited represent public opinion as we usually find it in its natural state in western developed democracies—a top of the head impression of sound bites and headlines combined with low levels of information?[7] Or is there some method for the people involved to engage the issues in a balanced and informed way? Of course these are not, strictly speaking, the only possible alternatives, but we will simplify the discussion by restricting it to these two poles in what is obviously a question of degree.

This second great divide between deliberative and non-deliberative forms of opinion (B1 versus B2 in above diagram) is just as consequential as the first division between unrepresentative and representative samples of the public (A versus B). At least in terms of alternative dispute resolution, why should we listen to an unrepresentative group who presume to speak for

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[3] *See generally* Norman M. Bradburn, *Presidential Address: A Response to the Nonresponse Problem*, 56 PUB. REV. Q. 391 (1992).

[4] JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 22 (2009).

[5] WhiteHouse.gov, *Citizen's Briefing Book, available at* http://www.white house.gov/sites/default/files/microsites/Citizens_Briefing_Book_Final2.pdf.

[6] Anand Giridharadas, *Athens on the Net*, N.Y. TIMES, Sept. 12, 2009, at WK1.

[7] For an overview of information levels in the U.S. and comparatively, see, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996).

everyone else? And why should we listen to a group that has not thought much about the issue or made serious efforts to become informed about it? The first two points are that the persons consulted need to be representative and their views need to be deliberative. A third issue has to do with the nature of the views that are collected post-deliberation. Do we expect or strive for a consensus? Is the result of the deliberations meant to be a public agreement, or do we collect the views in some other way? Some variants of deliberative democracy operate like a jury. Indeed, one common model is the so-called "citizen's jury."[8] Other designs employ shared instant voting, sometimes on electronic keypads. What is the best way to get the views or final considered opinions of those who deliberate? Does it matter?

Our last basic divide is between designs that are consensus driven (B2A) and those that are not (B2B). Some of the deliberative democracy literature idealizes consensus and contrasts deliberation itself with so-called aggregative conceptions of democracy that count individual votes rather than seek consensus.[9] However, there is extensive literature of jury-based deliberations that show distortions in the process of group decisions seeking consensus. Work by Cass Sunstein and his colleagues showed that jury-like processes produce "polarization."[10] If an issue has a midpoint, and if a group starts out on one side of the midpoint, it will tend to move further out from the midpoint in the same direction. So if the issue is, for example, a left-right political one, and the group starts out on the right, it will move further to the right; if it starts out on the left, it will move further to the left. Such a predictable pattern is disturbing to advocates of deliberation because it implies that the changes of opinion are due to a predictable distortion of group psychology rather than to the merits of the issue.[11]

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[8] *See generally* ANNA COOTE & JO LENAGHAN, CITIZENS JURIES: THEORY INTO PRACTICE (1997).

[9] Joshua Cohen, *Deliberation and Democratic Legitimacy, in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996). *But see* FISHKIN, *supra* note 4, at 85–88 (critiquing the distinction between aggregative and deliberative theories).

[10] Cass R. Sunstein, *The Law of Group Polarization, in* DEBATING DELIBERATIVE DEMCORACY 80 (James S. Fishkin & Peter Laslett eds., 2003). *See also* David Schkade, Cass R Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift* 100 COLUM. L. REV. 1139 (2000).

[11] *See* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 1–20 (2009).

However, as Sunstein has admitted, this pattern does not apply to the Deliberative Poll, a process that does not seek consensus.[12] Sunstein offers two causal mechanisms to explain polarization: a "social comparison" effect and an imbalance in the "argument pool."[13] The seeking of consensus, as in a jury verdict, clearly offers a strong version of the social comparison effect, as everyone knows everyone else's position and there is group pressure to get a result. In Deliberative Polling, by contrast, the final considered judgments are collected in confidential questionnaires, and the moderators are trained not to seek consensus. If there is a consensus at the end of the day, then it will be apparent in the confidential questionnaires. Any danger of a false consensus is lessened by this design. In addition, there are elements of balance in the Deliberative Polling design such as balanced briefing materials, balanced moderation, and balanced expert panels that seem to deal with the argument pool's imbalance.

III. DELIBERATIVE POLLING AND DELIBERATIVE DEMOCRACY

Deliberative Polling begins with a concern about the defects likely to be found in ordinary public opinion—the incentives for rational ignorance applying to the mass public and the tendency for sample surveys to turn up non-attitudes or phantom opinions (as well as very much "top-of-the-head" opinions that approach being non-attitudes) on many public questions. At best, ordinary polls offer a snapshot of public opinion as it is, even when the public has little information, attention, or interest in the issue. Deliberative Polling, by contrast, is meant to offer a representation of what the public would think about an issue under good conditions. Every aspect of the process is designed to facilitate an informed and balanced discussion. After taking an initial survey, participants are invited, typically for a weekend, to engage in face-to-face discussion. They are then given carefully balanced and vetted briefing materials to provide an initial basis for dialogue. They are paid honoraria, travel expenses, lodging, etc. Everything is done to recruit those initially drawn in the sample. The briefing materials are the product of a separate stakeholder process of deliberation—an advisory committee representing competing points of view ensures the balance and accuracy of the materials used.

Participants in Deliberative Polling are randomly assigned to small groups for discussions with trained moderators and are encouraged to ask questions that arise from the small group discussions to competing experts

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[12] *Id.* at 21–98.

[13] Sunstein, *supra* note 10, at 83–84.

and politicians in larger plenary sessions. The moderators attempt to establish an atmosphere where participants listen to each other and no one is permitted to dominate the discussion. At the end of the weekend, participants take the same confidential questionnaire as they did at the time of first contact and the resulting judgments in the final questionnaire are usually broadcast along with edited proceedings of the discussions throughout the weekend. The weekend microcosm tends to be highly representative, in terms of attitude and demographics, as compared to the entire baseline survey and to census data about the population. In every case thus far, there have also been a number of large and statistically significant changes of opinion over the weekend. Considered judgments are often different from the top-of-the-head attitudes solicited by conventional polls. Looking at the full panoply of Deliberative Polls, more than two-thirds of the opinion items change significantly following deliberation.

But what do the results represent? Our respondents are able to overcome the incentives for rational ignorance that normally exist in the mass public. Instead of one vote in millions, they have, in effect, one vote in a few hundred in the weekend sample and one voice in fifteen or so in the small group discussions. The weekend is organized so as to make credible the claim that the voices of our respondents matter. They overcome apathy, disconnection, inattention, and an initial lack of information. The opinions of participants from all social strata change during the course of deliberation. From knowing that someone is educated or not, economically advantaged or not, one cannot predict change in the deliberations. We do know, however, that becoming informed on the issues predicts change on policy views. In that sense, deliberative public opinion is informed and representative. As a result, it is also, almost inevitably, counterfactual. The public will rarely, if ever, be motivated to become as informed and engaged as our weekend microcosms.

The idea is that if a counterfactual situation is morally relevant, why not do a serious social science experiment—rather than merely engage in informal inference or arm-chair empiricism—to determine what the appropriate counterfactual might actually look like? And if that counterfactual situation is both discoverable and normatively relevant, why not then let the rest of the world know about it? Just as John Rawls' original position can be thought of as having a kind of recommending force, the counterfactual representation of public opinion identified by the Deliberative Poll also recommends to the rest of the population some conclusions that

they ought to take seriously.[14] They ought to take the conclusions seriously because the process represents everyone under conditions where they could think—the process embodies a democratic decision made under especially good conditions.

I offer Deliberative Polling as a practical method for realizing deliberative democracy. But deliberative democracy is only one form of democracy, one which is easily confused with its rivals. It is worth pausing to consider the range of possibilities before returning to the similarities and contrasts between deliberative democracy and alternative dispute resolution.

IV. FOUR DEMOCRATIC THEORIES

There are many democratic theories. In order to get a handle on the range of possible positions, it is useful to think of some core component principles—political equality, (mass) participation, deliberation, and the value of avoiding tyranny of the majority (which I will call "non-tyranny"). Three of these principles are internal to the design of democratic institutions, and one, non-tyranny, is about the effects of democratic decision, effects that have long worried critics of democracy. If we consider these four principles to be essential components of a democratic theory, then the variations in commitment to them provide a kind of rudimentary grammar that allows us to specify the range of alternative theories. In other words, we can get a handle on different democratic theories according to whether or not they accept or reject these component principles.

By political equality, I mean the extent to which an individual's views are counted or weighed equally with those of others in a decision process. More specifically, does the design of a decision process give each person a theoretically equal chance of being the decisive voter (or having the decisive opinion in achieving a majority)? Or, to take an obvious example, do voters in Rhode Island have far more voting power than voters in New York in selecting members of the Senate? By participation, I mean actions by voters or ordinary citizens intended to influence politics or policy or influence the dialogue about them. By deliberation, I mean the weighing of reasons— under good conditions, in shared discussion—about what should be done. Good conditions refer to having access to reasonably good information and to a balanced discussion with others who are willing to participate conscientiously. This summary is a simplification, but should do for now. By

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[14] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971). For more on this analogy, see JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 81–104 (1991).

non-tyranny, I mean the avoidance of a policy that would impose severe deprivations when an alternative policy could have been chosen that would not have imposed such deprivations on anyone.[15] Obviously there are many interesting complexities about the definition of severe deprivations, but the basic idea is that a democratic decision should not impose very severe losses on some when an alternative policy would not have imposed such losses on anyone. The idea is to rule out only some of the most egregious policy choices and leave the rest for democratic decision.

	Competitive Democracy	Elite Deliberation	Participatory Democracy	Deliberative Democracy
Political equality	+	?	+	+
Participation	?	?	+	?
Deliberation	?	+	?	+
Non-tyranny	+	+	?	?

Four views on democracy are outlined in the table above: (1) Competitive Democracy, (2) Elite Deliberation, (3) Participatory Democracy, and (4) Deliberative Democracy. Each of these views explicitly embrace two democratic core principles, and is agnostic in its view of two other core principles. Explicit commitments of these principles are signaled by a "+." Agnosticism is represented by "?". While there are sixteen possible positions defined by acceptance or rejection of the four principles, I have argued elsewhere that the useful positions reduce to these four.[16] Variations that aspire to more than two of these principles turn out to be utopian or vacuous since they just paper over hard choices that need to be faced in the typical patterns by which these principles conflict. On the other hand, those positions that aspire to less than two of these principles include elements of one of our four positions but are less ambitious than necessary. The four positions outlined above have all been influential. In some cases, I modify a familiar position to make it more defensible, in order to get the strongest version of each position.

Competitive Democracy references the notion of democracy championed by Joseph Schumpeter and, more recently, Richard Posner.[17] To use

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[15] For these definitions and the theories they identify see FISHKIN, *supra* note 4, at 60–62. For an in-depth discussion of non-tyranny, see JAMES S. FISHKIN, TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES 3–61, 99–123 (1979).

[16] *See* FISHKIN, *supra* note 4, at 197–200.

[17] *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 169–302 (1942); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 181–212 (2003).

Schumpeter's famous phrase, democracy is not about collective will formation but about a "competitive struggle for the people's vote."[18] Legal guarantees, particularly constitutional ones, are designed to protect against tyranny of the majority. Within that constraint, all we need are competitive elections. While Schumpeter did not even specify political equality as a requirement for competitive elections, I have included it here on the grounds that it makes the position more defensible than would a position that embraced competitive elections in rotten boroughs. The question marks signal agnosticism about the other two principles. Some variants of this position avoid prizing participation, viewing it as a threat to stability or to elite decisionmaking. Those adhering to this theory feel that it is better not to arouse the passions of the masses. The passions might be dangerous and motivate factions adverse to the rights of others, threatening Competitive Democracy's commitment to protect against tyranny of the majority. Because of collective action problems and incentives for "rational ignorance" (to use Anthony Downs' famous phrase), little can be expected of ordinary citizens.[19] This position makes that minimalism a virtue.[20]

Elite Deliberation, refers to the notion of indirect filtration, which was championed by Madison in his design for the U.S. Constitution. The Constitutional Convention, the ratifying conventions, and the U.S. Senate were supposed to be small elite bodies that would consider the competing arguments. They would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens," as Madison said in Federalist 10 when discussing the role of representatives.[21] Madison held that the public views of such a deliberative body "might better serve justice and the public good than if pronounced by the people themselves if convened for the purpose."[22] A similar position of elite deliberation was given further development by John Stuart Mill, particularly in his account of the "Congress of Opinions" which was supposed to embody a microcosm of the nation's views. This was a place "where those whose opinion is over-ruled feel satisfied that it is heard, and set aside not by a mere act of will, but for what are thought superior reasons" (prefiguring Jürgen Habermas' famous notion about being convinced only by the "forceless force of the better

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[18] SCHUMPETER, *supra* note 17, at 269.

[19] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

[20] *See* POSNER, *supra* note 16, at 172–73.

[21] THE FEDERALIST NO. 10, at 49 (James Madison) (American Bar Association ed., 2009).

[22] *Id.*

argument").[23] This position, like the last one, avoids embracing mass participation as a value. The passions or interests that might motivate factions are best left un-aroused. The Founders, after all, had lived through Shays' rebellion (an armed uprising of indebted farmers in Massachusetts in 1786-1787) and viewed unfiltered mass opinion as dangerous. If only the Athenians had a Senate, they might not have killed Socrates.[24]

Participatory Democracy describes a position that emphasizes mass participation and equal counting. While many proponents of Participatory Democracy would also like deliberation, the essential components of the position require participation (perhaps prized for its "educative function"[25]) and equality in considering the views offered or expressed in that participation (even if that expression is by secret ballot). Advocates of Participatory Democracy might also advocate for voter handbooks, as did the Progressives, but its foremost priority is public participation, whether or not the public becomes informed or discusses the issues.[26] Part of the problem with this position is that it is sometimes advocated based on a picture of small-scale decisionmaking—such as the New England town meeting, but is then implemented in the context of mass democracy—for example the California process of ballot initiatives.[27]

The fourth position, Deliberative Democracy, attempts to combine public deliberation with an equal consideration of the views that result (whether those views are counted in votes or in a tabulation of opinions, as in a poll). One method for implementing this two-fold aspiration is the deliberative microcosm chosen by lot, a model whose essential idea goes back to ancient Athens. It was used by institutions such as the Council of 500 (which was chosen by lot and which met for a year, setting the agenda for the Assembly), the *nomethetai* (legislative commissions that were convened for a day to make the final decisions on some legislative proposals), the *graphe paranomon* (a procedure whereby a person could be prosecuted before a jury

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[23] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 116 (1991); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 287–328 (1996).

[24] *See* THE FEDERALIST NO. 63, at 361–67 (James Madison) (American Bar Association ed., 2009).

[25] CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 42 (1970).

[26] *See* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984). For information on the relative ineffectiveness of voter handbooks and other efforts to get voters more informed, see *id.* at 137–39.

[27] *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL (1999).

of five hundred chosen by lot for making an illegal proposal in the Assembly), and the citizens juries (which were also typically juries of five hundred chosen by lot that had a purview far greater than modern juries).[28] Modern instances of something like this idea include the Citizens Assemblies in British Columbia and Ontario as well as the method I call Deliberative Polling.[29] A Deliberative Poll administers a survey to a scientific random sample of the population, proceeds to engage that sample in extensive face-to-face or online deliberation, and then administers the same survey again. Many Deliberative Polls are full-fledged scientific experiments with control groups.[30]

The microcosmic version of deliberative democracy is not the only one. The essential idea is to combine political equality with deliberation. The microcosm is the most practical strategy, but, if in principle, one could get everyone deliberating, that would satisfy the position just as well. Bruce Ackerman and I have a proposal, Deliberation Day, for doing so, but it is an ambitious and elaborate experiment.[31] For the moment, however, we will focus on a more easily implemented microcosmic strategy.

V. DELIBERATIVE DEMOCRACY VERSUS ALTERNATIVE DISPUTE RESOLUTION?

In light of these distinctions between forms of democracy, consider Susskind's argument that a consensus-based approach among stakeholders is "more democratic" than what he calls deliberative democracy.[32] I would ask "more democratic" in what sense, and also, what is meant by "deliberative democracy?" Susskind builds an extended case based on one example: he asks us to imagine a town of thirty thousand considering a controversial industrial facility that poses difficult trade-offs between employment and the

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[28] For a good overview of these ancient institutions, see MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES AND IDEOLOGY (1991).

[29] See the Final Report of the British Columbia Citizen's Assembly Making Every Vote Count: The Case for Electoral Reform, the British Columbia Citizen's Assembly (2004), available at http://www.citizensassembly.bc.ca/resources/reports/dmaclachlan-3_0412181253-524.pdf. For Ontario see One Ballot, Two Votes: A New Way to Vote in Ontario; Recommendation of the Ontario Citizens' Assembly on Electoral Reform (2007) available at
http://www.citizensassembly.gov.on.ca/assets/One%20Ballot,%20Two%20Votes.pdf

[30] For an overview of this research program, see FISHKIN, supra note 4.

[31] See BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004).

[32] Susskind, supra note 1, at 396–97.

environment.[33] His account of deliberative democracy is to let the elected city council hold hearings and either vote on the merits or hold a referendum.[34] His argument is that the work of stakeholders attempting to reach a consensus has the two-fold merit that it is more democratic and might lead to better results.[35] Based on this example, he characterizes "deliberative democracy" as subject to the following three fundamental problems:

1. The Majority Rule Problem: we allow the majority to rule, but if we tried, we could come close to meeting the needs of all the stakeholders affected by or involved in key public policy choices.
2. The Representation Problem: we rely on general-purpose elected officials rather than ad hoc representatives selected specifically to speak on behalf of the scope and intensity of concerns of key stakeholder groups in public policy decisions.
3. The Adversarial Problem: we accept an adversarial approach to decisionmaking when facilitated joint problem-solving would produce results that are fairer in the eyes of the parties, more efficient from the standpoint of an independent analyst, more stable as defined by the terms of the agreement, and wiser, in retrospect, according to the parties and independent analysts.[36]

These observations are flawed. First, Susskind has misidentified deliberative democracy as a target for his arguments. As you see in our classification above, his example combines competitive democracy (officials who run for elected office), participatory democracy (the referendum), and perhaps some elite deliberation (among the city council members). It involves elements of all three rivals to deliberative democracy, but does not incorporate the use of deliberative democracy by the people themselves. Hence, the example upon which he builds his argument misfires—there is no discussion at all of what we call deliberative democracy.

Second, once one really considers the nature of deliberative democracy applications, properly defined, it is arguable that they deal as well or better with his three problems than would his proposed consensus-based approach among stakeholders. Consider, for example, his "majority rule problem." His claim, presumably, is that deliberations that occur as part of the stakeholder process may change preferences and result in broadly advantageous

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[33] *Id.* at 395–96.

[34] *Id.* at 395.

[35] *Id.* at 398–99.

[36] *Id.* at 397.

solutions.[37] Yet who is more likely to change: stakeholders who represent organized groups or ordinary citizens? In reality, most ordinary citizens will initially have less informed and less definitive views about most policy issues than would professional advocates and interest group representatives. As noted earlier, there is usually a lot of room for ordinary citizens to change in a deliberative process. On the other hand, organized advocacy and interest groups will have firm opinions and will also feel some responsibility to stand by those opinions for their supporters. Their advocacy roles will greatly constrain their opinion flexibility, at least as compared to ordinary citizens. Hence, a deliberation by the people, if well conducted, might actually open up areas of cooperation that the interest groups who speak for them might find difficult to adopt. But once those areas of cooperation are sanctioned by a public democratic process, they can be invoked by all sides as a possible way forward.

Next, consider Susskind's "representation problem." Stakeholders purport to speak for ordinary citizens, but they are usually self-selected or self-appointed, either as individuals or as groups organized to fill that role. Many ordinary people, in whose interests the stakeholders supposedly speak, would be surprised to know who is purporting to represent their interests or what is advocated on their behalf. Who are these "ad hoc representatives?" What qualifies them to speak for you when there is no guarantee of any basis for their agreeing with your point of view? Rather than self-nomination or public visibility as an advocate for a given position or an ad hoc choice by a mediator, deliberative democracy suggests the scientific method of microcosmic representation. A good random sample of the people represents everyone, not just organized groups. When done properly, it begins with the same views as the rest of the population. A microcosm of the people can represent all the people without the gap between organized interests and the (mostly) unorganized public.

Now consider Susskind's last problem: the reliance on "adversarial" decisionmaking. This reliance may be characteristic of courts and political advocacy in competitive democracy (campaigns, elections, partisan interests, and mass participation in participatory/referendum democracy). However, deliberative democracy provides a basis for preference transformation and for dialogue where those with competing positions can learn from each other. It can be, in fact, a form of facilitated problem-solving through evidence-based dialogue. Once again, Susskind's argument misfires by being directed at one or another of the other democratic models, rather than at deliberative democracy.

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[37] *Id.* at 402.

VI. How It Works

Consider an example to contrast with Susskind's hypothetical one. In 1996, the regulated public utilities in Texas faced a requirement for "Integrated Resource Planning" to determine how they were to provide electric power in their service territories. They were supposed to consult the public in some way as part of this process. The plans needed to be submitted to the Public Utility Commission for approval.[38]

All eight regulated utilities conducted Deliberative Polls. First, an advisory group of the relevant stakeholders was formed to vet a briefing document suitable for ordinary citizens. That document described competing policy options and the pros and cons of each. Would the power come from coal, natural gas, or renewable energy, or would there be an investment in "demand side management" (conservation which would reduce the need for more power)? Would the power be produced locally, or would it be brought in by transmission lines? Would there be subsidies for poor customers?

Once the briefing document was completed, a questionnaire was devised about the competing policy options for supplying energy. In addition, it posed questions about knowledge and fundamental values that might be relevant to the trade-offs at issue. A random sample was recruited from the entire service territory in each case and was brought, with all expenses paid and an honorarium, to a single place for a weekend of discussions. The discussions took place in small groups with trained moderators as well as in plenary sessions with panels of competing experts to answer questions from the groups. The final session of the weekend was held with the Public Utility Commissioners themselves, who answered questions from the sample. After the deliberations, the participants took the same questionnaire that they had taken initially.

In eight such Deliberative Polls in various parts of Texas and nearby Louisiana, the public favored shrewd combinations of natural gas, renewable energy, and conservation. Averaging over eight projects, the percentage willing to pay more on its monthly utility bill to support renewable energy such as wind power ranged from 52–84%. The percentage willing to pay more for conservation ranged from 43–73%.[39] The resulting Integrated Resource Plans all included substantial investments in renewable energy. Before the Texas Deliberative Polls, the state of Texas had the lowest usage

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[38] For a more detailed account of this case, as well as some other Deliberative Polling cases with policy consequences, see FISHKIN, *supra* note 4, at 150–58.

[39] *Id.* at 124.

of wind power on a percentage basis of any state in the U.S.[40] Based on the successive Deliberative Polls, the Integrated Resource Plans, which took account of their results, and then the Renewable Energy Standard that was supported by the Deliberative Polling results, Texas surpassed California as the leading state in wind power in the U.S. in 2007.[41]

The head of the Texas Renewable Energy Industries Association wrote the following about the eight Deliberative Polls:

> These polls had astounding positive effect. They showed overwhelming customer support for the addition of renewable energy sources. Not only did folks from all regions of the state of Texas say they wanted clean, renewable power on the system, they indicated their willingness to pay more for it (mostly from $1 to $5 a month). There was also a preference for the cost to be shared by all users. This was a significant underpinning for the decisions yet to come.[42]

Interest groups such as the Environmental Defense Fund and Public Citizen found that they could agree with the companies in question and support the results and their implementation. These interest groups were accustomed to an adversarial process and were surprised to be able to issue press releases contemporaneously with the utility companies that applauded the same results. The stakeholder process that laid the groundwork for the deliberations by the mass public was similar in spirit to Susskind's consensus-based approach. However, the deliberative democracy component used the perceived legitimacy of the public's conclusions under a system that was transparent, balanced, and accurate. The process and its conclusions were televised. The final Deliberative Polling results were shared with the public and then filed with the Commission as part of the Integrated Resource Planning process.

VII. CONCLUSION

Deliberative democracy processes have been used in a variety of countries for many difficult issues. We have employed them in Northern

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[40] Prior to November 1995, there were no commercially viable wind projects in Texas. *See Renewable Electricity Standards: Lighting the Way: Hearing Before the House Select Committee on Energy Independence and Global Warming*, 110th Cong. 40–47 (2007) (statement of Mike Sloan, Managing Consultant, The Wind Coalition).

[41] FISHKIN, *supra* note 4, at 124.

[42] Russel Smith, *That's Right, I Said a Texas Wind Boom*, WHOLE EARTH, 20–21 (2001).

Ireland, in Bulgaria for issues with the Roma, in Porto Alegre, Brazil for civil service reform, in China for choice of infrastructure, and in Italy for a health care budget crisis.[43] In all these cases, there is an appeal to the public's representative and informed judgments. When the process is sufficiently transparent (usually accompanied by media coverage and materials on the web) and when it is clearly scientific and evidence driven, so that it is not open to manipulation, it has the credibility to assist in the solution of difficult issues. It does not aspire to replace or supplant the consensus-based approach to alternative dispute resolution, but it provides a distinctive addition to the toolkit for resolving hard choices.

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[43] *See, e.g.,* The Center for Deliberative Democracy, http://cdd.stanford.edu (last visited Mar. 1, 2011) (detailing these and other deliberative democracy projects).