First, let me set this paper in the context of my larger project. I believe that, globally and nationally, we need more state coercion than we now have to solve the growing number of free-rider (collective action) problems created by our growing interdependence. As we require more and more state coercion, we also need greater perceived legitimacy to make that coercion effective. It would be best if perceptions of legitimacy rested not on manipulation but on morally acceptable normative foundations. Suggesting such foundations is a task for what we might call applied political theory. In the exploration of the forms of normative legitimacy that might support growing state coercion, I suggest that normative theorists should, among other things, investigate existing the conceptual sources of perceived legitimacy to see if those ideas might contain valid and useful normative principles, looking not only at the way ordinary people use words but also at their practices. The proximate goal is to puzzle out the (possibly contradictory) ideals behind those words and practices. The ultimate goal is to increase the possibilities for legitimate coercion.

A unified theory of all of our ideals may well be impossible. A unified theory even of the subset of political ideals or ideals related to justice may also be impossible. So far, neither Kant nor Rawls nor Habermas nor anyone else has fully convinced me with their attempts at producing such a unified theory. As a consequence, I, and anyone else in the same conceptual difficulty, will for the moment have to make do with plural and even competing ideals, as Isaiah Berlin suggested.

Plural and competing ideals do not, however, necessarily create a hodgepodge. I argue in this paper that ideals are often contingent on particular circumstances. When this is the case, one ideal can apply in one situation and another in another situation. Ideals that in some contexts conflict may in other contexts be complementary.

Thinking of ideals as contingent is like looking for interactions in science. An idea advanced as a general law may turn out to apply in one context and not in another. The effect of A upon B may hold only in certain conditions. Human beings are good at recognizing in nature any correlation above .3 (e.g., the association between race and income in the U.S.). We are worse at recognizing partial correlations (e.g., that this association disappears among generals in the military). For interactions both in the world of ideals and the world of science we often need a deeper analysis than readily appears to the naked social eye.

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1 Charles F. Adams Professor of Political Leadership and Democratic Values, Harvard Kennedy School. This paper, prepared for presentation at the NYU Colloquium in Legal, Political, and Social Philosophy on October 1, 2015, is an early draft of these ideas, not for quotation or reproduction.
The paper has three substantive sections. The first investigates a fundamental ideal: the democratic ideal of equal power. It argues that this ideal should carry less weight in the three circumstances of relatively common interests, respect deriving from other sources, and ample opportunity for individuals to develop their citizenly faculties. The second section investigates three democratic norms regarding representation: descriptive representation, representative congruence, and democratic accountability. It argues here too that these lower-level ideals, which might be considered democratic norms rather than ideals, have greater/lesser weight or take different formulations in different contexts. The third section investigates the newly specified ideal or norm of deliberative negotiation, arguing that applying this ideal requires necessary modifications in other democratic ideals/norms, and that those modifications should apply only in certain contexts.

The final section, in conclusion, argues that all of these norms and ideals are not only contingent but also aspirational. They are regulative ideals. Any actual claim to democratic legitimacy must therefore be partial. We should speak not of regimes or practices being “legitimate” or “illegitimate,” as a dichotomy, but rather of their being “more or less” legitimate, on a spectrum. No actual regime or practice can be fully legitimate. In the quest to increase the perceived and normative legitimacy of state coercion, it therefore helps to emphasize both the contingency and aspirational quality of our ideals.

**Equal power**

Equal power is arguably a central ideal of democracy. Jack Lively (1977) defined democracy as equal power. Carole Pateman (1970) made equal power a necessary component of “participatory democracy.” It is analytically clearest to define “power” here as coercive power, namely the threat of sanction or the use of force. With this definition, majority rule as a form of democratic rule rests for its normative legitimacy on equal power, through the equal weight of every vote.

Equal power has at least two sources for its normative legitimacy. The first is the positive value of human dignity. In the Christian tradition and many others, each individual is considered fundamentally equal in value. That equal value translates politically into a vote of equal weight. The second source derives, less positively, from a default. Isaiah Berlin (1955-56) first pointed out that all societies have rules, that within the categories of any rule all instances are to be

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2 For more detail, see Mansbridge 1977, 1980.

3 I define power more broadly as “the actual or potential causal relation between the preferences or interests of an actor or set of actors and the outcome itself,” a formulation adapted (by adding interests and pluralizing actors) from Nagel’s (1975) definition, which improves on those of Weber and Dahl by including anticipated reactions and not requiring intent. The categories of the threat of sanction and use of force derive from Bachrach and Baratz (1963). Equal power in this definition does not mean the unequal capacity to persuade when interests do not conflict (see, e.g., Lukes 1974; Knight and Johnson 1997). (This footnote is adapted from Mansbridge et al. 2010, 80, n. 44.)
treated equally, and that the distinctions between categories are upheld by reasons (including “it’s always been that way” and “God says so”). When the reasons upholding the barriers between categories are eroded, the barriers fall and the default is equality. When the reasons for inequality cannot be sustained, the very character of a rule determines that, normatively, equality rushes in.

In the 1960s, equal power was the central ideal of democracy for the many young people in America and elsewhere who began to create small “participatory democracies” in hundreds of thousands of collectives (including “free schools,” newspapers, legal clinics, food coops, bicycle repair collectives, among others). In most of these, the ideal of the equal power of each member was an article of faith. After studying in depth one such collective and a small New England town meeting (a face-to-face direct democracy in which each citizen is nominally an equal member of the “legislature” of the town), I concluded that the ideal of equal power had only contingent value. I argued that the ideal of equal power is rooted in three deeper ideals, and that when those ideals can be satisfied at a lower cost than satisfying the demands of equal power, equal power loses much or all of its value. Those deeper ideals are the equal protection of interests, equal respect among members of the polity, and the equal opportunity to develop one’s faculties as a citizen.

The equal protection of interests is the classic liberal reason for democracy. Assuming conflicting interests, it sees the equal vote as a weapon enabling each to protect her own interests. Aggregating equally-weighted votes produces a legitimate democratic outcome in the face of irremediable conflict. Pateman (1970), Macpherson (1973) and others derided such conceptions of democracy as “self-protective,” in contrast to the “educative” and other conceptions they advanced. Self-protection has nevertheless served consistently as one major reason for extending the franchise, even among such “educative” theorists as J.S. Mill ([1861] 2010).

In contexts of relatively common interests, however, equal power is less needed to protect one’s interests equally. The congruence of one’s own interests with the interests of those in power provides such protection. If you and I both genuinely want to go from Chicago to Boston, I can fall asleep in the back seat while you take the wheel, on the grounds that you are highly unlikely to turn around and drive instead to Chatanooga. My interests in getting to Boston are protected not by my having equal power with you, but by my interests being congruent with yours.

The interests of even two people are never completely congruent of course. In groups that make decisions by democratic means, situations range from those in which the members of the deciding body have largely common interests to ones in which they may expect their interests to conflict frequently. For the purpose of protecting interests equally, equal power has more or less value as an ideal depending on the context of common or conflicting interests. When making power more equal has costs in other values, one should be more willing to pay those costs in contexts where interests are most likely to conflict, and less willing to pay those costs in contexts
of relatively common interests. The value of equal power varies contingently according to the degree that the protection of interests derives from other sources.

Equal power also both reflects and creates equal respect among members of the polity. A fundamental respect for the dignity of the human being undergirds the ideal of equal power. Equal power is also a means to the end of equal respect, because it produces in others both the recognition of equal status and the fear of equal sanction.

In some contexts, however, equal power is not necessary for equal respect. In academic departments, for example, respect may derive from the intellectual work of the members, not from their power over departmental decisions. In such departments, those who take the job of chair, which brings with it greater power both to sanction and to channel the behavior of other members against their will, may have less respect in the department than one who never takes an administrative position. In such contexts, equal power is not an effective means to equal respect. The value of equal power varies contingently according to the degree that equal respect derives from other sources.

Carole Pateman considered “equality of political power in determining the outcome of decisions” an integral part of participatory democracy (Pateman 1970, 69), and because she also argued for the “educative” purposes of participatory democracy, one might assume an implicit argument for equal power as a means to such education. Since Tocqueville, participation in democracy has been thought to develop the citizenly faculties (including a concern for the common good), although to my knowledge, no one has ever explicitly argued that equal power per se was required for such development. If one were to make that argument, it would be relatively easy to refute. Taking responsibility for the whole can surely be developed in many ways other than exercising an equal erg of coercive power over the decisions of that whole. Mill argued that jury duty and small parish offices would accomplish this function. The value of equal power should vary contextually according to the degree that the educative benefits of democracy derive from other sources.

**Representation**

*Descriptive representation*[^4]

Between the late 1890s and the late 1990s, few argued for descriptive representation, that is, the representation of constituents by representatives who looked like them, or, more substantively, had shared their politically relevant experiences. In a much-used textbook on democratic theory, the liberal J. Roland Pennock wrote, "No one would argue that morons should be represented by morons" (Pennock 1979, 313; see also Griffiths and Wollheim 1960, 190; Grofman 1982, 98; Pitkin [1967] 1972, chap. 4). Even among explicit advocates of group representation the ideal of descriptive representation found little support. Will Kymlicka wrote bluntly, "[T]he general idea

[^4]: For more detail, see Mansbridge 1999.
of mirror [descriptive] representation is untenable" (1995, 139) and Iris Marion Young concurred: "Having such a relation of identity or similarity with constituents says nothing about what the representative does" (1997, 354). Liberals, Marxists and feminists agreed that representative institutions should be judged by how well the representatives represented individuals and the public’s interests, not the way those representatives looked.

Yet many women want more women in Congress. Many African Americans want more African Americans in Congress. These desires are not just emotional mistakes. For at least four contingently valid sets of reasons, descriptive representation can, in specific contexts, increase the normative legitimacy of the resulting laws, not just their perceived legitimacy, both in the law-making arena and at the point of the application of coercion.

The first set of reasons involves contexts of uncrystallized interests. Descriptive representation, particularly in the law-making arena, can be of great importance when interests on a particular issue are uncrystallized – that is, the issue has not previously been much discussed in the regular political process and no representative or political party had taken a stand on it.

For descriptive representation of uncrystallized interests in the law-making arena, consider the United States in 1991, when the issue of sexual harassment had not yet come up in the arena of electoral politics. None of the parties had discussed it or taken stands on it. No representative running for office had mentioned it. Yet when the U.S. Senate denied Anita Hill the opportunity to testify at the hearings on Clarence Thomas ‘s appointment to the Supreme Court, it was six women from the House of Representatives who charged up the Senate steps to demand that she be heard. (Their move set in motion a series of events that eventually resulted in “The Year of the Woman,” with its significant increase in female representatives in the U.S. Congress.) It is highly unlikely that anyone would have run up the steps to make this demand if there had been no women, or perhaps only one or two women, in the House of Representatives. The issue was not crystallized. The women in the House, all Democrats, reacted spontaneously and immediately to the news from the Senate, affirmed one another in their reactions, and quickly decided together what to do (Chase 2014). No male representative in the House or Senate, with all the good will and desire to represent the interests of women he may have had, took such action. Because the representation of uncrystallized interests is one function of descriptive representation and the importance of uncrystallized interests is not constant, the value of descriptive representation varies contingently according to the degree that interests are uncrystallized.

A second set of reasons for descriptive representation arises in contexts of a history of communicative mistrust. In a context of communicative mistrust, members of a subordinate group often have become used to not being heard. They expect their arguments to fall on deaf ears. They may take friendly advice as criticism. They have less access to the subtle cues of mutual understanding that dominant groups have developed. For these reasons and others, in the United States, African Americans are more likely to contact African American law-makers than
white law-makers (Gay 2002, 719). African American lawmakers, in turn, are more likely to respond to African American citizens reaching out to them, even if those citizens come from another district (Broockman 2013). As one African American member of Congress commented, "Black constituents feel comfortable with me, and see that I feel comfortable with them" (Swain 1993, 219). To a lesser degree the same is true with women activists facing male legislators (Mansbridge 1999).

Communicative mistrust undermines the representative relationship not only at the law-making level but also at the point of application of coercion. Principle 8 of Robert Peel’s “Principles of Policing” states that “the police are the public and that the public are the police.” Ideally, not just the police but any functionary at the point of application of coercion should be a representative of the public to the public. To increase legitimacy, that functionary should have several communicative tasks: communicating to the coerced the reasons behind the coercion; communicating the respect that identifies the coerced as a law-giving equal; and engaging in two-way communication with the coerced, so that, in the ideal, both parties may understand what is happening, mutually identify possible injustices within the act of coercion, and act on those possible injustices constructively. When descriptive representation facilitates this task, it has positive value in legitimating coercion.

Last year in Ferguson, Missouri, when the protest against police violence seemed to be turning into a riot destroying businesses and savings in the Black community itself, the governor of the state gave control of security operations in Ferguson to Captain Johnson, a member of the highway patrol, not the trained security forces. As one of his first acts, Johnson, who is African American, joined the protestors and marched with them. His being black allowed him to surmount the wall of communicative distrust. Because the creation of communicative trust is one function of descriptive representation, the value of descriptive representation varies contingently according to the degree that representatives and constituents are functioning in an historical context of communicative distrust.

In two other contexts – the historical political subordination of disadvantaged groups and the low de facto legitimacy of the polity among members of those groups -- descriptive representation also, respectively, helps to create a social meaning that those groups are "able to rule" and increases the attachment to the polity of members of the group. Although these values are external to the substantive representation of interests, they increase perceived legitimacy appropriately from a normative perspective. In these cases the larger value of descriptive representation to the polity varies contextually according to the degree that a group of citizens has experienced historical political subordination and accords the polity low de facto legitimacy. When the implementation of descriptive representation involves some costs in other values, paying those costs makes most sense in these historical contexts.

Descriptive representation does not insure good representation of uncrystallized interests, improved communication between representatives and constituents, improved public perceptions
of a disadvantaged group, or a greater perceived legitimacy of the polity among members of that group. It cannot insure good lawmaking or the good administration of any form of state coercion. Descriptive representation is not required for perceived or normative legitimacy, either at the lawmaking level or at the point of application of coercion. It can, however, be one piece of the quilt of legitimacy. In specific contexts descriptive representation can contribute contingently to both perceived and normative legitimacy.

Representative congruence

Before 1974, most political scientists in the U.S. followed the lead of the major writers in the field (Miller and Stokes 1963; Kingdon 1973) in seeing the valued congruence between constituents and representatives as taking two causal paths. I call these the “selection” and “sanction” paths. In the selection model, voters seek out competent representatives whose lives had given signals of acting in a “gyroscopic,” or internally motivated, manner and whose interests and political views are relatively well aligned with the voters’ own. In the sanction model, voters expect the representatives to reflect the voters’ will in the legislature because if they did not the voters would not re-elect them. In any actual instance of representation, both paths have some weight. All representatives must to some degree be influenced by the threatened sanction of non-re-election. All, I venture, also have buried at least somewhere deep in them a gyroscope attuned to their deepest substantive interests, values, and beliefs. The size of the gyroscopic core and the sanction periphery vary by the political context and the individual’s character.

In 1974, two books appeared (Fiorina 1974; Mayhew 1974), perhaps influenced by the then reigning models in the discipline of economics, that almost eliminated conceptual reliance on the selection model for many political scientists. These books portrayed representatives as single-minded seekers of re-election and constituents as citizen power-holders who exercised their power through the vote, by getting their representatives to do what they would otherwise not have done. The ideal bore some resemblance to the market, with politicians acting as entrepreneurs offering policies and voters acting as consumers choosing one policy over another (see Schumpeter 1945). It had the seduction and analytic convenience of relying only on self-interested motivation in the case of both voters and representatives, with an invisible hand producing the public good. In the late 1990s, perhaps again driven by an evolution within the discipline of economics, political science began to return to the selection model. In the future the selection model may return as a full equal to the sanction model in political analysis.

We might not call the sanction model of representation a democratic “ideal” any more than we would call a market an ideal. The sanction model does embody certain democratic ideals such as freedom and equal power. That model is also subject to corruption, so that when an instantiation of the model in practice is uncorrupt, we can say that it is living up to the ideal. Its primary

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For more detail, see Mansbridge 2009.
virtue is efficiency, however, so that in ordinary language we might not call it an ideal. The selection model comes closer to an ideal, in that we might say that ideally we want to be represented by a more competent and politically effective version of ourselves, who will act in our material, ideal-regarding, and symbolic interests because they themselves either have those interests or, for internal reasons, want to further those interests.

To the degree that the selection model is an ideal, however, its instantiation is contingent. The overriding contingency in practice is that, for this version of a principal-agent relationship to come into being, the world has to produce agents who, for whatever reason, actually want, for internal reasons, to do what their principals want them to do. As economists have recognized since at least 1985, on occasion the goals of principals and agents can be “aligned.” In these instances “purposes line up naturally.” Corporate executives can place “like-minded managers in positions of responsibility,” and politicians can appoint staff “who share their goals, who will make the choices regarding welfare or the environment that they would make.” Because “[t]hose who share one’s objectives tend to carry them out,” the “alignment of objectives is beneficial to the performance of an agency relationship,” and “both agent and principal have an incentive to make a good match” (Pratt and Zeckhauser 1985, 15). The alignment of objectives between principal and potential agent is contingent. The world is not likely to produce someone who internally wants to cut the grass behind my house. This context requires external motivation. In some historical moments in some political systems, however, the social system is relatively likely to produce someone who wants to represent me politically and who also internally wants to promote many of the goals that I have for the polity. The practical value of the selection model of representation varies contingently according to the degree that representative agents appear who have gyroscopically internalized the same values and interests as the voter principals.

Other contextual factors also affect the value of the selection model. As I have stated elsewhere,

The benefits of selection are high when agents will face unpredictable future situations, when agents must act speedily, creatively, flexibly, and adaptively, when they must dedicate their powers to an evolving goal and adopt different means as the need demands, when the goals are long-run rather than short-run, and when principals and agents prefer relationships based on mutual trust and common goals rather than instrumental relationships (Mansbridge 2009, 370).

The benefits of selection are also high comparatively when the sanctions and monitoring required by the sanction model are impractical or very costly. The costs of selection are low where sufficient numbers of potential agents are self-motivated, where the probabilities of aligned objectives between principals and agents are high, where principals can fairly easily gather sufficient information about agents to make a reasonably accurate choice at the time of selection, and where agents can effectively self-sort into appropriate roles (Idem.).
Most of the contingencies affecting the value of this ideal are simply matters of efficiency. On the other hand, trust relationships based on common goals may be better in themselves than instrumental relationships based on suspicion and the need for constant monitoring. If this were the case, the relationship embodied in the selection model would be an enduring and non-contingent ideal, while the capacity of individuals to put that ideal into practice would be contingent on circumstances. The ideal itself would not be contingent, as with equal power, but its instantiation would be contingent.

*Democratic accountability*\(^6\)

Much the same logic drives models of accountability. Different forms of accountability derive from the sanction and selection models of representation. The sanction model of representation requires accountability as monitoring and sanctioning. In the current dominant understanding of the word, “accountability,” the emphasis lies on the capacities of the principals to punish the agent and the vulnerability of the agent to that punishment. Today, “[w]hen people seek to hold someone accountable, they are usually planning some kind of punishment” (Fearon 1999, 5). Thus by 1999, an influential volume on accountability in politics could define accountability as follows: “Governments are 'accountable' if citizens can discern representative from unrepresentative governments and can sanction them appropriately, retaining in office those incumbents who perform well and ousting from office those who do not” (Przeworski et al.1999, 10). Accountability has become a matter of monitoring and sanctioning, congruently with the sanction model of representation and in contrast to an earlier definition more congruent with the selection model.

The selection model, by contrast, facilitates accountability as giving an account – the more traditional understanding of the term. In this earlier definition, “accountability” is defined substantively as “liability to give an account of, and answer for, discharge of duties or conduct” (Oxford English Dictionary 1989). This definition focuses on the giving of an account, touching on sanctions only through the implications of “answer for,” which still has narrative overtones.\(^7\) (See also the French *rendre compte* and the German *Rechenschaft abgeben.*) Giving an account can include both “narrative accountability,” the one-way reason-giving characteristic of the U.S. Supreme Court, and “deliberative accountability,” a two-way process between representative and constituent in which both speak, are heard, and influence the outcome. Two-way deliberative accountability comes closer to communicative ideals, but is harder to achieve.

The newer sanction-based meaning of accountability has evolved in tandem with the “audit explosion” (Power 1994) in the use of quantitative metrics to measure the performance of public servants. This move has occasioned philosophical comment. Onora O’Neill, seeing the new

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\(^{6}\) For more detail, see Mansbridge 2014.

\(^{7}\) On accountability as giving an account (showing, explaining, and justifying past actions), see also Behn 2001, p. 4; Philp 2004, p. 12; and O’Neill 2002, p. 58.
forms of accountability as rooted in distrust, remarks that although “trust often invites reciprocal trust" in a virtuous spiral, "when trust starts spiraling downwards ... we may lose it altogether” (2002, 19). Distinguishing between "integrity-based systems" of public office and rule and "compliance-based systems," Mark Philp writes that an integrity-based system "requires that the agent has the appropriate dispositions and character and behaves appropriately because he or she has that degree of probity, rather than simply acting in a response to external incentives.” Such a system "expects people to be guided by the desire to act in keeping with their responsibilities and fundamental commitments.” A compliance-based system, founded on distrust and sanctions, is by contrast inherently dishonoring. Philp concludes, “Someone who regards his or her conduct...as a matter of honour should not be held to account in a way that is itself dishonouring” (2008, 37, 42). Yael Tamir (2012) argues that accountability can become "malignant" when initial distrust of government representatives generates a desire for "continuous comparable monitoring, which in turn leads to numerical assessments that corrupt what they intend to measure, thus intensifying distrust." Groups with a free-market or conservative agenda, she suggests, may actively foster both the initial distrust and the later downward spiral of malignant accountability in order to disempower the state.

Two thoughtful economists, Geoffrey Brennan and Timothy Besley, have also registered their conclusions that some individuals are less “knavish” (Brennan 1996) and more “trustworthy” (Besley 2006) than others. With their observation that individuals vary by type, Brennan and Besley take the first step toward a contingency theory of accountability.

Yet neither the philosophers, with their normative concerns, nor the economists, with their efficiency concerns, have thought to mention three considerations relevant to a contingency theory of accountability. First, each individual is not one type but many. Different social contexts activate different features of one's identity. Second, social contexts differ in their proportions of individuals with different kinds of intrinsic motivation. Third, history matters. A government or administration that has been corrupt for centuries may need to introduce strong sanction-based accountability systems, as Denmark did in the two centuries between approximately1650 and 1850, to disrupt the existing long-standing and highly integrated equilibria based on self- or group-interest (Rothstein 2011, Mungiu-Pippidi 2015) before it can move to a selection, or integrity-based, system. Conversely, a government or administration that has an integrity-based system and begins to introduce sanctions into it may find the newly introduced extrinsic motivation driving out the existing intrinsic motivation (Deci and Ryan 1999, Frey 1997, Goodin 1980). A contingency theory of accountability would take into consideration the mix of motivations within each potential agent, the mix of intrinsically motivated actors in a specific context, and the possible interactional dynamics over time.

From a normative perspective, as with the selection model of representation to which it is linked, the ideal of deliberative accountability may not be contingent. The ideal of trustworthy actors
interacting communicatively to forge a common good in a selection model of representation with narrative and deliberative accountability may be a stable, non-contingent ideal that is simply contingent on fortunate circumstances for its instantiation. In analogy, John Rawls made liberty rights lexically prior in the ideal, but agreed that in certain contingent circumstances “one can concede their limitation…to the extent…necessary to prepare the way for the time when…[the limitations are] no longer justified” (1971, 132). In this case the ideal itself is not contingent, it is only contingently applicable. If, however, one were to contend that the sanction model, along with its accountability through monitoring and sanctions, were a genuinely competing ideal, then the ideals of monitoring/sanctioning and narrative/deliberative accountability themselves would be contingent.

**Deliberative negotiation**

Deliberative negotiation means

…based on processes of mutual justification, respect, and reciprocal fairness. Such negotiation includes elements of arguments on the merits made by advancing considerations that the other parties can accept; searching for zones of agreement and disagreement; and arguing about the terms of fair processes as well as outcomes, with a background of sufficient mutual respect for those arguments to have motivating force. Deliberative negotiation takes place in a context of relative openness and disclosure about interests, needs, and constraints (Warren and Mansbridge, et al., 2013, 92-93).

This newly-minted term stands for a cluster of normatively desirable practices in democratic attempts to reach agreement. The practices run from pure deliberation (aiming at consensus or clarifying conflict, with the assumption that all will gain from this communicative endeavor) through “fully integrative negotiation” (in which parties with conflicting interests search for solutions from which all will benefit and none experience losses), “partially integrative negotiation” (in which parties with conflicting interests bring other issues into the negotiation, trading lower for higher values so that the overall value in the negotiation is expanded), and fair compromise (in which parties with conflicting interests make fair offers, based on reasonableness, each sacrificing something to reach outcomes better for all). The practice of deliberative negotiation does not include “pure bargaining,” in which each party acts purely strategically in a power-based zero-sum contest over the surplus generated by the negotiation.

For purposes of argument, I will take deliberative negotiation as an ideal. Achieving the conditions for deliberative negotiation, however, requires sacrifices in three other democratic values: the “right to know,” high turnover in office with contested elections, and the focus on a unitary common good. In the paper on which this section is based, a team of theorists (and a few

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8 For more detail, see Warren and Mansbridge et al. 2013.
comparativists) convened by the American Political Science Association (APSA) argues that in certain contexts those costs would are democratically worth paying. In these contexts, the right to know, high turnover and contested elections, and the focus on a unitary common good are contingently less valuable.

The “right to know”

Good negotiations require closed doors. Yet publicity is a long-standing democratic norm, perhaps even an ideal. To partake adequately in collective decisions, the citizen must be well informed. Citizens may have a “right to know” the available information on the subjects on which they are being asked to decide. The right-to-information campaign in India adopted the slogan, “The right to know is the right to live” (Singh 2007 and Florini 2007 passim). Yet normatively the “right” to know may often be satisfied by transparency in rationale, or public access to the reasons for the outcome, rather than transparency in process, or public access to the details of actual interactions (Mansbridge et al. 2010, Warren and Mansbridge et al. 2013, Mansbridge 2014). The APSA article argues that privacy in negotiation is normatively acceptable to the degree that it meets the following conditions:

- Citizens have the opportunity to deliberate about the rationales for closed-door negotiations.
- Citizens have, with warrant, high trust in their representatives.
- The interests of the members of the polity who are affected (or potentially affected) by the outcomes are fairly represented in the negotiation.
- Negotiators are subsequently transparent in their rationales for a decision, providing enough information, reasoning, and publicity that citizens can engage in informed debate and judgment.

(Warren and Mansbridge et al., 2013, 112)

The first of these conditions requires some parsing and may be a bit of a fudge. Because the “right to know” is framed in terms of a right, it should be impervious to majority rule. Nevertheless, if a majority of citizens, directly or through their representatives, after a deliberation of relatively good quality, were to decide to abridge this right in certain conditions (e.g., for purposes of negotiation), their decision should increase the democratic credentials of a closed-door negotiating process. The first condition, however, does not go so far as to require a specific prospective authorization of privacy.

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9 This paper is “deliberatively co-authored” in the sense that one or two authors take the lead, while other authors participate in active deliberation over the issues, challenge formulations, contribute new concepts, formulations, ideas, and wording, and serve as co-authors on the product. The formula in the first footnote specifies that “Although each co-author would, if writing independently, put things in his or her own way, the paper represents a direction of thought the co-authors collectively endorse.” For other examples, see Mansbridge et al. 2010 and Mansbridge et al. 2012.
Rather, this and all of the other conditions aim to specify the contingent contexts in which the right to know might validly be abridged.

Like the other conditions to other democratic values in this section on deliberative negotiation, these conditions on the right to know in the context of negotiation are not intended as dispositive. The authors saw themselves as making only a first cut at the problem. For purposes of this paper, however, the point is that the “right to know” is not absolute but instead, when it comes in conflict with other democratic values such as the capacity to forge democratic agreement, contingent on specifiable conditions.

*High turnover and contested elections*

In a representative democracy, one strong democratic value is the “responsiveness” of the representative to the constituent, often thought to derive from short terms, contested elections, and high turnover in office. Advocacy organizations that promote electoral reform often point to high rates of incumbency as self-evidently undemocratic. Empirical indexes of democracy also often count relatively uncontested elections as indicators of failures in democracy. The sanction model of representation relies on the prospect of a contested election to provide the threat that makes the representative act in the interests of the constituent.

Yet in a selection model of representation, where in the pure case the constituent has chosen a representative who is internally motivated to pursue ends the constituent also favors, the prospect of a contested election serves no relevant function. When a more competent but similarly aligned potential representative appears, or when either the constituent or the representative changes so their goals are no longer in alignment, the constituent will want to replace the incumbent representative. Otherwise, in the selection model, the constituent will want to retain the incumbent for as long as possible. There are costs to selecting the right person and those costs have already been paid. The representative’s actions in office have, in the best case, reinforced the earlier conception that the constituent had developed of the representative’s overall direction and goals. Communication between representative and constituent has been facilitated by the constituent’s becoming more likely to learn the representative’s name, some her personality traits, and perhaps how to contact her. If the constituent has actually attempted a contact and received a reply, the impetus to further communication has been reinforced. In a selection model, the costs of a long incumbency are fewer and the gains greater than in a sanction model.

Long incumbencies promote deliberative negotiation because in the legislature they lead to long-standing and repeated interactions, both with members of one’s own party and across the aisle. As Gutmann and Thompson point out:
When adversaries know each other well, they are far more likely to recognize whether the other side’s refusal to compromise on a principle is a negotiating tactic or a real political constraint. They are less likely to act as players in the classic bargaining game who hold out for their maximum individual payoff, producing an outcome that makes both sides worse off. In longer-term relationships, legislators have a better sense of their colleagues’ intentions, their trustworthiness, and the political constraints they are facing—and their colleagues know that they do. They are repeat players. That enables all to make more confident judgments about when to compromise and when not to (2012, 170).

Repeated interaction, particularly when it has informal as well as formal elements, creates the reputational structure and warranted trust that allow participants to share information without believing that it will be leaked to the media, to sympathize overtly with the positions of those on the opposite side of the negotiating table, and to float possible concessions or other ideas without having these reported to constituents and activists as sell-outs. In the U.S. Congress, the “great negotiators” have all been in office a long time.

Because contested elections and high turnover have value in a sanction model of representation, and because no actual instance of representation comes without some normatively appropriate sanctions, relatively uncontested elections and long incumbencies have their costs. Those costs, however, vary depending on the context. The democratic costs are smaller the more the following conditions hold:

— The representative, by and large, promotes policies and a broad political direction of which the majority of constituents approves.
— Most constituents consider themselves relatively satisfied with the representative.
— The minority of constituents is not deeply unsatisfied with the representative.
— The existing media system, interest-group system, and party system (through either an opposing party or internal-party dynamics) are healthy, able to present alternative policies, and able to publicize departures from citizen preferences or interests.
— The citizens are active in other forms of politics and therefore able to inform themselves easily and take action skillfully if their current representative no longer seems appropriate.

(Warren and Mansbridge et al., 2013, 104-05)

The democratic value of high turnover and contested elections diminishes when these conditions hold. The democratic value of long incumbencies correspondingly increases.
A unitary common good

The classic ideal of “deliberative” democracy focused on a unitary common good.

In the classic ideal, individuals enter a deliberation with conflicting opinions about what is good for the polity, but after voicing and hearing the reasons for different options, converge on one option as the best, for the same reasons. Ideally, the deliberation is based on reason. It aims at consensus and the common good. In most formulations it explicitly excludes negotiation and bargained compromise. It excludes self-interest.

In the classic antithesis between deliberation and aggregation, the rejection of self-interest is a central part of the larger rejection of aggregation, negotiation, and interest-group pluralism. Iris Marion Young summarizes the classic contrast between deliberative and “interest-based” models of democracy as follows: “Democratic processes are oriented around discussing [the] common good rather than competing for the promotion of the private good of each. Instead of reasoning from the point of view of the private utility maximizer, through public deliberation, citizens transform their preferences according to public-minded ends, and reason together about the nature of those ends and the best means to realize them” (1996, 120-21).

Indeed, in Jürgen Habermas’s early work (and that of earlier scholars in this tradition), public and legislative deliberation should ideally rest only on “the standards of ‘reason’” and “the authority of the better argument” on matters of “common concern” ([1962] 1989, pp. 28, 36, 37). This view is inseparable from a concept of “law as an expression of reason,” in contrast to will.

Laws ideally embody “the reasonable consensus of publicly debating” persons, not a “compromise between competing private interests.” This definition excludes from deliberation not only self-interest but also all forms of negotiation.

Much of what became known as “deliberative political theory” in the second half of the twentieth century therefore began by distinguishing between “deliberation,” meaning processes of mutual justification, and “bargaining,” meaning processes in which individuals or groups say

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10 See Mansbridge et al. 2010 for detailed footnotes on the intellectual history of this dichotomy.

11 Habermas [1962] 1989, 81, citing Schmitt [1928] 1957, 148: the “law is not the will of one or of many people, but something rational-universal; not voluntas, but ratio.”

they will do or give something in exchange for something else, with each trying to give the least and get the most in the bargain. Jon Elster summed up this approach by identifying bargaining as “instrumental,” “private,” and resulting in a “compromise between given, and irreducibly opposed, private interests.” On the other side of his dichotomy, he identified “arguing” with “rational agreement rather than compromise” and with “public debate with a view to the emergence of a consensus” (1986, 103 and passim).

Recently, however, a subset of deliberative theorists has begun to take pluralism seriously as a democratic ideal. In fully plural polity, not only opinions on the common good but also material interests would come in conflict. This conflict would not merely reflect the “circumstances” of politics and justice, “marked by a conflict as well as an identity of interests” (Rawls [1971] 1999, 109) but would be part of the ideal itself. A pluralist ideal would incorporate sufficient diversity to generate conflict. For similar reasons, normative theorists have also begun to accept self-interest, constrained by fairness, as a valuable input to deliberation (Mansbridge et al. 2010). Deliberation, in this conception, helps citizens not only forge consensus but also clarify and structure conflict, in preparation for either negotiation or majority rule as the next stage in reaching a democratic decision (Mansbridge 2015).

This move from the classic model to one that accommodates self-interest and negotiation raises the issue of side payments. Successful negotiations often require bringing in issues separate from the issue central to the negotiation so that the larger agreement may allow parties to trade according to the different values they place on different parts of the agreement, conceding on issues that are of less value to them and insisting on concessions from others on issues that are of high value. In the process, “logrolling” or “side payments” often become critical features of a negotiated agreement.

Side payments have always had a questionable normative status. Among negotiation scholars, “logrolling” has neutral or positive normative valance, as indicated by the definition, “Logrolling is the act of making mutually beneficial trade-offs between the resources under consideration” (Thompson and Hrebec 1996, p. 398). In legislative practice, however, logrolling can involve “pork barrel” projects that benefit only one legislator’s constituents, could not get a majority on their own, and generally come at the expense of the taxpayers as a whole. As a result, logrolling with pork barrel projects “tends to result in overspending and it is discriminatory” (Pennock 1970, 714). From the perspective of democratic norms, the interests of the broader public may be excluded from the decision-making. Side payments may also undermine the purpose of a policy when the cost of those payments spreads resources too thinly or when the side payments gut the logic of the policy or its enforceability.

Side payments may serve the public interest, however, when a local project has externalities that promote the common good and local citizens are unwilling to pay the costs. Side payments may
also serve the public interest when a political institutional structure requires supermajorities that must be cobbled together somehow in order to produce democratic action. The institutional design of checks and balances, with its own democratic value, comes at the cost of potential rent-seeking on the part of individuals and groups located at important veto points.

The APSA authors did not discuss the problems raised by side payments at the face-to-face workshop on deliberative negotiation; that work all occurred after the workshop by email. Nor could the group build on much past work on the issue. Nevertheless, the group concluded tentatively that side payments conform to democratic norms better the more the following conditions are achieved or approached:

— The side payments are transparent.
— The side payments survive cost-benefit scrutiny on the allocation itself; that is, there must be an overall benefit to the collectivity served as measured against the cost of providing that benefit.
— The rationale of the benefit provided by the side payment is justifiable to those affected (for example, taxpayers) who were not involved in the trade.
— The side payments are needed to negotiate an agreement.

(Warren and Mansbridge et al., 2013, 173-4)

The goal of this short list is less to set out an unimpeachable list of conditions in which side payments perform valuable democratic functions than to begin debate over what those conditions might be. For purposes of this paper, there are two main points. First, the ideal of a unitary common good is itself contingent on that good not arising from an undesirable homogeneity of individuals, opinions, and interests. Second, some political practices previously normatively characterized as bad can, contingent on their positive roles in deliberative negotiation, figure as democratically valuable goods.

Conclusion

This paper has traversed a number of democratic values, ranging from the ideal of equal power that some consider central to democracy itself to the practice of side payments, which has only occasional democratic value. It has run from the grand to the trivial. It has considered not only what many would consider ideals but also norms, and practices to which norms must be applied. In all these cases, the democratic values of the ideals, norms, and practices are contingent upon context.

Many of these norms and ideals are not only contingent but also aspirational. The ideal of equal power, for example, is a “regulative” (aspirational) ideal that applies to aggregative forms of democracy. No actual polity, even the most dedicated left-wing collective, can produce fully equal power (Mansbridge 1980). The ideal of no power is a regulative ideal that applies to
deliberative forms of democracy. No actual democracy, even one whose members are fully committed to conclusions produced only by the force of the better argument, can create a speech situation in which power is absent. Because none of these ideals can ever be fully achieved, any actual claim to democratic legitimacy must be partial. We should therefore speak not of regimes or practices being “legitimate” or “illegitimate,” as a dichotomy, but rather of their being “more or less” legitimate, on a spectrum. Because no actual regime or practice can be fully legitimate, in the quest to increase the perceived and normative legitimacy of state coercion, it helps to emphasize both the contingency and the aspirational quality of our ideals.

In our current crises of legitimacy we need what might be called applied political theory. We also need meta-theory to figure out how our ideals and norms fit together. And we need historical political theory in part because it’s good to know where you’ve been when you try to figure out where you are going. We need all the intelligence on these problems that we can get, including the intelligence of past generations. Applied political theory, using all the resources of the profession, would consciously try to give guidance to political actors and political scientists who at the moment face thorny questions of legitimacy.

In the process of puzzling out what political acts are more democratically legitimate than others and why, it may help to take seriously the way ordinary citizens perceive legitimacy. In my own work I came across the contingent need for equal power by asking members of a highly committed participatory workplace why they were comfortable with the unequal power they perceived in their group. For descriptive representation, I asked myself, as a citizen not all that different from other citizens, why I wanted women in the U.S. Congress. Perceived legitimacy cannot be a simple guide to normative legitimacy. It can easily be manipulated. But particularly among groups of people for whom a problem in democratic theory is a problem in everyday life, the insights of ordinary people can give some guidance to normative theory. Taking those insights seriously could be one step in constructing an applied political theory that could help build democratic legitimacy by specifying more carefully what democratic legitimacy requires.

Although “nudges” (Thaler and Sunstein 2009) and other forms of good design can be evolved to keep necessary levels of state coercion to a minimum and prevent extrinsic coercion from driving out voluntary intrinsic motivation to act in ways that further the public good, the world will nevertheless predictably need more and more legitimate coercion to solve the collective action problems that will arise – and have arisen -- with increasing interdependence. As the demand for legitimate coercion increases, however, its supply is decreasing. Post-materialist “critical citizens” (Norris 1999), primed by the Holocaust and totalitarian evils (Offe 2013), and both recognizing and rightly fearing the extraordinary powers of the modern state, are demanding more and more of their governments before they will grant those governments legitimacy. As the tension builds between increasing need and declining supply, it would help to have more applied political theory that could guide citizens and political scientists alike when they desire to understand legitimacy better. Political theorist, with their allies in political philosophy and law, form the only community whose members can receive salaries for thinking about the normative
side of political legitimacy. When the world looks to us for better thought about what
democratic practices are legitimate and why, I think we can help most if, in the realms of ideal
theory and practical application, we borrow from the way the natural sciences have turned
toward interaction to see our ideals as frequently, if not always, contingent on context.
References


