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Of: Talking It Through: Puzzles of American  
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## DEMOCRACY AS CIVIC CONVERSATION

**TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY.** By Robert W. Bennett.<sup>1</sup> Cornell University Press. Pp. 223. \$29.95.

*Louis R. Cohen*<sup>2</sup>

This elegant book seems more important at the moment than its author is willing to claim. Professor Bennett argues that the best account of America's democratic institutions is that they foster a complex "conversation" about public affairs between the citizenry and its leaders. He insists that the aim of his "conversational perspective" is simply to describe why many features of our government have survived and seem to work, and not to judge whether they are working *well*. But his own enthusiasm for both American democracy and "democratic conversation" shines through, and he surely believes that the democracy works well when the conversation is smooth and not bitter, and that our most effective leaders are those who can converse most effectively with the public.

Bennett has been arguing for a while that the traditional primary explanation of American government—that it allows the will of a majority of citizens to be reflected through the voting process in the nation's decisions—is incoherent, inconsistent with what happens, and fails to account for central features of that government.<sup>3</sup> His summary here of the shortcomings of "majoritarianism and the vote-centered model" as a description of the real world is clear and efficient (pp. 18-33), and the book

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1. Nathaniel L. Nathanson Professor of Law, Northwestern University School of Law. Professor Bennett served as the school's Dean from 1985 to 1995.

2. Partner, Wilmer Cutler Pickering Hale and Dorr LLP, Washington D.C. Mr. Cohen has argued several cases concerning the structure of American government, including *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (invalidating state limits on congressional terms), and *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down the presidential line-item veto).

3. See Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481 (1997).

would be fun to read even if there were only this delicious (good-natured) attack on a standard model.

On the traditional view, at least in its most naive form, the views of a majority of citizens dictate policy, not directly (as in the legendary New England town meeting) but through the election by majority vote of representatives, who in turn make decisions by majority votes within their representative bodies, and the election of a President, again by majority vote, to take care that the policies are faithfully executed.

This is, of course, not merely a false but a wholly impossible explanation. The nation has not resolved—and should not—even the fundamental question whether elected representatives “should” reflect the views of their constituents or should instead act in what they consider the best interests of the polity as a whole. That question, put pristinely by 18th Century theorists, is greatly complicated in American practice by the work of political parties, interest groups, and many organizations that mediate the views of constituents on their way to the legislature. But even if it were clear that representatives are expected simply to vote in accordance with their constituents’ wishes, outcomes would hardly reflect simple majority sentiment: for example, outcomes depend on which questions are put to a vote, and how the questions are defined, and in what order they are taken up (all of which depend on distinctly non-majoritarian processes); and outcomes also depend on what legislative trades the representatives are allowed to make. Moreover, of course, since the beginning of the Republic, the composition of both national and state legislatures has been determined not only by votes but by the boundaries of legislative districts drawn with a keen eye to the desired election outcomes. And, as we have been repeatedly reminded, the President need not be elected by a majority or plurality of all voters.

Bennett does not, in my view, sufficiently criticize one important consequence of naive vote-centered majoritarianism that has a bearing on much of what he does say. In 1964, the Supreme Court established a high-water mark for the naive theory by imposing a strict “one-man [sic] one-vote” standard on the apportionment of both the U.S. House of Representatives<sup>4</sup> and state legislatures.<sup>5</sup> The Court seems to have thought that giving each

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4. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (“as nearly as practicable, one man’s vote in a congressional election is to be worth as much as another’s”).

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

resident (*not*, incidentally, each eligible voter) an equal theoretical fraction of a legislator would work some democratic magic, and it therefore required frequent redrawing of district lines to make districts as nearly equal as other constraints allow.

In this, the Court largely ignored the problem it has since found intractable and which a plurality of Justices have now formally given up on solving: the actual composition of the resulting legislature depends on how the district lines are drawn and who is grouped with whom.<sup>6</sup> Equally important, the 1964 Court largely overlooked the fact that geographic line drawing is itself a process full of political opportunities, and that everyone involved is quite capable of calculating the consequences of each proposed map with some precision. One result of the Court's insistence on repeated redistricting to produce numerical equalities (and disregard of the politics of actually drawing the lines) is the present rigid and deep division of the House of Representatives. Forty years of party trading of safe districts in the mapping process have meant that very few seats are now in play in any election, and many seats are safely in the hands of one party and occupied by persons whose views are partisan enough to win a primary rather than flexible enough to win a contested general election.

Bennett is persuasive that giving each citizen an equal influence, through her vote, is pretty far from what American democracy is about, and he offers a much more convincing and interesting explanation of our particular democracy and its long survival: we are engaged in a complex public "conversation" about public affairs. Government in America is structured so as to give leaders a wide range of opportunities and obligations to engage with overlapping constituencies about subjects of concern, and to give citizens a sense that they are being spoken to and listened to. The federal system with its boldface division of responsibility among different levels of government; separate elections of the executive at both the national and state levels; bicameral legislatures with different geographically defined constituencies electing individual members (rather than proportional representation of parties as in many other democracies); First Amendment protection of robust debate on matters of public concern; even the Supreme Court's practice of publishing dissenting opinions (which by definition are contrary to the law as the Supreme Court is declaring it)—all these features create a

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6. See *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004).

deliberate complexity that forces leaders to explain their views to different sets of the public, gives members of the public many qualitatively different opportunities to respond (at the polls and otherwise), and helps citizens feel engaged in their government.

Bennett identifies four theoretical problems for which “conversationalism” provides an interesting explanation:

1. Why doesn't much of anyone seriously object to giving each state two Senators? From an apportionment perspective, the U.S. Senate is of course a monstrosity. The fraction of a Senator that a resident of Wyoming “enjoys” is about 50 times the fraction enjoyed by a Californian. So why does (almost) nobody ever argue that the Senate is so seriously “undemocratic” that we ought to amend the Constitution to change it? Does everyone simply assume that the civics-class story of the Great Compromise between the big states and the little states resolved the issue for all time? When we amended the Constitution to take the selection of Senators away from the state legislatures and give it to the people of each state, why was there no serious suggestion of changing the apportionment as well (pp. 49-65)?

2. Why do we count children under 18 for apportionment purposes (as we do—apportionment is based on total population) but fail to reflect them in any way in the voting process? From a vote-centered standpoint, there is a serious logical inconsistency. The percentage of children in the population actually varies a good deal from state to state and between districts within states. As a result, each eligible voter's “fraction” of a Congressman or legislator actually varies far more than the Supreme Court deemed allowable in the reapportionment cases, to the detriment of voters in places with lots of children. (And, depending on your perspective, the interests of the children and their families are systematically underrepresented, with the result that there is much more political focus, for example, on the welfare of senior citizens than the welfare of children.) Nobody advocates giving actual votes to five-year-olds, but if they are to count as part of a district's population, presumably because their interests ought to be reflected in national and state decisions, why not give their parents or guardians an extra vote on their behalf? And why has almost nobody ever seriously suggested such a thing (pp. 67-84)?

Bennett's answer to these two puzzles is that the existing rules reflect a “conversational” expectation that is far more important than any principle of apportionment. The composition of

the Senate creates a group of legislators who speak to and respond to constituencies that are defined differently from (but overlap with) the constituencies that elect the House of Representatives, giving each citizen qualitatively different opportunities to be addressed and participate in public processes. Children count but do not vote because the conversation, in which voting is a chief means of expression for ordinary citizens, is an adult process. From a conversational perspective, these features that seem anomalous on a vote-centered model make a good deal of sense.

Whether particular features of our government foster conversation is of course debatable. A current example is the Electoral College, which, perhaps curiously, has never been the subject of strong or sustained popular objections, even though it means that the President is not elected by majority vote of the populace as a whole. A “conversational” explanation of the acceptance of the Electoral College might be that it has forced presidential candidates to focus on issues that concern the States as such, and to seek votes in places other than the major population centers where they might otherwise spend their entire campaigns. On the other hand, in the current election, the Electoral College structure appears to be causing the candidates to focus on “swing states” to the partial exclusion of large areas of the country. But either way, Bennett’s question—Does the institution foster a sense of communication and engagement between the President and the various parts of a large country?—is surely one useful way to think about the institution.

3. Why do so many people vote? Given the effort involved, the lost opportunity to spend an hour or two more enjoyably or profitably, and the exceedingly small chance that any individual’s vote will alter the outcome, going to vote is not rational if outcome-altering is the only value an individual sees. (The more usual question, of course, is “Why don’t more people vote?” but Bennett says correctly that if individuals are guided by rational self-interest the answer to that question is easy: it is not worth the effort.) As Bennett notes, modern “rational choice” theorists have identified the problem of why people vote and labeled it a “paradox” but have had difficulty solving it (pp. 106-15).

The “conversational” answer to the question is straightforward. What a citizen “gets” from voting is not primarily or even significantly his own percentage chance of changing the outcome but rather an opportunity to respond to what the voter has heard from the candidates. Voting viewed in this way is a central act in

a participatory process of communication between governors and governed. The rewards of this form of participation still are not sufficient to induce half of the eligible population to vote, but they account nicely for the half that does.

4. Why does it bother constitutional scholars that the Supreme Court is allowed to strike down federal and state legislation? Bennett's remaining problem is of a different kind. He begins with what Alexander Bickel called the "countermajoritarian" difficulty in justifying the Supreme Court's power of judicial review. Why, in a democracy, do we allow an unelected Court to invoke the Constitution and invalidate the work of an elected Congress? Bickel went so far as to call judicial review "a deviant institution in the American democracy," asserting that a determination that a law is unconstitutional "thwarts the will of representatives of the actual people of the here and now" and acts against "the prevailing majority."<sup>7</sup>

Part of the answer to that question, Bennett says, is that the notion that the stricken law represented the will of "the prevailing majority" is largely a myth and, on the other hand, courts are certainly not immune to the influence of political processes. Laws are enacted (or not) by complex processes at several removes from any popular vote and need not closely reflect a prevailing popular majority, and courts, conversely, are subject to various political constraints including the manner of their selection. One can describe the President, Congress, the administrative agencies (which make important parts of the law), and the federal courts as *all* parts of a process that is ultimately responsive to "the governed," without any of the parts being either purely democratic or purely "deviant."

But Bennett sees good reasons why Bickel's "countermajoritarian difficulty" continues to haunt constitutional theorists even when they recognize (as Bickel himself surely did) that simple majoritarianism is a myth. He suggests that one source of these misgivings about the Supreme Court's power of judicial review is that it is "*counterconversational*." The very limits on the Supreme Court's activities that make its role tolerable—the Constitution's insistence that it may decide only concrete cases presented to it by particular litigants—mean that the Court sometimes makes sweeping legal doctrine in cases where only a handful of people have been heard, depriving everyone else of

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7. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 16, 17-18 (1962).

the right to be part of that particular area of the national conversation. Bennett thus offers one interesting explanation of why Bickel's problem is a problem at all (pp. 85-105).

At several places, Bennett insists at some length that his "conversational" approach is intended to be descriptive only, to "account for" many facts of American democracy without judging the results (*e.g.*, pp. 117-21). I am not sure why he so firmly resists normative judgments, or that it is possible to be "descriptive only." Bennett is not (most of the time) arguing that the desire to facilitate conversation was the historical cause of a particular democratic feature. The point of his "description"—what he is "accounting for"—is why Americans broadly continue to find particular features of our democracy desirable, or at least acceptable, and why that democracy has now persisted for a long time. But when the subject is the features of a form of democratic government, popular acceptance and long survival sound to me like normative criteria. I hope Bennett will turn to using his conversational approach to think about what now works and what does not.

That would certainly be timely, because we are in a testing period for the national conversation, which has *lost* some of its necessary, built-in complexity and tolerance and become increasingly two-sided and shrill. The reasons for this range from the fact that the communications revolution has made it easier to rally citizens at opposite poles, to the spread of safe seats in the House of Representatives through reapportionment, to the personalities of our recent Presidents. But we now (as this is written) have a President who speaks very effectively to just-under half of the population and fails quite dramatically to reach the other just-under half; a rigidly divided Congress that finds compromise excessively difficult, and a population increasingly split into two groups that distrust each other. I don't want to stray too far beyond my subject, but we are in some danger, it seems to me, of having our huge democracy divide into something resembling the stable factions that Madison feared in a smaller and simpler context.<sup>8</sup> It was that fear, surely, that produced some of the features of American democracy that were intended to *complicate* our national conversation by requiring holders of various offices to speak and respond to a great variety of overlapping constituencies and groups, creating many opportunities for par-

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8. See THE FEDERALIST NO. 10, at 122-23 (James Madison) (Penguin Books 1987) (1788).

ticipation, dialogue, and tradeoffs among intensely felt interests, and producing some tolerance born of an appreciation of complexity. This seems like a good time to think hard about how well our institutions are actually working from the conversational perspective.