

Legislative Deliberative Democracy: Debating Acts Restricting Freedom of Speech During War

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Abstract

Freedom of speech is a basic right in a democracy. During war, however, national legislatures tend to enact laws that restrict this basic right. Under what circumstances can such laws be democratically legitimate?

I argue that the degree of democratic legitimacy of laws that restrict freedom of speech during war depends on the extent of legislature deliberation on such laws. The more law makers in both chambers of the legislature seriously consider information and arguments, reason on the common good and seek to persuade and decide the best legislative outcome, in committees and on the floor, the more democratic legitimacy can be associated with such laws.

This paper fills a gap in the scholarly literature regarding the evaluation of the democratic legitimacy of laws that restrict freedom of speech during war, by bridging different theoretical perceptions and presenting an alternative normative account of deliberative democracy which focuses on the deliberations of a national legislature. Using the United States as a case study, I assess the extent of Congressional deliberation during World War I, World War II and the Cold War.

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Introduction

Freedom of speech is a basic right in a democracy. During war, however, there is a tendency to curb freedom of speech. In the face of external threats, governing institutions restrict it. The United States is such a case.

In June 1917, eight weeks after Congress declared war on Germany, it passed the Espionage Act¹ (still in effect until this day), which prohibits, when the United States is at war, for anyone: to make “false statements” with an intent to interfere with the operation or success of the armed forces or to promote the success of its enemies; to attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces; to obstruct the recruiting or enlistment service of the United States; and to mail any letter, pamphlet, publication or thing of any kind, in violation of any of the provisions of the Act.²

During World War I over 2,000 people were prosecuted under the Espionage Act and approximately half were convicted.³ A number of cases reached the Supreme Court which upheld the convictions of lower courts. Other indictments under the act were made during World War II.

In 1918 Congress legislated the Sedition Act,⁴ an amendment to the Espionage Act, which in addition prohibited during war any “disloyal, profane, scurrilous or abusive” expression about the form of government, the Constitution, the armed forces or the flag of the United States (or use of any language intended to bring the latter “into contempt, scorn, contumely, or

¹ 65th Congress, 1st Session, *Congressional Record – Senate*, Vol. 55, 3259–3264, June 5, 1917.

² Act of June 15, 1917, chap. 30, title I & title XII, Espionage, *Statutes at Large of the United States of America*, Vol. 40, Part 1, 219 & 230 (Washington: Government Printing Office, 1919). The Espionage Act is actually concerned with espionage matters and the protection of military secrets, but two parts have to do with free speech during war.

³ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Company, 2004), 593, ft. 136.

⁴ 65th Congress, 2nd Session, *Congressional Record – Senate*, Vol. 56, 6057, May 4, 1918; 65th Congress, 2nd Session, *Congressional Record – House*, Vol. 56, 6186–6187, May 7, 1918.

disrepute”); or use of any language intended to “incite, provoke or encourage resistance to the United States”; as well as expression urging, inciting or advocating any curtailment of production of products necessary to the prosecution of war.⁵ (The Sedition Act was repealed by Congress in 1921).⁶

This paper is concerned with the phenomena of legislation by a national legislature restricting freedom of speech during war. Under what conditions can the legislation of such laws be considered democratically legitimate?

By democratically legitimate I mean that people consent to obey the law, even if they have reservations. People do not view the law as unconstitutional, and in general, government has no need to force obedience.⁷

There is limited scholarship regarding an answer to this question. First, although the literature of war and emergency powers shows that governmental war powers, including the abridgment of rights during war, should be legitimized in law by the national legislature after deliberation,⁸ the literature does not explain the conditions under which the legislation of such laws can be considered democratically legitimate.

Second, while deliberative democracy theory offers an answer to the question of legitimacy of legislation in democratic political systems – a democratically legitimate law is

⁵ Act of May 16, 1918, chap. 76, *Statutes at Large of the United States of America*, Vol 40, Part 1, 553 (Washington: Government Printing Office, 1919).

⁶ Joint Resolution of March 3, 1921, chap. 136, *Statutes at Large of the United States of America*, Vol 41, 1359–1360 (Washington: Government Printing Office, 1921). There were relatively few prosecutions under the Sedition Act since it was enacted so late in the war; Stone, 191.

⁷ Here I assent to Gianfranco Poggi’s observation that legitimacy in the modern constitutional state – citizen’s compliance to the State’s authority – is based on the citizens’ understandings of Weber’s legal-rational type of legitimacy; that is, laws are valid if produced according to the procedural rules vested in the State’s constitution and are the product of reason. Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford: Stanford University Press, 1978), 107.

⁸ See for example Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), 296, 300, 302.

produced in a process of public discussion and debate in which participants reason on the common good – the theory of deliberative democracy put forward by theorists such as Jürgen Habermas⁹ is poorly suited for the real world: we live in large-scale democratic countries, and it is impossible for all the citizens in a country to participate in an ideal deliberative process.

Third, while libraries contain collections of epics on war, on domestic and legislative politics, and on civil liberties, there are only very few works that connect these subjects, and when they do, they are subjective analyses since they use values as a yardstick. Such substantive reasoning is problematic because of its subjective nature. Zechariah Chafee’s classic study of free speech in the United States,¹⁰ for example, weighs values and interests to understand the First Amendment¹¹ and to find “the true meaning of freedom of speech” and the “boundary line” of free speech in wartime.¹² Geoffrey Stone’s comprehensive narrative on free speech in wartime also analyzes values and principles and, reviewing six episodes in U.S. history, concludes that in each of them “the United States *excessively* sacrificed the freedom of speech” although over time Americans “*have made progress*” (emphases in the original).¹³

I agree with many of the arguments Chafee and Stone put forward; however, we live in large-scale democratic nation-states and our democracy is representative – our representatives are the ones who enact the laws that govern us – therefore we should look in the realm where actual decisions (laws) are made and examine arguments made by our representatives when

⁹ Jürgen Habermas, “Three Normative Models of Democracy,” *Constellations* 1 (1994): 1–10; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Trans. William Rehg (Cambridge: The MIT Press, 1996), especially 296–308 (originally published in German in 1992).

¹⁰ Including during World War I and through 1941, Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press, 1967).

¹¹ To the Constitution of the United States – “Congress shall make no law...abridging the freedom of speech, or of the press.” Chafee, vii–xiii, 8–9, 31–35.

¹² Chafee, 31, 35.

¹³ Stone, 530, 533, 3–14.

legislating laws restricting freedom of speech during war. To use Michael Kochin's words (drawing on Bruno Latour): facts are made by people, and made somewhere; therefore, to understand a policy (or a law), we need to follow actors into the sites where they produce it.¹⁴ In this case we need to follow politicians into the legislature.

Thus, while different fields in academia have touched upon the question of the democratic legitimacy of legislation restricting freedom of speech during war, explanations have been incomplete – whether they are in the realm of war and emergency powers, deliberative democracy or law.

I fill the above-mentioned gaps in the scholarly literature regarding the evaluation of the democratic legitimacy of laws restricting freedom of speech during war, by bridging different theoretical perceptions and presenting an alternative normative account of deliberative democracy that focuses on the deliberations of a national legislature.

I regard deliberative democracy as an aspect of representative democracy and not as a substitute for it¹⁵ and therefore argue that legislation restricting freedom of speech during war can be considered democratically legitimate if members of a national legislature deliberated well; that is, during the process of discussion and debate, they reasoned on the public good, seriously considered information and arguments and sought to decide and to persuade as to the best legislative solution. I term this “Legislative Deliberative Democracy.”

My claim is that laws restricting freedom of speech during war carry a higher degree of democratic legitimacy when members of a democratic government's national legislature, the

¹⁴ Michael S. Kochin, “What Political Science Needs to Learn from Science Studies,” *2009 Annual Meeting of the American Political Science Association*, Toronto, Canada.

¹⁵ See similar perspectives in Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy & American National Government* (Chicago: The University of Chicago Press, 1994); and in John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Melbourne: Cambridge University Press, 1998).

representatives of the people, duly deliberate on them, that is, if information and arguments are put forward in a collective reasoning process on the merits of the legislation and on the greater public good (e.g., arguments in regard to the constitutionality of the proposed legislation or in regard to protecting the welfare of the nation during war) and persuasion takes place. The higher the extent of deliberation, the more legitimacy is attached to the legislation.

The matter of deliberations in a national legislature on laws restricting freedom of speech during war, and thus the degree of their democratic legitimacy, is particularly important because most legislation does not raise fundamental issues of democratic legitimacy; that is, in general, laws enacted by the national legislature do not undermine civil liberties. On the other hand, historically, wars have had the effect of undermining civil liberties in democracies, including laws enacted by the national legislature that restricted freedom of speech.

This paper has two parts. Initially I will introduce a normative framework concerning the democratic legitimacy of laws restricting freedom of speech during war. In it, I shall review literature of war and emergency powers, the background and fundamental elements of deliberative democracy theory, deliberative democracy as an aspect of representative government and criteria on how to measure legislative deliberation.

The next part looks at the United States as a case study, starting with World War I and the Espionage and Sedition Acts, followed by World War II and the Cold War, including the Smith Act of 1940 and the McCarran Act of 1950. On the basis of the normative conception concerning the democratic legitimacy of laws restricting freedom of speech during war that I develop in Part I (“Legislative Deliberative Democracy”), I assess the extent of deliberation on the different statutes in the U.S. Congress, among other things: congressional committee

hearings, and the extent of deliberation on the floor, including the presentation and the consideration of information and arguments.

I conclude with a summary of the main arguments and highlight policy implications regarding the war on terror which are relevant in our times.

Part I: Normative Framework

War Powers and Deliberation

There is a tension between “basic” freedoms, such as freedom of speech, and the need to protect the existence of the nation in time of war. To use Carl Friedrich's words, for any community that is committed to a faith in which its members receive a substantial amount of freedom and work together effectively, the task of survival “becomes one of defending the inner-most self as well as that of defending the outer-most boundary.”¹⁶

Clinton Rossiter pointed out in his well-known study on war and emergency powers that “wars are not won by debating societies.”¹⁷ Historically, in times of crisis, democratic constitutional governments are altered to overcome threats; that is, government has more power and the people fewer rights.¹⁸ For example, governments abridge the rights of citizens to speak freely.¹⁹ However, the purpose of this strong government (or “constitutional dictatorship”) is the defense of democracy, of the political and social liberties of the people.²⁰

¹⁶ C. J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence: Brown University Press, 1957), 12–13.

¹⁷ Rossiter, 6.

¹⁸ Rossiter, 5.

¹⁹ Rossiter, 290.

²⁰ Rossiter, 7.

Both Rossiter and Friedrich begin their review on war and emergency powers with a discussion on the Roman dictatorship, in which absolute power was granted temporarily to a citizen, in order to overcome a threat and defend the republic and its constitution.²¹ Under modern conditions the actual practices of constitutional dictatorship are often of legislative nature;²² that is, emergency legislation is introduced or existing laws are modified.

Hence, when discussing the dangers of constitutional dictatorship, Rossiter stated that any particular step in encroachment of the state upon the liberties of its citizens should be instituted as a permanent policy “only by the elected representatives of the people and only after full deliberation.”²³ In addition, among the criterions to judge a constitutional dictatorship, Rossiter listed legitimizing powers in the constitution or in law and he discussed the importance of the national legislature, for example in relation to any demands for the abridgment of rights.²⁴

John Finn offers a theory of constitutional maintenance and constitutional crises with the task of “defending the inner-most self.”²⁵ Taking into account that democratic governments will take whatever action necessary to ensure survival, including overriding individual rights,²⁶ Finn deems that in times of crisis, the written words of a specific constitution that limit the powers of government aren’t what are important, rather it’s “why we initially thought such limitations

²¹ Rossiter, 15; Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Boston: Ginn and Company, 1950), 574. Rossiter stating that “nowhere in all history has the belief that a constitutional state can alter its pattern of government temporarily in order to preserve it permanently been more resolutely asserted and successfully proved than it was in the storied Republic of ancient Rome.”

²² Friedrich, *Constitutional Government*, 577–578; Rossiter, 8–9. Oren Gross and Fionnuala Ní Aoláin note that “legislative accommodation” is the most common approach of accommodating security needs in times of crisis, that is, modifying existing “ordinary laws” or introducing “emergency legislation.” Oren Gross and Fionnuala Ní Aoláin, *Laws in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), 66–67.

²³ Rossiter, 296.

²⁴ Rossiter, 300, 302.

²⁵ John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford: Oxford University Press, 1991), 44.

²⁶ Finn, 15.

desirable.”²⁷ He refers to “constitutive or preconstitutional principles”²⁸ that democratic constitutional governments must abide to and that bind, whether or not they appear in any particular constitutional document.²⁹ They include reason and deliberation in public affairs:³⁰ “for questions of constitutional emergencies, constitutionalism should be understood not in terms of limited government but rather as a commitment to a public life premised upon the public articulation of reasons in support of particular actions taken for the public welfare.”³¹ Hence, “constitutional maintenance demands not substantive limitations on emergency power”³² but rather articulation of reasons that can persuade others – the reasoned justification of the need for emergency powers.³³ Concurrently “good” reasons are those that can persuade others on their own merit and must admit of a response.³⁴ Thus Finn concludes that in addition to preserving physical integrity, we must maintain “our identity as political communities founded upon constitutionalism's twin commitments to reason and deliberation in public affairs.”³⁵

Yet what does it mean to deliberate?

Deliberative Democracy and Legitimacy

Deliberative democracy theory evolved initially as a criticism of liberal and elite democratic theory.³⁶ The dominant theoretical theme among American political scientists in the decades

²⁷ Finn, 6.

²⁸ Finn, 7.

²⁹ Finn, 26.

³⁰ Finn, 220.

³¹ Finn, 30.

³² Finn, 32.

³³ Finn, 31–32.

³⁴ Finn, 35.

³⁵ Finn, 219.

³⁶ Fontana Benedetto, Cary J. Nederman, and Gary Remer, “Introduction: Deliberative Democracy and the Rhetorical Turn,” In *Talking Democracy: Historical Perspectives on Rhetoric and Democracy* (University Park: The Pennsylvania University Press, 2004), 5.

following World War II was that of adversary democracy:³⁷ fundamental conflict is inevitable,³⁸ there is no common interest and the preferences of one individual are not worth more than those of another.³⁹ Schumpeter concluded that there is “no such thing as a uniquely determined common good that all people could agree on.”⁴⁰ Democracy is about electoral competition among potential leaders who scan the “marketplace” to discover voter's preferences: voters function as consumers, and politicians (and political parties) as entrepreneurs.⁴¹ The political act is private, the political process instrumental,⁴² and as social choice theory noted, while voting might be a mechanism for aggregating individual preferences, it does not yield a public opinion about a common good.⁴³

Critiques of this competitive-pluralist view of politics developed during the 1970s,⁴⁴ when among others things, it was emphasized that the task of politics is also “to create justice”⁴⁵ and therefore behavior associated with the market is inappropriate in the public arena (or

³⁷ Jane Mansbridge, “Motivating Deliberation in Congress,” In *El Pluribus Unum: Constitutional Principles and the Institutions of Government*. Ed. Sarah Baumgartner Thurow (Lanham: University Press of America, 1988), 59.

³⁸ Jane Mansbridge, “A Deliberative Theory of Interest Representation,” In *The Politics of Interests: Interest Groups Transformed*. Ed. Mark P. Petracca (Boulder: Westview Press, 1992), 34.

³⁹ Mansbridge, “Motivating Deliberation in Congress,” 59–60.

⁴⁰ Quoted in James Bohman and William Rehg, “Introduction,” In *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: The MIT Press, 1997), xi.

⁴¹ Bohman and Rehg, xi; Mansbridge, “Motivating Deliberation in Congress,” 60–61.

⁴² Jon Elster, “The Market and the Forum: Three Varieties of Political Theory,” In *Deliberative Democracy: Essays on Reason and Politics*. Ed. James Bohman and William Rehg (Cambridge: The MIT Press, 1997), 3.

⁴³ Bohman and Rehg, xi. For a discussion on William Riker's observation that voting is unstable and ambiguous see Jack Knight and James Johnson, “Aggregation and Deliberation: On the Possibility of Democratic Legitimacy.” *Political Theory* 22 (1994): 279–281. For a review and critique of social choice theory, see Elster, “The Market and the Forum,” 4–11.

⁴⁴ Bohman and Rehg, xii.

⁴⁵ Elster, “The Market and the Forum,” 11.

“forum”).⁴⁶ Political scientists underestimated the role of deliberation and the power of norms and motives, such as fairness.⁴⁷

The evolution of deliberative democracy theory began with Jürgen Habermas, who did not refer to deliberation by name but depicted the core ideas:⁴⁸ he expressed in his theory the view that democratic politics is about changing preferences via rational public debate with the aim to reach consensus.⁴⁹

In 1994 Habermas introduced his concept of “discourse theory” as a normative model of democracy.⁵⁰ It is a proceduralist view of democracy, which integrates elements of both the liberal and republican view of politics.⁵¹

According to the liberal view, society is “a market-structured network of interactions among private persons,”⁵² and democracy programs the government in the interest of society as political rights, for example the right to vote and free speech, allow citizens to assert their private interests via elections, which aggregate a collective political will.⁵³ According to the republican view, politics entails more than the mediating function described earlier. Politics is a “form of substantial ethical life,” where free and equal citizens shape their relations, and orientation to the common good is a source of social integration.⁵⁴ These two views differ on the nature of the

⁴⁶ Elster, 10.

⁴⁷ James Q. Wilson, “Interests and Deliberation in the American Republic, or Why James Madison Would Never Have Received the James Madison Award,” *Political Science and Politics* 23 (1990): 560.

⁴⁸ Mansbridge, Jane, Hartz-Karp, Janette, Amengual, Matthew and Gastil, John. “Norms of Deliberation: An Inductive Study.” *Journal of Public Deliberation* 2 (2006): Article 7: 2.

⁴⁹ Elster, “The Market and the Forum,” 3, 11.

⁵⁰ Habermas, *Models of Democracy*. See also Habermas, *Between Facts and Norms*.

⁵¹ Habermas, *Models of Democracy*, 1. Bohman and Rehg state that deliberative democratic theory “arises on the terrain staked out by the debates” between liberal theorists and civic republicans regarding conceptions of legitimate government. See Bohman and Rehg, x.

⁵² Habermas, *Models of Democracy*, 1.

⁵³ Habermas, 1–2.

⁵⁴ Habermas, 1–2.

political process: while the liberal view sees voters express preferences and license power to rival political parties, and thus “opinion” in the public sphere and in parliament is determined by competition (a market-oriented attitude), the republican view sees the “opinion” occurring in the public sphere and in parliament molded by “public communication oriented to mutual understanding”⁵⁵ (a “dialogic” conception).⁵⁶

Habermas claims that although the republican view “preserves the original meaning of democracy”⁵⁷ due to the public use of reason, the republican model is too idealistic: conflicting interests drive political goals, and politics is about compromises, not necessarily a “hermeneutical process of self-explication of a shared form of life.”⁵⁸ Hence the republican view suffers from “ethical overload.”⁵⁹ He proposes instead a model of “discourse” (or “deliberative politics”) where procedures that secure fair bargaining practices and “forms of deliberation” produce democratic outcomes.⁶⁰

This proceduralist view of democracy integrates elements of both the liberal and the republican views: reasonable or fair outcomes are obtained by “weaving together pragmatic considerations, compromises, discourses of self-understanding and justice,”⁶¹ and the success of politics depends neither on the “satisfaction of private preferences” nor on a “collectively acting citizenry” but on the institutionalization of “procedures and conditions of communication.”⁶²

⁵⁵ Habermas, 3.

⁵⁶ Habermas, 3.

⁵⁷ Habermas, 3.

⁵⁸ Habermas, 4.

⁵⁹ Habermas, 1.

⁶⁰ Habermas, 4–6.

⁶¹ Habermas, 6.

⁶² Habermas, 7.

Consequently, legitimacy is not derived from elections (the liberal view) or a constitutive community (the republican view) but rather from “procedures and communicative presuppositions”:⁶³ public opinion formed in the networks of the public sphere⁶⁴ generates “influence,” which is transformed into “communicative power” through elections and points the use of “administrative power” in specific directions by means of legislation.⁶⁵ (On my criticism on the model of discourse in the “public sphere,” see below.)

Drawing on the work of Habermas and others, Joshua Cohen was the first theorist to characterize principles of an ideal deliberative procedure.⁶⁶ Cohen maintains that the procedure must capture the principle that “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals.”⁶⁷ His criteria for an ideal deliberative procedure are: (1) *Freedom* – deliberating participants are not constrained by “prior norms or requirements” but act on the results of their deliberation.⁶⁸ (2) *Reason* – parties state reasons for advancing proposals and expect that either supporting or critical reasons will determine the fate of proposals (i.e., collective choices are settled deliberatively).⁶⁹ (3) *Equality* – deliberating parties are equal to one another. They are formally equal as everyone has the equal right to introduce proposals, offer support or oppose, that is, actively deliberate, and everyone has an equal voice in the decision; they are substantively equal as the existing distribution of power and resources in society does not have a bearing on their chances to deliberate or on their

⁶³ Habermas, 8–9.

⁶⁴ Or spheres: “The currents of public communication are channeled by mass media and flow through different publics,” Habermas, *Between Facts and Norms*, 307.

⁶⁵ Habermas, *Models of Democracy*, 8–9; John S. Dryzek, “Legitimacy and Economy in Deliberative Democracy,” *Political Theory* 29 (2001): 656.

⁶⁶ Joshua Cohen, “Deliberation and Democratic Legitimacy,” In *The Good Polity: Normative Analysis of the State*, Ed. Alan Hamlin and Philip Pettit (Oxford: Basil Blackwell, 1989), 17–34; Mansbridge, “Norms of Deliberation,” 4.

⁶⁷ Cohen, 22.

⁶⁸ Cohen, 22.

⁶⁹ Cohen, 22.

role in deliberation.⁷⁰ (4) *Consensus* – ideal deliberation “aims to arrive at a rationally motivated consensus,”⁷¹ as the procedure involves a free discussion based on reasoning among equals (however, as even under ideal conditions, consensus is not always attainable, deliberation ends with a majority vote).⁷²

Cohen further emphasizes that the implications of an ideal deliberative procedure include focus on the common good: while no one is indifferent to their own good, “everyone also seeks to arrive at decisions that are acceptable to all who share the commitment to deliberation.”⁷³ Therefore, one's own preferences are not sufficient reason for advancing a proposal, and reasons that make the proposal acceptable to others are also needed. Thus, the interest, aims and ideals that survive deliberation are those that comprise the common good, those that are legitimate to appeal to in public deliberation. (I view this point crucial to the deliberative process and will refer to it again later.)

Bernard Manin was one of the first theorists to highlight the connection between deliberation and democratic legitimacy:⁷⁴ a democratically legitimate decision cannot represent the will of all but should result “from the *deliberation of all*”⁷⁵ (emphasis in original).

Manin explains that when individuals make collective decisions, they do not have all the necessary information and a complete set of coherent preferences. In a process of deliberation, of confrontation of various points of view and of exchanging evidence, individuals: (1) discover

⁷⁰ Cohen, 22–23.

⁷¹ Cohen, 23.

⁷² Cohen, 23.

⁷³ Cohen, 23.

⁷⁴ Bernard Manin, “On Legitimacy and Political Deliberation,” *Political Theory* 15 (1987): 338–368.

⁷⁵ Manin, 352.

information they did not previously have (and learn of consequences), (2) may change opinions, and (3) become aware of conflicts in their own desires and as a result modify objectives.⁷⁶

Therefore “the source of legitimacy is not the predetermined will of individuals but rather the process of its formation, that is, deliberation itself”⁷⁷ (and as stated earlier, the deliberation of all). In other words, a “legitimate law is the *result of general deliberation* and not the *expression of the general will*”⁷⁸ (emphasis in original).

Deliberation is not only a process that enables individuals to ascertain their own preferences; deliberation also makes persuasion possible (through argumentation). Persuasion is different from refutation or demonstration – it is not about discovering the truth; persuasion concerns putting forward arguments, which are more or less convincing, with the aim of producing agreement with the listener.⁷⁹

Of course after deliberation comes a vote. However, Manin argues that the majority principle carries legitimacy, because it comes after a deliberative process in which everyone was able to take part, various points of views were confronted, including that of the minority, but the reasons for deciding on the majority's solution were more convincing.⁸⁰ Thus “the procedure preceding the decision is a condition for legitimacy.”⁸¹

Manin also notes, and on this point Cohen joins him, that the concept of deliberation does not justify any action by a majority, including suppression of fundamental liberties that are

⁷⁶ Manin, 349–350.

⁷⁷ Manin, 351–352. Similarly Habermas notes, “Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation... Hence the *discursive level* of public debates constitutes the most important variable,” Habermas, *Between Facts and Norms*, 304.

⁷⁸ Manin, 352.

⁷⁹ Manin, 352–353.

⁸⁰ Manin, 359–360.

⁸¹ Manin, 360.

necessary for deliberation, such as freedom of speech. The ideal of deliberative democracy presupposes freedom of expression.⁸²

This is an important point: even if a deliberative process is conducted ideally, its outcome cannot undermine basic tenets of democracy. We would not regard a law that denies, for example, free elections or restricts all kinds of speech as democratically legitimate. Thus, even if participants in an ideal deliberative process arrive at the decision that some votes are not equal to others, or that criticism of a certain government policy is completely forbidden, we would not view these outcomes as legitimate in a democracy.

Seyla Benhabib, writing on deliberation and democratic legitimacy, argues that legitimacy results from free public deliberation of all.⁸³ In her view, democracy is a form of organizing the public exercise of power on the basis of the principle that decisions are “the outcome of a procedure of free and reasoned deliberation”⁸⁴ among equal individuals.

Benhabib claims that Rousseau's political theory incorporates a paradox: legitimacy is based on the “general will,” which represents the interests of all, but taking a vote is merely a sum of particular wills and cannot claim legitimacy.⁸⁵ Moreover, the aggregation of preferences cannot claim rationality: there are no grounds to conclude that the outcome of such a procedure leads to the best interest.⁸⁶ She therefore suggests a deliberative model of democracy, where legitimacy and rationality can be obtained if institutions in a polity are arranged so that the common interest “results from processes of collective deliberation conducted rationally and

⁸² Manin, 362; Cohen, 28–30. Manin adds freedom of conscience, of opinion and of association as fundamental liberties necessary for exercising the right to vote and participate in deliberation. Cass Sunstein writes that rights are regularly preconditions for deliberation, stating freedom of speech as the most obvious example; see Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993), 135, 142.

⁸³ Seyla Benhabib, “Deliberative Rationality and Models of Democratic Legitimacy,” *Constellations* 1 (1994): 26.

⁸⁴ Benhabib, 27.

⁸⁵ Benhabib, 28–29.

⁸⁶ Benhabib, 29.

fairly among free and equal individuals.”⁸⁷ The deliberative process allows rationality because it: (1) brings forth information, (2) leads to critical reflection and thus to formation of coherent preferences and (3) forces individuals to support their publicly articulated views with good reasons for all involved.⁸⁸

Others have developed Habermas's and Cohen's ideas concerning deliberative democracy and different models were introduced. There has been criticism of the theory, some friendly and others not as much.⁸⁹ For instance, claims have been made that deliberative democracy undermines the legitimacy of identity politics,⁹⁰ leading contemporary deliberative theorists to expand the classic ideal.⁹¹

⁸⁷ Benhabib, 30–31.

⁸⁸ Benhabib, 32. Note the reiteration of Manin on information (which Benhabib herself recognizes) and of Cohen regarding giving reasons for all those involved.

⁸⁹ For example see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996); Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (New York: Oxford University Press, 1999); James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: The MIT Press, 1996); James Bohman and William Rehg (eds.) *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: The MIT Press, 1997); Bruce Ackerman and James S. Fishkin, “Deliberation Day,” *The Journal of Political Philosophy* 10 (November 2002): 129–152. Some view John Rawls as a deliberative democrat, and indeed he has contributed to theory, for example, see John Rawls, “The Idea of Public Reason,” In *Deliberative Democracy: Essays on Reason and Politics*, Ed. James Bohman and William Rehg (Cambridge: The MIT Press, 1997), 93–141.

⁹⁰ William H. Simon, “Three Limitations of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy,” In *Deliberative Politics: Essays on Democracy and Disagreement*, Ed. Stephen Macedo (New York: Oxford University Press, 1999), 50–53; Iris Marion Young, “Difference as a Resource for Democratic Communication,” In *Deliberative Democracy: Essays on Reason and Politics*, Ed. James Bohman and William Rehg (Cambridge: The MIT Press, 1997), 385, and Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy” In *Democracy and Difference: Contesting the Boundaries of the Political*, Ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), 121.

⁹¹ Jane Mansbridge et al., “The Place of Self Interest and the Role of Power in Deliberative Democracy,” *The Journal of Political Philosophy* 18 (Nov. 2010): 66. Bächtiger et al. distinguish between “Type I deliberation [which] is rooted in the Habermasian logic of communicative action, and embodies the idea of rational discourse” and type II deliberation, which “incorporates alternative forms of communication” including emotional discourse and storytelling. André Bächtiger et al., “Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Blind Spots and Complementarities,” *The Journal of Political Philosophy* 18 (March 2010): 33–34, 36.

The majority of deliberative theorists think of deliberative democracy in “populist”⁹² terms, where equal citizens debate rationally about the common good. However, I disagree with this notion on theoretical, as well as empirical, or practical grounds.

In his discussion of discourse theory, Habermas refers to the public sphere, to public opinion and to “communicative power,” stating that “democratically constituted opinion- and will-formation depends on the supply of informal public opinions” that develop in the public sphere.⁹³ So, on the one hand, as mentioned earlier, Habermas explains that public opinion formed in the networks of the public sphere generates “influence,” which is transformed into “communicative power” through elections and points the use of “administrative power” in specific directions by means of legislation.⁹⁴ Yet, on the other hand, Habermas states that “within the boundaries of the public sphere...actors can acquire influence, not political power”:⁹⁵ “political *influence* supported by public opinion is converted into political *power* – into a potential for rendering binding decisions – only when it affects the beliefs and decisions of *authorized* members of the political system”⁹⁶ (emphasis in original). This is correct: citizens may discuss policies, but only elected officials have the power to legislate after deliberation. And since this is the case, I argue that the democratic legitimacy of laws does not rest on a

⁹² I borrow the phrase from Ethan J. Leib, “Can Direct Democracy Be Made Deliberative?,” *Buffalo Law Review* 54 (2006): 912.

⁹³ Habermas, *Between Facts and Norms*, 308. Habermas describes the public sphere “as a network for communication information and points of view... the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified *public* opinions,” Habermas, *Between Facts and Norms*, 360.

⁹⁴ Habermas, *Models of Democracy*, 8–9. In his book he elaborates at one point that according to the discourse theory of democracy “binding decisions, to be legitimate, must be steered by communication flows that start at the periphery [i.e., professional agencies and associations, charitable organizations, foundations, etc.] and pass through sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts,” Habermas, *Between Facts and Norms*, 355–356.

⁹⁵ Habermas, *Between Facts and Norms*, 371.

⁹⁶ Habermas, *Between Facts and Norms*, 363.

“discursively structured public sphere” rather on the level of deliberation by democratically elected assemblies.

I do not dismiss the existence and importance of communicative flows in the public sphere; on the contrary, it is clear that they signal people’s preferences, for example, the preference to restrict freedom of speech during war, and by examining them, we have part of the answer to the question why and how such restrictions came about. Yet the only way to examine the degree of democratic legitimacy that these laws carry is to analyze whether the *legislators* have duly deliberated on them, and not by looking at the “discursive level” of opinion- and will-formation in *public spheres*.

Similarly, I dismiss the concept lately advocated by Mansbridge et al. (among others) – “a systemic approach to deliberative democracy”⁹⁷ – in regard to the democratic legitimacy of laws. It is not that organizations (e.g., schools, hospitals), the media, elites, experts and so on do not or should not deliberate; it is the fact that only the legislature has the authority to enact laws that bind and force our behavior, and therefore it is the deliberation of its members that we should be concerned about.

In addition to the theoretical argument, I disagree with the ideals put forward by deliberative theorists on empirical, or practical, grounds. First, there is no precise way to observe and measure if in fact communication flows in the public sphere meet discursive criterions. Second, as Conover et al. have pointed out, the citizens of modern liberal states do not deliberate – they have neither a special time nor a special place to do so – and while they do conduct political discussions, using data collected in six communities in the United States and Britain, the

⁹⁷ Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F. Thompson and Mark E. Warren, “A Systemic Approach to Deliberative Democracy,” In *Deliberative Systems: Deliberative Democracy at the Large Scale*, Ed. John Parkinson and Jane Mansbridge (Cambridge: Cambridge University Press, 2012), 1–2.

researchers concluded that citizen's political discussions fall short of the standards set by theorists for democratic deliberation.⁹⁸ Similarly Robert Goodin claims that there is no genuine deliberation in the public sphere – participants do not actively engage with each other – rather opinions are simply voiced in public.⁹⁹

In sum, deliberative democracy as envisioned by political philosophers is incompatible with modern democracy. In practice, we live in large-scale democratic countries, and our democracy is representative. As Robert Dahl writes, in a modern, large-scale democratic nation-state, control over government decisions is vested in officials, who are elected in frequent and fairly conducted elections.¹⁰⁰ One can relatively easily conceive the deliberation of a dozen people in a committee, but how can deliberation work in a country?

John Dryzek calls attention to the “key restraint” of deliberative democracy legitimacy: that of economic scale.¹⁰¹ Indeed as Michael Walzer observed, “Deliberation is not an activity for the demos...100 million of them, or even 1 million or 100,000 can't plausibly 'reason together'.”¹⁰² Goodin writes that the deliberative democratic ideal is not feasible in large-scale societies, adding to the problem of numbers, those of distance and time.¹⁰³

⁹⁸ Pamela Johnston Conover, Donald D. Searing and Ivor M. Crewe, “The Deliberative Potential of Political Discussion,” *British Journal of Political Science* 32 (2002): 21, 24, 60–61.

⁹⁹ Robert E. Goodin, “Democratic Deliberation Within,” *Philosophy & Public Affairs* 29 (2000): 90–92.

¹⁰⁰ Robert A. Dahl, *On Democracy* (New Haven and London: Yale University Press, 2000), 85.

¹⁰¹ Dryzek, “Legitimacy and Economy in Deliberative Democracy,” 651–657. Dryzek's solution – a conception of “discursive democracy that emphasizes the contestation of discourses in the public sphere” (Dryzek, 657) – may solve the issue of economy but is problematic mainly because, as he himself implies, the contestation of discourses can be manipulated by strategy and power, and legitimacy is dependent on the engagement of a “broad variety of competent actors” (Dryzek, 663, 666).

¹⁰² Michael Walzer, “Deliberation, and What Else?” In *Deliberative Politics: Essays on Democracy and Disagreement*, Ed. Stephen Macedo (New York: Oxford University Press, 1999), 68. Walzer does not deny the importance of deliberation but observes that “politics has other values in addition to, and often in tension with, reason.” For example, democratic politics include compromises that “reflect the balance of forces, not the weight of arguments” (Walzer, 59, 62). I agree but emphasize that deliberation in a legislature is an integral part of democratic politics and, as noted earlier, is a vital link to the democratic legitimacy of laws.

¹⁰³ Goodin, 82, 98; suggesting to complement “external-collective” deliberation with “internal-reflective” deliberation, that is, making people “imaginatively present” in individual deliberators minds.

Deliberative Democracy and Representative Government

I maintain that we can reconcile the problem of economy of scale with the fundamental elements of deliberative democracy theory, by viewing deliberative democracy, as some scholars do, as an aspect *of* representative democracy and not as a substitute for it.¹⁰⁴

Jane Mansbridge argues that “representation is, and is normatively intended to be, something more than a defective substitute for direct democracy.”¹⁰⁵ Discussing “forms” of representation, she writes that representation requires good deliberation: between citizens and representatives in periods of communication between elections whenever a representative tries to influence voter's preferences by the time of the next election (“anticipatory representation”), among citizens and between citizens and their representatives at the time the representative is selected (“gyroscopic representation”) and to ascertain whether or not representatives have fulfilled their promises or have persuasive reasons for not doing so (“promissory representation”).¹⁰⁶ Each form of representation contributes to the quality of deliberation in the legislature: for example, in gyroscopic representation when citizens vote for a representative who is expected to pursue the public interest.¹⁰⁷

¹⁰⁴ Interestingly, even Habermas at one point states that while justified decisions about laws demand face-to-face deliberation, not all citizens can join in such a practice and “[a] solution to this problem is provided by the *parliamentary principle* of establishing representative bodies for deliberation and decision making.” Habermas, *Between Facts and Norms*, 170.

¹⁰⁵ Jane Mansbridge, “Rethinking Representation,” *American Political Science Review* 97 (Nov. 2003): 515.

¹⁰⁶ Mansbridge, 525.

¹⁰⁷ Mansbridge, 525. See also John Parkinson's theoretical discussion on the concept of representation in general, in which he asserts that elected representatives have a *dual* role: not only that of a delegate held accountable to the instructions of voters but also that of a “trustee” that has the authority to decide and act as he sees appropriate. Thus, representation offers influence to those who are not physically present in the deliberative forum while producing an assembly that persuades and reasons together. (In this manner, while decisions by a deliberative body may not necessarily be “representative” of the majority, when those outside it are exposed to the arguments in their own deliberations, they should be convinced.) John Parkinson, “Legitimacy Problems in Deliberative Democracy,” *Political Studies* 51 (March 2003): 186–188, 190.

Furthermore, as Nadia Urbinati maintains, representation “plays a key role in forging the discursive democratic character of politics” as it is “a comprehensive filtering, refining, and mediating process of political will formation and expression.”¹⁰⁸ Urbinati argues that indirectness (“a constitutive mark of representative democracy”) makes room for deliberation and that a deliberative form of politics favors representation as “it fosters a relationship between the assembly and the people that enables the demos to reflect upon itself and judge its laws, institutions, and leaders.”¹⁰⁹ Thus representation is more than merely instrumental; it carries a “moral distinctiveness.”¹¹⁰

John Uhr maintains that deliberative assemblies are the “core institutions in regimes of deliberative democracy.”¹¹¹ Reviewing requisites of effective representation, he concludes that the fundamental task of a representative legislature is not only to reflect but also to form the views of the public it represents.¹¹² Therefore in fulfilling its legislative responsibilities, a representative assembly deliberates. As elected legislatures are “multi-minded,” deliberation allows the opening up and weighing of merits of options. Duly weighing and considering proposals achieves a “balanced” choice.¹¹³

Uhr identifies the Australian Parliament as the “centerpiece in the deliberative process” and the “primary deliberative institution.”¹¹⁴ The Australian Constitution framers expected

¹⁰⁸ Nadia Urbinati, “Representation as Advocacy: A Study of Democratic Deliberation,” *Political Theory* 28 (Dec. 2000): 760.

¹⁰⁹ Urbinati, 761. Directness, or a direct political presence, does not mean active participation or that all talk. Urbinati, 762.

¹¹⁰ Urbinati, 767–768.

¹¹¹ Uhr, *Deliberative Democracy*, 3.

¹¹² Uhr, *Deliberative Democracy*, 91.

¹¹³ Uhr, *Deliberative Democracy*, 92–94.

¹¹⁴ John Uhr, “Parliament and Public Deliberation: Evaluating the Performance of Parliament,” *UNSW Law Journal* 24 (No. 3 2001): 722–723.

Parliament “to play a prominent part in reflecting, refining and reframing public deliberation.”¹¹⁵ While Parliament is obliged to take note of the views or demands of those it represents, it is also obliged to weigh their contending interests and the community's needs. Thus Parliament does not only reflect public opinion, it also refines it, as competing views of community interests are debated and weighed.¹¹⁶

In fact, the idea that democracy is not simply the aggregation of preferences, and that via deliberation, a common interest is attainable, is as old as modern representative democracy itself.¹¹⁷ Edmund Burke, in his famous speech to the Electors of Bristol in 1774, made the classic early statement on the issue:

“Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates, but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.”¹¹⁸

In the nineteenth century John Stuart Mill advocated “government by discussion”¹¹⁹ and viewed the representative assembly as a deliberative institution, where the opinions of every section of society are voiced and debated, and decisions are the result of “superior reasons.”¹²⁰

¹¹⁵ Uhr, *Parliament and Public Deliberation*, 712.

¹¹⁶ Uhr, *Parliament and Public Deliberation*, 712–713, 723.

¹¹⁷ Jon Elster, “Introduction,” In *Deliberative Democracy* (New York: Cambridge University Press, 1998), 1–2; Mansbridge, “Motivating Deliberation in Congress,” 60; Bessette, 40.

¹¹⁸ Quoted in Elster, “Introduction,” 3.

¹¹⁹ Elster, 4.

¹²⁰ Bessette, 43.

Writing in the 1940s, Friedrich distinguished between the dual functions of parliaments in modern democracy: on the one hand, they represent the “will” of the people, and on the other, they deliberate on what to do and how to solve public problems.¹²¹ Parliaments are representative assemblies and deliberative assemblies at the same time. “Speech” in parliament is namely orderly talk and reply, argument and debate.¹²² Through argument and discussion, interests are articulated as well as rationalized.¹²³

Thus, I’ve shown that the issue of economy of scale of deliberative democracy theory is reconciled by viewing deliberative democracy as an aspect of representative democracy, in which elected representatives of the people engage in deliberation.

Having established this normative argument, I now consider the following: is the United States a representative deliberative democracy and how so?

Deliberative Democracy and American National Government

In *Federalist* No. 10,¹²⁴ James Madison wrote that the efficacy of representative government is “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country,”¹²⁵ adding, in *Federalist* No. 49, that only public reason “ought to control and regulate the government” and that passions “ought to be controlled and regulated by government.”¹²⁶ To ensure that the chosen

¹²¹ Friedrich, *Constitutional Government*, 324.

¹²² Friedrich, 325.

¹²³ Friedrich, 259.

¹²⁴ *The Federalist* is a series of eighty-five essays written by Alexander Hamilton, James Madison and John Jay, during 1787–1788, promoting the ratification of the U.S. Constitution.

¹²⁵ Jay, Hamilton, James, Madison and John, Jay. *The Federalist Papers*, edited by Clinton Rossiter with an introduction and notes by Charles R. Kesler (New York: Signet Classic, 2003), 76. All references to *The Federalist* are to the Rossiter edition.

¹²⁶ *Federalist* No. 49, 314.

body will continue to hold the public trust, Madison wrote in *Federalist No. 57* that the representative's terms of appointment shall be limited.¹²⁷

Cass Sunstein and Joseph Bessette uphold that the framers of the American Constitution sought to establish a deliberative democracy. The first to coin the term “deliberative democracy” and perceive it as an aspect of representative government was Bessette, writing in 1978 on “Deliberation in Congress.”¹²⁸ Bessette maintains that the framers wanted and designed a deliberative democracy:¹²⁹ in this case, one in which the citizenry reasons, or deliberates, through their representatives.¹³⁰ Elections ensure that the representatives of the people share citizen's interests, desires and values.¹³¹

Bessette notes that unlike modern pluralists and social choice theorists, the framers believed that there is a genuine “common good” that is not reducible to the preferences of the states or individuals.¹³² Their hope was that by implementing governmental reforms (e.g., limiting state power and expanding the power of national government, restricting legislative authority to legislative matters, having larger assemblies and longer terms), robust deliberation

¹²⁷ *Federalist No. 57*, 348.

¹²⁸ Both Bohman and Rehg, as well as Mansbridge et al. concur that Bessette first coined the term. See Bohman and Rehg, xii, and Mansbridge et al., “Norms of Deliberation,” 4. In 1978 Bessette completed his dissertation on deliberation in Congress, in 1979 he delivered a paper at the annual meeting of the American Political Science Association on deliberation in Congress and in 1980 he published an article on deliberative democracy. See Bessette, xi; Mansbridge, “Motivating Deliberation in Congress,” 62; and Bohman and Rehg, xii and xxviii ft. 10. Bessette's detailed perceptions on deliberative democracy in America were elaborated in his 1994 book on deliberative democracy and American national government: Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy & American National Government* (Chicago: The University of Chicago Press, 1994).

¹²⁹ Bessette, 1, 6, 40.

¹³⁰ Bessette, 1.

¹³¹ Bessette, 2, 36, 46. Bessette argues that “the theory of deliberative democracy that undergirds the American constitutional order rests on the central proposition that there are two kinds of public voice in a democracy – one more immediate or spontaneous, uninformed, and unreflective; the other more deliberative, taking longer to develop and resting on a fuller consideration of information and arguments – and that only the latter if fit to rule” (Bessette, 35).

¹³² Bessette, 256–257, ft. 97.

on the national interest could be achieved.¹³³ During the “critical period” of the 1780s an excessive “local spirit” in both the state legislatures and national Congress had undermined policymaking. While the common interest is not detached from the interests of the parts, it is more than their aggregation. By means of electoral mechanisms and institutional design that would bring into government responsible and experienced men, who together learn and concentrate on national concerns, the framers' expectation was that deliberation on “the common good of society”¹³⁴ or “the comprehensive interests of [the] country”¹³⁵ could be realized.¹³⁶

In order to promote deliberation on the common good and limit factionalism,¹³⁷ the framers proposed elections in large districts and also designed representative bodies that promote informed and reasoned decision making by determining lengthy terms of service:¹³⁸ six years for the Senate and two years for the House of Representatives (double the one-year norm for state legislatures). A long term would allow the legislator time to acquire “knowledge of the subjects on which he is to legislate.”¹³⁹ In addition, lengthy terms would promote farsightedness among legislators. This is true especially in the Senate, where elections were staggered every two years, thus allowing relatively independent judgment as well as consideration on the long-term consequences of legislation.¹⁴⁰

¹³³ See also Charles Kessler's reading of the Federalist authors' argument for separation of powers, which leads to the conclusion that the “Constitution conduces to a deliberative legislature,” in *The Federalist Papers*, pp. xxvii.

¹³⁴ Federalist no. 57, quoted in Bessette, 27.

¹³⁵ Federalist no. 62, quoted in Bessette, 27.

¹³⁶ Bessette, 26–28.

¹³⁷ Defined by Madison as “a number of citizens, whether accounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” *Federalist* No. 10, 72.

¹³⁸ Cass R. Sunstein, “Beyond the Republican Revival,” *The Yale Law Journal* 97 (1987–1988): 1560; Bessette, 14–16, 23–26.

¹³⁹ Madison in *Federalist* No. 53, quoted in Bessette, 23.

¹⁴⁰ Bessette, 24–25. Bessette observes that the executive branch would also contribute to deliberation, among other measures, in its “Information on the State of the Union Address,” in formally giving reasons for a veto and in persuading Congress to ratify international treaties; but its unique contribution to “effective and competent

Sunstein writes that Madison regarded representation as an opportunity for achieving governance by officials dedicated to the public good: representatives “operating above the fray” engage in a collective reasoning process of discussion and debate, in which the legislative outcomes of their deliberation are related to the common good (as opposed to self-regarding outcomes).¹⁴¹ Separation of powers would not allow a private group's interest to dominate government, thus balancing inclinations to self-interested representation. Structural provisions of the Constitution, such as a bicameral legislature, ensured that some representatives would be closer to local pressures and others more isolated.¹⁴² The result was a “deliberative democracy”:¹⁴³ the Federalists’ understanding was that politics was to be deliberative in the sense that representatives would not “respond mechanically” to private pressure – while they are accountable to the public, their task is first and foremost to deliberate.¹⁴⁴

Bessette defines the deliberation established by the American constitutional system as “a reasoning process in which the participants seriously consider substantive information and arguments and seek to decide individually and to persuade each other as to what constitutes good public policy.”¹⁴⁵ He further elucidates that deliberation is an analytical process: participants identify and investigate problems, evaluate policies, consider proposals and formulate remedies. And in order that a deliberative process be genuine, “participants must be open to the facts,

governance” is through “energy” – concentrating authority in one person who can act quickly, decisively and often secretly. See Bessette, 28–31.

¹⁴¹ Cass R. Sunstein, “Interest Groups in American Public Law,” *Stanford Law Review* 38 (1985–1986): 41–42.

¹⁴² Sunstein, *Interest Groups*, 43–44.

¹⁴³ Sunstein, *Interest Groups*, 45.

¹⁴⁴ And not to bargain, Sunstein, *Interest Groups*, 45–47. In *The Partial Constitution*, Sunstein writes that “above all, the American constitution was designed to create a deliberative democracy.” In such a system, representatives, on the one hand, are accountable to the people, but on the other, they deliberate free from the influence of the self-interest of private groups, reasoning collectively on the common good. Therefore in American public law, outcomes should not be a reflection of private or self interests yet are to be formed via deliberation. Sunstein, *The Partial Constitution*, 19–23, 134.

¹⁴⁵ Bessette, 46.

arguments, and proposals that come to their attention and must share a general willingness to learn from their colleagues and others.”¹⁴⁶ Similarly, Paul Quirk describes congressional deliberation as “the intellectual process of identifying alternatives, gathering and evaluating information, weighing considerations, and making judgments about the merits of public policies.”¹⁴⁷

Bessette writes that every deliberative process involves three essential elements: information, arguments and persuasion.¹⁴⁸ In Congress, information and arguments are presented and participants are persuaded, not only on the floor of the House and the Senate – clearly floor debates are the most official (and accessible) expression of Congress's deliberative character (bill sponsors explain and defend their proposal, others challenge them and a response is offered) – but actually the deliberative process begins months before, when a policy initiative is born, perhaps outside Congress, afterward continues in congressional committees and their reports and goes on in parallel in informal channels.¹⁴⁹

As Congress deals with a vast amount of complex legislative issues, the committees of the House and Senate enhance Congress's capacity for deliberation.¹⁵⁰ Committees allow division of labor and development of expertise and make available the thorough examination of information and arguments that deliberation requires, and as such they deliberate for the

¹⁴⁶ Bessette, 46.

¹⁴⁷ Paul J. Quirk, “Deliberation and Decision Making,” In *The Legislative Branch*, Eds. Paul J. Quirk and Sarah A. Binder (New York: Oxford University Press, 2005), 316.

¹⁴⁸ Bessette, 49–54. Concerning persuasion, Bessette suggests, as does Manin, that legislators often have no initial preferences on an issue, but after considering information and arguments on an issue – or reasoning on its merits – they reach a position. This constitutes to persuasion (of course, in some instances, participants may actually change their minds). Bessette, 52–54. In similar fashion, Quirk maintains that members of Congress make their own respective “judgements” about legislation, by obtaining information and arguments, and assessing the information, Quirk, 316, 317.

¹⁴⁹ Bessette, 151–176, 51–52; Quirk, 316–317.

¹⁵⁰ Friedrich, *Constitutional Government*, 333.

respective chamber they serve. Oral and written testimonies presented at hearings – by representatives of the administration, other members of Congress, experts and groups – are an important element of committee deliberation as they provide information, put forward views pro and con proposals and clarify the strengths and weaknesses of different positions.¹⁵¹ At the conclusion of committee deliberation, if the committee decides to report a bill, the committee makes a written report.¹⁵² The committee report is a key mechanism used to persuade members of Congress on the merits of committee decisions regarding a bill.¹⁵³

Over the years, congressmen have acknowledged and case studies have shown that genuine persuasion occurs as a result of floor debate.¹⁵⁴ Persuasion on the floor is not only about changing minds, it also involves “making up minds,” that is, “the process whereby the reasoned considerations of information and arguments moves a legislator from broad initial dispositions or preferences to specific decisions.”¹⁵⁵ Floor debates usually involve real exchange between opposing sides: a bill's sponsors explain and defend their proposal, others challenge them and a response is accordingly offered.¹⁵⁶

Hence in the United States a deliberative democracy was created in which deliberative majorities are formed through the operation of governmental institutions as the representatives of the people reason about public policy for their constituents.¹⁵⁷

¹⁵¹ Bessette, 156–157, 51; Malcolm E. Jewell and Samuel C. Paterson, *The Legislative Process in the United States* 3rd ed. (New York: Random House, 1977), 177, 417.

¹⁵² Jewell and Paterson, 424.

¹⁵³ Bessette, 159–160.

¹⁵⁴ Bessette, 166.

¹⁵⁵ Bessette, 167.

¹⁵⁶ Bessette, 168–169. Low attendance on the floor does not necessarily mean that there isn't any deliberation: members of the House and Senate are informed and influenced on what is said on the floor through staff, the Congressional Record and informal word of mouth.

¹⁵⁷ Bessette, 213–215, 36. Sunstein, *The Partial Constitution*, 19–20.

Summarizing the theoretical notions discussed earlier, governmental war powers, including the abridgment of rights during war, should be legitimized in law by the national legislature after deliberation. Deliberative democracy theory offers an answer to the question of legitimacy of legislation in democratic political systems: a *democratically* legitimate law is produced in a process of public discussion and debate in which participants reason on the common good. As noted, the theory of deliberative democracy put forward by theorists such as Habermas and Cohen is poorly suited for real world: we live in large-scale democratic countries, and it is impossible for all citizens in a country to participate in an ideal deliberative process. I take the view of those deliberative theorists that regard deliberative democracy as an aspect of representative democracy and not as a substitute for it. The concept of deliberative democracy and American national government acknowledges the importance of deliberation about the common good in the institutions of representative government.

I thus argue that legislation restricting freedom of speech during war can be considered democratically legitimate if members of a national legislature, the representatives of the people, deliberated well; that is, during the process of discussion and debate, they reasoned on the public good, seriously considered information and arguments and sought to decide and to persuade as to the best legislative solution. The higher the extent of deliberation, the more legitimacy is attached to the legislation. I term this “Legislative Deliberative Democracy.”

Measuring Legislative Deliberation

Obviously nondeliberative activities or influences, such as bargaining¹⁵⁸ and group and private interests, partly explain lawmaking. However, this is beside the point. My claim is a normative

¹⁵⁸ Including legislators trading support, rewards and punishment, compromise and coalition building – see Bessette, 58–62, Steiner et al., *Deliberative Politics in Action*, 4, 23–24, and Quirk, 316.

one: that the degree of the democratic legitimacy of a law passed by a national legislature restricting freedom of speech during war lies in the extent of its members' deliberation on the public good.

It is important to note that the question of democratic legitimacy of a law restricting freedom of speech during war is not answered by revealing that procedures were constitutional. Laws restricting freedom of speech during war can be legislated in accordance to constitutional rules, but the degree of their democratic legitimacy depends of the extent of the deliberation made by legislators. Thus, I do not claim that a law is illegitimate (or unconstitutional) if the level of legislative deliberation is low, but rather that the degree of democratic legitimacy attached to a law that restricts freedom of speech during war depends on the extent of legislative deliberation. The higher the extent of deliberation, the more legitimacy is attached to the legislation.

On the basis of fundamental elements of deliberative democracy theory discussed earlier, I contend using the following criteria to measure the extent of legislative deliberation:

1. Committee Hearings. Were there oral testimonies or public hearings? Did external groups, individuals or experts appear before the committee and articulate views concerning the proposed legislation restricting freedom of speech? Did the executive offer written reports?¹⁵⁹ How was the original draft of the law amended as a result of oral or written testimonies at the committee stage?
2. Debate in Both Chambers. Did both houses deliberate on the proposed legislation? For instance, if in the United States, the House of Representatives considered a bill during one

¹⁵⁹ See Bessette's discussion on deliberating within U.S. Congressional committees, 156–165, 51; and Edward L. Lascher, "Assessing Legislative Deliberation: A Preface to Empirical Analysis," *Legislative Studies Quarterly* 21 (1996): 508–509.

session and hastily voted on it, we would view the extent of deliberation on the act as lower as opposed to broad deliberation by both houses.

3. Exchange of Information and Arguments on the Floor. Did the sponsors of proposed legislation explain and defend it? Did others challenge them? Was a response subsequently offered? Did the sponsors answer questions and provide facts?¹⁶⁰ (For example, a review of relevant previous legislation and court rulings or past policies regarding freedom of speech.)
4. Public Good.¹⁶¹ Were arguments framed in terms of the public good and how so? (For example, arguments in regard to fundamental questions concerning freedom of speech and the constitutionality of the proposed legislation, or in regard to protecting the welfare of the nation during war.)
5. Persuasion. Did members of the legislature acknowledge that after considering information and arguments, they either reached a position or changed their minds?¹⁶² Were provisions of the draft law amended, and in what way? Was the vote partisan?

Reiterating a point made earlier: it is not that debating issues in public is not important. On the contrary, in a democracy, what people, groups and organizations have to say concerning public policies is extremely important. Their opinions matter. But the public at large cannot and does not deliberate. On the other hand, lawmakers in a representative assembly can and should do so. In modern democratic states, the national legislature is the principal deliberative institution. It is

¹⁶⁰ Bessette, 151–152, 49–51; Lascher, 509; Quirk, 335.

¹⁶¹ As mentioned earlier, reasoning on the common good is an essential principle of deliberation. See also the claim that deliberation on “public ideas” is the core responsibility of elected officials when formulating policy, and that indeed in practice many times it is so, in Robert B. Reich, “Introduction,” *The Power of Public Ideas*, Ed. Robert B. Reich (Cambridge: Ballinger Publishing Company, 1988), 3–4, 6, 11 and Garry R. Oren, “Beyond Self-Interest,” 13–14, 27–28 and Steven Kelman, “Why Public Ideas Matter,” 31, 39–53 in the same edited volume.

¹⁶² Bessette, 51–55, 166–169; Manin, 353.

there where our elected representatives take opinions and interests into account and after deliberation enact laws that regulate our behavior.¹⁶³

Part II: Congressional Deliberation on Acts Restricting Freedom of Speech During War

While there were many ways freedom of speech was restricted in the United States in times of crisis, including state statutes,¹⁶⁴ there were four instances when the American national Congress enacted federal acts restricting freedom of speech. (I deal only with the portions of the statutes that restricted speech, and not with the parts that regulated matters of espionage, military secrets and classified information, foreign commerce, aliens and the like.) The federal acts are the Espionage Act of 1917, the Sedition Act of 1918, the Alien Registration Act of 1940 (the Smith Act) and the Internal Security Act of 1950 (the McCarran Act).¹⁶⁵

The Espionage Act of 1917 is still in effect, and it not only restricts specific speech when the United States is at war but also declares nonmailable items in violation of the act. The act was enforced during both world wars and was upheld by the Supreme Court.

¹⁶³ Furthermore, since we deliberate through our representatives, the aftermath of legislature deliberation is in certain respects consequential to it: we would expect the executive to enforce and the courts to rule on the basis of legislature underpinnings. For example, if the extent of legislative deliberation on a law restricting freedom of speech during war was high – hence the law had a high level of democratic legitimacy – we would expect that the law be enforced and adjudicated according to its legislative understandings.

¹⁶⁴ See Stone, *Perilous Times*. Self as well as imposed censorship of the press was also employed – for example see Michael S. Sweeny, *Secrets of Victory: the Office of Censorship and the American Press and Radio in World War II* (Chapel Hill: University of North Carolina Press, 2001).

¹⁶⁵ The Sedition Act of 1798, which was enacted during the “Half War” with France (which made it a crime to publish “false, scandalous, and malicious writing” against the government of the United States, and expired by its own terms in 1803), is excluded from this paper because the environment of its legislation was very different, thus making it a unique case, which is incomparable to the others. To note just two examples: (1) Characteristics of mass society of the late modern era, pertinent to the periods of World War I, World War II and the Cold War – such as mass media (magazines, radio, film), diverse associations and interest groups – were not yet developed. (2) The inner workings of Congress as a legislative institution were different. For example, initially Congress relied on temporary select committees. The Senate Judiciary Committee was established only in 1816, and it played an important role – including from a deliberative aspect – with respect to the Espionage, Sedition, Smith and McCarran Acts of the twentieth century.

The Sedition Act of 1918, actually an amendment to the Espionage Act, prohibited during war language provoking resistance to the United States and was also upheld by the Supreme Court (however, repealed by Congress in 1921).

The Smith Act of 1940, introduced in Congress on the eve of World War II to “prohibit certain subversive activities,” prohibited advocating the necessity of overthrowing the government by force and was enforced both in World War II and in the course of the Cold War. The act was initially upheld by the Supreme Court in 1951 (*Dennis v. United States*).¹⁶⁶

The McCarran Act of 1950, legislated at the height of the Cold War to “protect the United States against certain un-American and subversive activities,” required communist organizations to register with the attorney general and established the Subversive Activities Control Board. Passed into law over President Truman’s veto, it too was initially upheld in 1961 by the Supreme Court (*Communist Party of the United States v. Subversive Activities Control Board*).¹⁶⁷

Using the criteria mentioned earlier to measure legislative deliberation, elsewhere I delved into an empirical analysis and showed how deliberations were conducted on them; that is, I assessed the extent of congressional deliberations and thus of the degree of the acts’ democratic legitimacy.¹⁶⁸ Following is a table summarizing the empirical findings:

¹⁶⁶ In 1957 the Court adopted a narrow interpretation of the Smith Act (*Yates v. United States*) and prosecutions ceased. Geoffrey R. Stone, “Civil Liberties in Wartime,” *Journal of Supreme Court History* 28 (2003): 236–238.

¹⁶⁷ In a case in 1965, the Supreme Court held that registration violated the Fifth Amendment privilege against self-incrimination (*Albertson et al. v. Subversive Activities Control Board*). David Caute, *The Great Fear: The Anti-communist Purge Under Truman and Eisenhower* (New York: Simon and Schuster, 1978), 172, 38. And in a later ruling, the Court held a provision of the Act unconstitutional (*United States v. Robel*, 1967). Stone, *Perilous Times*, 416n.

¹⁶⁸ Avichai Levit, *Legislative Deliberative Democracy: Debating Acts Restricting Freedom of Speech During War* (New York and London: Routledge, 2021), chapters 3, 5 and 7. The analysis of congressional deliberation is based predominantly on primary sources, specifically official documents – hearings before the House and Senate committees and subcommittees, and the *Congressional Record*,

Figure 1: Summary of Empirical Findings: Congressional Deliberation on Acts Restricting Freedom of Speech during War

	Espionage Act	Sedition Act	Smith Act	McCarran Act
Committee Hearings	✓	✗	✓	✓
Debate in both Chambers	✓	✓	✓	✓
Exchange on the Floor	✓	✓	✓	✓
Public Good	✓	✓	✓	✓
Persuasion	✓	✓	✓	✓

The Espionage Act and the McCarran Act were extensively deliberated by Congress. In the case of Espionage Act, congressmen took the bill under serious consideration, displayed sensitivity to the issue of free speech and narrowed the bill, drafting its provisions as to impair free speech during war to a minimum they thought was necessary for the safety of nation. In the case of the McCarran Act, House and Senate committee members gathered information on the way to protect the United States against subversive activities, amendments were made as a result of oral and written testimonies and, on the floor, members of the House and Senate exchanged reasoned arguments with the intent to persuade as to what is the best legislative solution to the Communist threat to the nation's security. Consequently, the Espionage Act and the McCarran Act can be considered democratically legitimate measures.

which is a word-for-word account of the floor proceedings and debates of the House of Representatives and Senate.

On the other hand, the Sedition Act and the Smith Act were only moderately deliberated and therefore carry a lower level of democratic legitimacy. In the case of the Sedition Act, public hearings were not held at a congressional committee, the House scantily deliberated the pending bill and arguments in both chambers were only occasionally framed in terms of the common good while an underlying current in the arguments that were advanced was that of an unreflective and war-frenzied public voice. In the case of the Smith Act, the extent of deliberation on the provisions that restricted freedom of speech was relatively low; there wasn't any real exchange between opposing sides, no serious discussion on the significance of restricting the constitutional right to free speech or notable support of arguments with evidence or information; and the bill was only slightly changed as a result of committee and floor deliberation.

Conclusion

During war, democracies tend to curb freedom of speech. In this paper I examined the phenomena of legislation by a national legislature restricting freedom of speech during war and asked under what circumstances is such legislation democratically legitimate.

Although the literature of war and emergency powers show that abridgment of rights during war should be legitimized in law by the national legislature after deliberation, the literature does not explain the conditions under which the legislation of such laws can be considered democratically legitimate. And while deliberative democracy theory offers an answer to the question of legitimacy of legislation in democratic political systems – a democratically legitimate law is produced in a process of public discussion and debate in which participants reason on the common good – the theory of deliberative democracy put forward by theorists such

as Jürgen Habermas is poorly suited for the real world: we live in large-scale democratic countries, and it is impossible for all the citizens in a country to participate in an ideal deliberative process.

Regarding deliberative democracy as an aspect of representative democracy and not as a substitute for it, I proposed an alternative normative account of deliberative democracy that focuses on the deliberations of a national legislature in regard to the circumstances legislation restricting freedom of speech during war can be considered democratically legitimate. This account provides that legislation restricting freedom of speech during war can be considered democratically legitimate if members of a national legislature deliberated well; that is, during the process of discussion and debate, they reasoned on the public good, seriously considered information and arguments and sought to decide and to persuade as to the best legislative solution. I term this “Legislative Deliberative Democracy.”

I use five criteria to measure legislative deliberation: committee hearings, debate in both chambers, exchange of information and arguments on the floor, framing arguments in terms of the public good and persuasion. Laws restricting freedom of speech during war carry a higher degree of democratic legitimacy when members of a democratic government’s national legislature, the representatives of the people, duly deliberate on them. The higher the extent of deliberation, the more legitimacy is attached to the legislation.

In conclusion, this paper addresses questions that matter in the democratic world. When democracies face war, how can they impede freedom of speech, including freedom of speech online, yet still remain democracies?

For example, using the Internet, ISIL has encouraged individuals to conduct terrorist acts in the United States.¹⁶⁹ Examples of such attacks on U.S. soil include the following: in December 2015, a married couple murdered fourteen people during a Christmas party at the California San Bernardino County Department of Public Health; in June 2016, a terrorist murdered forty-nine people at an Orlando gay nightclub; and in November 2017, a terrorist rammed his car and stabbed people at Ohio State University.¹⁷⁰ Over a fifth of the terrorist plots in the United States between 2014 and March 2017 were conducted by “virtual entrepreneurs” communicating digitally with ISIL.¹⁷¹

In the 2016 presidential campaign, both Republican and Democratic candidates voiced views in regard to limiting freedom of speech online. Donald Trump (R) said:

We’re losing a lot of people because of the Internet. And we have to do something. ... maybe in certain areas, closing that Internet up in some way. Somebody will say, “Oh freedom of speech, freedom of speech.” These are foolish people.

And Hillary Clinton (D) said:

Resolve means depriving jihadists of virtual territory. ... They are using websites, social media, chat rooms and other platforms to celebrate beheadings, recruit future terrorists, and call for attacks. We should ... figure out how we disrupt

¹⁶⁹ Daniel Byman, *An Intelligence Reserve Corps to Counter Terrorist Use of the Internet* (Hoover Working Group on National Security, Technology and Law, Aegis Series Paper No. 1810, July 2018), 1, 4; Seamus Hughes and Alexander Meleagrou-Hitchens, “The Threat to the United States from the Islamic State’s Virtual Entrepreneurs,” *CTC Sentinel* 10 (March 2017): 1–2, available at <https://ctc.usma.edu/the-threat-to-the-united-states-from-the-islamic-states-virtual-entrepreneurs/> [accessed: January 3, 2020].

¹⁷⁰ Daniel Byman, “How to Hunt a Lone Wolf: Countering Terrorists Who Act on Their Own,” *Foreign Affairs* 96 (March/April 2017): 96, 98–99.

¹⁷¹ Seamus Hughes and Alexander Meleagrou-Hitchens, “The Threat to the United States from the Islamic State’s Virtual Entrepreneurs,” *CTC Sentinel* 10 (March 2017): 1, 6–7, available at <https://ctc.usma.edu/the-threat-to-the-united-states-from-the-islamic-states-virtual-entrepreneurs/> [accessed: January 3, 2020].

them. ... You're going to hear all of the usual complaints, you know, freedom of speech, et cetera. But if we truly are in a war against terrorism ... then we've got to shut off their means of communicating.¹⁷²

In addition, some legal scholars have brought up the need to reconsider existing understandings on free speech,¹⁷³ including one proposal to limit freedom of speech by making it illegal to access websites that glorify or support ISIL; to distribute links to videos, images or text taken from those websites; and to encourage people to access such websites.¹⁷⁴

Even as ISIL has lost physical ground, it continues to inspire individuals to strike against the United States via its online activity, and it uses the Internet to advocate violent action.¹⁷⁵ Thus, the issue of limiting freedom of speech online in the fight against ISIL is of continued relevance. This question – that of balancing our desire to preserve the fundamental right of freedom of speech with the need to limit it under certain circumstances in order to defend ourselves and effectively fight jihadist terrorism – is one that everyone in a democratic society should care about.

¹⁷² David Post, "Protecting the First Amendment in the Internet Age," *Volokh Conspiracy Washington Post*, 21 December 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/21/protecting-the-first-amendment-in-the-internet-age/?utm_term=.c621071a412a [accessed: January 4, 2020].

¹⁷³ And other jurists think otherwise. Erik Eckholm, "ISIS Influence on Web Prompts Second Thoughts on First Amendment," *New York Times*, 27 December 2015, http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html?_r=0 [accessed: January 4, 2020].

¹⁷⁴ Providing graduated penalties for violations. Eric Posner, "ISIS Gives Us No Choice but to Consider Limits on Speech," *Slate*, December 15, 2015, http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [accessed: January 4, 2020].

¹⁷⁵ Nathan A. Sales, U.S. Department of State Acting Undersecretary for Civilian Security, Democracy and Human Rights, "After the Caliphate: A New Global Approach to Defeating ISIS," *Remarks: The Brookings Institution*, April 30, 2019, <https://www.state.gov/after-the-caliphate-a-new-global-approach-to-defeating-isis/> [accessed: January 4, 2020]; Joseph L. Votel, Cristina Bembenek, Charles Hans, Jefferey Mouton and Amanda Spencer, "#Virtual Caliphate: Defeating ISIL on the Physical Battlefield is Not Enough," *Center for a New American Security*, January 12, 2017, available at <https://www.cnas.org/publications/reports/virtual-caliphate> [accessed: January 4, 2020].

The views described previously by jurists and politicians are of value. However, the policy recommendation for democratic leaders in the United States deriving from this paper is as follows: any abridgement of freedom of speech online must be instituted by Congress, and only through genuine deliberation in Congress – where the people’s representatives during the process of discussion and debate reason on the public good, seriously consider information and arguments and seek to decide and to persuade as to the best legislative solution to the danger of ISIL web propaganda – can a law restricting online freedom of speech be democratically legitimate.

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