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## **Can Democracy be Deliberative and Participatory? The Democratic Case for Political Uses of Minipublics**

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*Abstract: This essay focuses on recent proposals to confer decisional status upon deliberative minipublics such as citizen juries, Deliberative Polls, citizen's assemblies, and so forth. Against such proposals, I argue that inserting deliberative minipublics into political decision-making processes would diminish the democratic legitimacy of the political system as a whole. This negative conclusion invites a question: which political uses of minipublics would yield genuinely democratic improvements? Drawing from a participatory conception of deliberative democracy, I propose several uses of minipublics that could enhance the democratic legitimacy of political decision-making in current societies.*

*“There is a difference between a sample of several hundred speaking for the nation  
and the entire citizenry actually speaking for itself”  
J. Fishkin – The Voice of the People, 44.*

In recent decades deliberative democracy has become increasingly popular.<sup>1</sup> One of the reasons for its popularity is that it offers an attractive interpretation of the democratic ideal of self-government. According to the ideal of deliberative democracy, citizens owe one another justifications based on reasons that everyone can reasonably accept for the coercive policies with which they must comply. To the extent that citizens can mutually justify the political coercion they exercise over one another, they can see

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<sup>1</sup> For surveys, see: J. Bohman, “Survey article: the coming of age of deliberative democracy” *The Journal of Political Philosophy*, 6 (1998), 400–25; S. Chambers, “Deliberative democratic theory,” *Annual Review of Political Science* 6 (2003), 307–26. For recent collections that include different theoretical approaches, see: S. Benhabib, ed., *Democracy and Difference* (Princeton, NJ: Princeton University Press, 1996); S. Besson and J. L. Martí, eds, *Deliberative Democracy and its Discontents* (Aldershot, UK: Ashgate, 2006); J. Bohman and W. Rehg, eds., *Deliberative Democracy* (Cambridge, MA: MIT Press, 1999); J. Elster, *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); J. S. Fishkin and P. Laslett, eds, *Debating Deliberative Democracy* (Oxford: Blackwell, 2003); Macedo 1999.

themselves as co-legislators or political equals in precisely the way the democratic ideal of self-government requires.<sup>2</sup> The essential contribution of public deliberation to democratic legitimacy is that it enables citizens to endorse the laws and policies to which they are subject as their own. In the absence of a commitment to mutual justification, citizens cannot meaningfully see themselves as participants in collective self-rule, but instead come to see themselves as coerced into compliance by others. Indeed, by adding a requirement of public justification, the deliberative model indicates a way in which citizens may be able to prevent political domination by consolidated majorities. They can engage in public deliberation in order to show that their proposals are supported by better reasons and hold out hope that the force of the better argument may move other citizens to change their political preferences.<sup>3</sup> The claim that better reasons (and not just a higher number of votes) are what lends legitimacy to the outcomes of democratic decisions is crucial to the idea of mutual justification as a criterion of democratic legitimacy that distinguishes deliberative democracy from other conceptions of democracy.

The idea of mutual justification helps in understanding the internal connection between the different political values that are essential to deliberative democracy. On the one hand, given that the epistemic quality of political deliberation has a direct impact on the legitimacy of its outcomes, improving the quality of deliberation is a non-negotiable aim for the realization of deliberative democracy. The more informed, impartial, mutually respectful and open to counterarguments participants are in deliberation, the more likely

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<sup>2</sup> As Gutmann puts it, “the legitimate exercise of political authority requires *justification to those people who are bound by it*, and decision making by deliberation among free and equal citizens is the most defensible justification anyone has to offer for provisionally settling controversial issues.” (A. Gutmann, “Democracy, philosophy, and justification,” in Benhabib 1996, 344). For similar renderings of this basic idea by other deliberative democrats see e.g. J. Cohen, “Deliberation and democratic legitimacy” in A. Hamlin and P. Pettit, eds, *The Good Polity* (Oxford: Blackwell, 1989), 17-34; J. Cohen, “Reflections on deliberative democracy” in Cohen, *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press, 2009), 330; Habermas 1996, 110; J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 227, and J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 137; Pettit 1997, 184. I analyze the intricacies of the commitment to mutual justification at the center of the ideal of deliberative democracy in C. Lafont, “Is the Ideal of Deliberative Democracy Coherent?” in Besson and Marti 2006, 3-26.

<sup>3</sup> See Cohen 1989; J. Elster, “The market and the forum” in J. Elster and A. Aanund eds, *The Foundations of Social Choice Theory* (Cambridge: Cambridge University Press, 1986), 103-32; B. Manin, “On legitimacy and political deliberation” *Political Theory* 15 (1987), 338-68; D. Miller, “Deliberative democracy and social choice” *Political Studies* 4 (1992), 54-67; C. Sunstein, “Preferences and politics” *Philosophy and Public Affairs* 20 (1991), 3-34; J. S. Dryzek, *Deliberative Democracy and Beyond* (Oxford: Oxford University Press, 2000).

it is that they will reach *substantively better political decisions*, i.e. those supported by the better reasons. On the other hand, since the justification of political decisions to those subject to them has a direct impact on their democratic legitimacy as well, it is not sufficient that political decisions be substantively good according to someone or other. They must be endorsed as such by *those who will be bound by them*, i.e. the citizenry in question.<sup>4</sup> The point of *democratic* deliberation is not simply reaching better outcomes but, above all, convincing those who will be bound by them that this is indeed the case by providing mutually acceptable reasons. Therefore, improving the quality of deliberation in the processes of opinion and will formation in which citizens participate is an equally non-negotiable aim for the realization of deliberative democracy. Institutional proposals for realizing deliberative democracy must be assessed by their promise to enhance the democratic legitimacy of the political system in which they will be implemented from both the deliberative and the participatory perspective.<sup>5</sup>

Taking this double criterion as a guide can be helpful for examining proposals for democratic innovation that focus on political uses of deliberative minipublics such as citizen juries, consensus conferences, deliberative polls, citizen's assemblies, and so on.<sup>6</sup> Many deliberative democrats enthusiastically endorse the proliferation of minipublics as

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<sup>4</sup> As Dryzek puts it, political "outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question." (J. S. Dryzek and S. Niemeyer, *Foundations and Frontiers of Deliberative Democracy* (Oxford: Oxford University Press, 2010), 23. See also J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press, 1996), 110; J. S. Fishkin, *When the People Speak* (Oxford: Oxford University Press, 2009), 46.

<sup>5</sup> Proposals must be democratically legitimate from both the participatory and the deliberative perspective. This does not mean that they must always improve the political system in both dimensions, only that they cannot threaten one dimension of legitimacy for the sake of enhancing the other. I analyze the tensions between deliberation and participation in different conceptions of deliberative democracy in C. Lafont, "Deliberation, Participation, and Democratic Legitimacy: Should Minipublics shape Public Policy?" *The Journal of Political Philosophy* 23/1 (2015), 40-63.

<sup>6</sup> On citizens' juries see: A. Coote and J. Lenaghan, *Citizens' Juries: Theory into Practice*. London: Institute for Public Policy Research, 1997; N. Crosby and D. Nethercut, "Citizen juries: creating a trustworthy voice of the people" in J. Gastil and P. Levine, eds, *The Deliberative Democracy Handbook* (San Francisco: Jossey-Bass, 2005), 111-19; G. Smith and C. Wales, "Citizens' juries and deliberative democracy" *Political Studies* 48 (2000), 51-65. On consensus conferences see: P. Dienel, "*Die Planungszelle. Der Bürger als Chance*." Wiesbaden: Westdeutscher Verlag, 2002; S. Joss and J. Durant, eds, *Public Participation in Science: The Role of Consensus Conferences in Europe* (London: Science Museum, 1995). On deliberative polls see: J. S. Fishkin, *Democracy and Deliberation* (New Haven, CT: Yale University Press, 1991); J. S. Fishkin, *The Voice of the People* (New Haven, CT: Yale University Press, 1997); Fishkin 2009. For a detailed catalogue of the different institutional innovations currently available, see Gastil and Levine 2005; for an analysis of different types of minipublics see M. Ryan and G. Smith, "Defining Mini-Publics," in K. Grönlund, A. Bächtiger and M. Setälä, *Deliberative Minipublics. Involving citizens in the democratic process* (Colchester: ECPR Press, 2014), 9-26.

a way to lead current democratic societies closer to the ideal of a deliberative democracy.<sup>7</sup> Some authors are more daring than others. Among current proposals there is a split between those who endorse conferring decisional status on minipublics directly, so that their recommendations would be taken up by the relevant political authorities without any need to ask for ratification by the citizenry (e.g. in elections or in a referendum) and those who hesitate to go as far as to hand over actual political power (e.g. of legislation or constitutional interpretation) to minipublics.<sup>8</sup> It is easy to see what drives the push towards the most ambitious option. A key reason to favor the institutionalization of deliberative minipublics is that their recommendations are of better deliberative quality and thus would lead to better outcomes. They reflect the deliberative transformation of raw, uniformed public opinion into considered public opinion. However, if the citizenry must ultimately accept or reject the minipublics' recommendations, and (as may often be the case) they are not aware of the minipublics' deliberations or reasons, then the decision will in fact be based on their raw, uniformed opinions, so the potential gains of using minipublics would be cancelled out. If giving

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<sup>7</sup> The view is too popular to provide an exhaustive list, but for a few examples see next note. For some critical voices see e.g. S. Chambers, "Rhetoric and the public sphere: has deliberative democracy abandoned mass democracy?" *Political Theory* 37 (2009), 323–50; Lafont 2015; C. Pateman, "Participatory democracy revisited" *Perspectives on Politics* 10 (2012) 7–19; J. Parkinson, *Deliberating in the Real World* (Oxford: Oxford University Press, 2006).

<sup>8</sup> For examples of the first kind see e.g. H. Buchstein, "Reviving randomness for political rationality: elements of a theory of aleatory democracy," *Constellations* 17 (2010), 435–54; J. S. Fishkin and R. C. Luskin, "Broadcasts of Deliberative Polls: aspirations and effects" *British Journal of Political Science* 36 (2006), 184–8; A. Fung, "Minipublics: deliberative designs and their consequences" in S. Rosenberg, ed, *Deliberation, Participation, and Democracy* (New York: Palgrave Macmillan, 2007), 161, 165; E. Ghosh, "Deliberative democracy and the countermajoritarian difficulty: Considering constitutional juries" *Oxford Journal of Legal Studies* 30 (2010), 327–359; R. Goodin and J. S. Dryzek, "Deliberative impacts: the macro-political uptake of mini-publics" *Politics and Society* 34 (2006), 225; E. Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (University Park: Penn State University Press, 2004); S. Levinson, "Democracy and the extended republic: reflections on the Fishkin project" *The Good Society* 19 (2010), 66; M. MacKenzie and M. Warren, "Two trust-based uses of minipublics in democratic systems" in J. Mansbridge and J. Parkinson, eds, *Deliberative Systems* (Cambridge: Cambridge University Press, 2012), 95–124; P. Pettit, "Depoliticizing democracy" in Besson and Martí 2006, 93–106; P. Pettit, *On the People's Terms* (Cambridge: Cambridge University Press, 2013); W. Talbot, *Human Rights and Human Well-Being* (Oxford: Oxford University Press, 2010). For examples of the second kind see e.g. J. S. Fishkin, "Deliberation by the People Themselves: Entry Points for the Public Voice" *Election Law Journal* 12/4 (2013), 496–507; C. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press, 2007). For an intermediate option that would leave it up to citizens whether to blindly trust the minipublics' recommendations see MacKenzie and Warren 2012. For the sake of simplicity, I will refer to minipublics with the power to make binding political decisions as "empowered minipublics."

minipublics some decisional status is normatively desirable at all, then they should be allowed to make the decisions in question. There does not seem to be a lot of space for hesitation at that point.

In light of the general enthusiasm among deliberative democrats about the potential benefits of inserting minipublics in the political process, it is becoming increasingly harder to see the motivations of those who hesitate. In what follows, I would like to contribute to this debate by offering some arguments from the other side. Adopting a participatory perspective, I argue that, whatever the benefits of conferring decisional status on minipublics may be, they are unrelated to *democratization* (1). Whether or not they would increase the deliberative quality of the political system as a whole, they would *diminish* their democratic legitimacy.<sup>9</sup> However, the point of the argument is not to reject the use of minipublics altogether or to claim that they cannot genuinely contribute to democratization. To the contrary, showing that conferring decisional status on minipublics would not be a democratic improvement is a first step in addressing the question of when and how minipublics could be used to lead to such improvement. I address this question in a second step by exploring different uses of minipublics that could improve the democratic legitimacy of current societies (2).

## **I. The Case for Empowered Minipublics Revisited**

Among the many political innovations developed in recent decades, deliberative minipublics are particularly attractive to deliberative democrats. The reasons have to do with two features of minipublics that are of special significance for the ideal of a deliberative democracy, namely, their high deliberative quality and their democratic representativeness. Deliberative minipublics provide a space for high quality face-to-face deliberation where participants receive balanced information on some important political issue, they are exposed to a variety of relevant social perspectives, and they have the opportunity to weigh the pro and con arguments in order to reach a considered judgment. Participants are randomly selected among ordinary citizens and, as a consequence, their

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<sup>9</sup>My argument here focuses on democratic representation and builds on a more general analysis of democratic legitimacy that I offer in Lafont 2015, but cannot reproduce here.

initial raw opinions on the issues in question can be quite uninformed, perhaps even biased or manipulated. However, the filter provided by the deliberative experience enables them to reach considered judgments on the issues in question. In fact, their views are often significantly transformed. Thus, it is plausible to assume that inserting minipublics into the political process would lead to substantively better outcomes. Still, quality deliberation has nothing to do with democracy per se. It is the representativeness of minipublics that makes them democratically significant, as compared to other deliberative forums. Participants in minipublics are randomly selected among ordinary citizens precisely with the purpose of getting a representative sample of the population. Although different types of minipublics reach that goal to different degrees, I will focus on Deliberative Polls (DP), since it is generally considered the gold standard in terms of achieving representativeness.<sup>10</sup>

As with all other types of minipublics, the idea behind deliberative polling is to take a relatively small group that everyone has an equal chance to be a part of, and to provide it with good conditions for deliberating over some relatively short period of time.<sup>11</sup> The techniques of stratified random sampling used for deliberative polling offer scientific support for the claim that the ordinary citizens who participate in the deliberative experience are an accurate mirror of the population as a whole; consequently, their views, interests, values, and so on reflect those of the people. What is so interesting in recreating a microcosm of the people is that precisely to the same extent that their initial judgments reflect the raw and uninformed public opinion that can be captured by regular polls, it is plausible to claim that their judgments after the deliberative experience reflect *what the people would think if they were informed and had the opportunity to deliberate about the matter*. As Fishkin puts it, “deliberative polling has a strong basis for representing the considered judgments of the people.”<sup>12</sup>

This explains why minipublics are so fascinating for deliberative democrats, for they offer precisely the combination of deliberative filter and democratic mirror that the ideal of a deliberative democracy requires. In endorsing this political innovation

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<sup>10</sup> See J. Mansbridge, “Deliberative Polling as the gold standard” *The Good Society* 19 (2010), 55–62.

<sup>11</sup> See Fishkin 1991, 1997, 2009.

<sup>12</sup> Fishkin 2009, 28

deliberative democrats can avoid having to choose one or the other as alternative conceptions of democracy do. Elite conceptions of democracy choose the filter over the mirror. They promise better political outcomes but at the price of taking decision-making away from the people and placing it in the hands of experts and political elites. By contrast, pluralist conceptions of democracy choose the mirror over the filter. They promise to leave decision-making in the hands of the people but at the price of endorsing majoritarian procedures that are insensitive to the quality of citizens' preferences and can therefore lead to unreasonable outcomes (whenever those preferences are uninformed, self-interested, biased, manipulated, etc.). The contrast to these unattractive alternatives explains the motivation behind proposals to confer decision-making authority to minipublics. Since minipublics combine the deliberative filter with the democratic mirror, conferring decisional status on them seems to offer a unique opportunity to simultaneously improve the *epistemic* and the *democratic* quality of political outcomes.

Unfortunately, I think that this impression is an illusion. Here is the argument in a nutshell. Proposals to confer decisional status on minipublics can be justified by epistemic considerations concerning the better quality of their outcomes. However, this line of argument, which is based on the filter claim, offers no basis for justifying the mirror claim. Alternatively, proposals to confer decisional status on minipublics can be justified by democratic considerations concerning their representativeness. However, this line of argument, which is based on the mirror claim, offers no basis for justifying the filter claim. Since defending the ideal of deliberative democracy requires justifying both claims neither of these lines of argument is viable for vindicating deliberative democracy. If one follows the first line of argument the proposal collapses into a special version of *elite* conceptions of democracy (i.e. a more egalitarian version of *blind deference to experts* than the standard variety), whereas if one follows the second line of argument the proposal collapses into a special version of *pluralist* democracy (i.e. a stronger version of *procedural majoritarianism* than the standard variety). Let me show why.

*The epistemic defense of empowered minipublics*

Starting with the epistemic line of argument, proposals to confer decisional status on minipublics must justify the choice of this particular institution vis-à-vis other alternatives. Whether minipublics in particular are preferable to potential alternatives depends on whether their peculiar feature of “mirroring the people” has some superior *epistemic* value over other features of alternative institutions that, precisely because they do not have to mirror the people, may yield higher epistemic payoffs. It is always possible that by offering higher levels of expertise, diversity, impartiality and so on (i.e. whichever features matter most in each case from a substantive point of view), alternative institutions could lead to even better outcomes. On complex political issues it would seem that actual experts with deep knowledge about the issues in question would be a better option than a random group of laypeople who had a few days worth of training to form their opinions on difficult matters. Almost any other group of experts would often have stronger epistemic credentials. At the very least, it would seem to be an open, empirical question which group of experts would be best in each particular case, depending on the issue at hand. But setting aside technocratic alternatives, let’s focus on possible variations in the configuration of minipublics. If what matters is the epistemic quality of their outcomes, why limit the pool of participants to citizens of the polity in question? Why not add epistemic diversity to the sample by including some foreigners (whether laypeople or experts) if that would lead to better outcomes?<sup>13</sup> Or why not increase impartiality by excluding from the sample any citizens likely to be biased with regard to the political issue at hand? This is the normal procedure in jury selection, for instance, where no attempt is made to “mirror the people” precisely in order to reach better outcomes (i.e. more impartial decisions). There are endless variations one could think of for improving the quality of the deliberative filter. The point is simply that it would be extraordinarily serendipitous if “mirroring the people” would invariably be the superior option among all possible alternatives from the strictly *epistemic* point of view of the quality of outcomes.

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<sup>13</sup> For instrumental justifications of democracy based on the value of epistemic diversity see e.g. H. Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many* (Princeton: Princeton University Press, 2013).

Proving this claim seems like a tall order. But even assuming for the sake of argument that the challenge could be met and that minipublics would always turn out to be epistemically superior to other alternatives this line of argument should still be worrisome to democrats. For if decisional status should be conferred to minipublics in virtue of the better epistemic quality of their considered judgments when compared to the raw opinions of the actual people, then it is not clear how one follows the argument up to precisely that point of better epistemic quality and then avoids drawing the full consequences that seem to follow. Whether or not deliberative minipublics deserve a special hearing in the political system, the biggest concern with this line of argument is the obvious implication that the raw voice of the actual people “is not a voice that by itself deserves any special hearing.”<sup>14</sup> If this is the case, then one wonders what justifies democratic elections, which give the strongest possible hearing to *that* voice by letting the actual people make crucial political decisions with no deliberative filter whatsoever (i.e. per secret ballot). If the voice of the actual people does not deserve any special hearing why let them vote? Indeed, it is upon the basis of precisely this line of argument that defenders of elite conceptions of democracy conclude that the actual people should never be allowed to make substantive political decisions; they should only be allowed to elect officials among the competing political elites and keep them accountable through the threat of removing them from office.<sup>15</sup> Taking this line of argument seriously would suggest more ambitious proposals for reform. Why not use deliberative minipublics to make all political decisions that are currently made by the actual people in democratic societies? (general elections, referenda, popular initiatives, etc.) If institutionalizing minipublics for making some political decisions is a net improvement in the deliberative quality of the political system as a whole then it would seem to follow that the more decisions are made by minipublics and fewer by the actual people the more the political system would improve.

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<sup>14</sup> Fishkin 2013, 504.

<sup>15</sup> For classic defenses of this view see J. A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Row, 1942); W. H. Riker, *Liberalism against Populism* (Long Grove, IL: Waveland Press, 1982); for a recent defense see R. A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003).

### *The democratic defense of empowered minipublics*

Now, for those who might find these consequences worrisome the alternative line of defense may seem more promising. Instead of focusing on the filter claim and thereby jeopardizing the ability to hold on to the mirror claim, from a democratic point of view it may seem more promising to focus on the mirror claim and see whether the filter claim can be retained as well. Proposals to confer decisional status on minipublics could be defended on the basis of democratic considerations of representativeness while also getting the extra boost that their deliberative quality provides for free, so to speak. It could be argued that even if some alternative institutions could offer a better deliberative filter and thus lead to better outcomes, since they will be less democratically representative than minipublics the latter win by default simply in virtue of the democratic value expressed by the mirror claim. But even if conferring decisional status on minipublics is not the highest epistemic improvement possible, so the argument goes, whichever modest improvement over the status quo their deliberative filter offers is an additional benefit that also counts in their favor. To show why this line of argument does not work we need to examine the mirror claim in depth.

As mentioned above, one of the most interesting features of minipublics is their statistical representativeness. In particular, Deliberative Polls seem most able to avoid the problems of self-selection that plague other types of minipublics. Many authors therefore consider them to be strongest in representativeness. This is not to deny that from an empirical perspective the actual accuracy of the stratified random selection techniques used in deliberative polling can be called into question in specific cases.<sup>16</sup> But for the purposes of my argument let's assume that methodological improvements could satisfactorily solve these problems and we can grant Fishkin's mirror claim. After all, for all their deficiencies, no one questions that participants in minipublics are more representative of the people as a whole than participants of other political institutions (e.g. judges, experts, political elites, bureaucrats, etc.). This is why many authors assume that conferring decisional status on minipublics would be a net democratic improvement

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<sup>16</sup> I discuss this issue in Lafont 2015, 49.

for the political system, at least compared to the alternative of limiting that status to less representative institutions.<sup>17</sup>

These considerations point to the second line of argument mentioned above. The case for conferring decisional status on minipublics can be based on democratic considerations of representativeness. It can be argued that citizens should trust minipublics' decisions, not so much because their participants would always be the most reliable group to make the best decision—a claim most likely to be false. Rather, citizens should trust minipublics' decisions because their participants are *like them*.<sup>18</sup> They should trust minipublics precisely because they are a mirror of the people. Therefore, their considered opinion is likely to reflect what they themselves would have concluded if they had participated. This view is often associated with a selection model of representation in contrast to a sanction model.<sup>19</sup> Within the sanction model representatives are expected to accurately track the attitudes and views of their constituents or face the sanction of not being reelected, whereas on the selection model constituents choose representatives with views and objectives largely aligned to their own so that the representatives have self-

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<sup>17</sup> This assumption is particularly visible in proposals to institutionalize minipublics for constitutional review (see e.g. Ghosh 2010, H. Spector, “Judicial Review, Rights, and Democracy” *Law and Philosophy* 22/3 (2003), 285–334 and “The Right to a Constitutional Jury” *Legisprudence* 3/1 (2009), 111–23; C. Zurn, “Judicial Review, Constitutional Juries and Civic Constitutional Fora: Rights, Democracy and Law,” *Theoria: A Journal of Social and Political Theory*, forthcoming), not to mention proposals for creating a “popular” branch of government modeled on minipublics (see Leib 2004).

<sup>18</sup> It is important to notice that this line of argument does not fit well with the epistemic strategy that focuses on outcome considerations. From a strictly epistemic point of view there is no reason to assume that “the people” are always or even often likely to reach the substantively best decisions. Think of all the important decisions that no one would propose be made by democratic referendum (from judicial to medical, economic, scientific, etc.) So, the fact that minipublics reliably indicate the considered opinion of the majority of the population, assuming they do, still says nothing about whether those opinions are likely to be substantively correct. Indeed, given the drastic differences in considered public opinion on contested political issues among all countries of the world, they can't all be right. If we take into account the temporal dimension, it is even more obvious how much considered public opinion on contested political issues has changed over time in all countries. Adopting this expanded perspective makes it entirely clear that the justification of the mirror claim depends on *democratic* not *epistemic* considerations. It assumes that the citizenry as a whole in each country is the constituent power, i.e. has the legitimate authority to make the decisions in question *regardless of whether it makes the right or wrong decisions*. Under the democratic assumption of the right to self-government, the question then becomes whether the people should defer their decisional authority to minipublics in some cases and, if so, why.

<sup>19</sup> For an in depth analysis of the selection model of representation see J. Mansbridge, “A “Selection Model” of Political Representation” *The Journal of Political Philosophy* 17/4 (2009), 369-98. For the contrast between the selection and sanction models regarding minipublics such as Deliberative Polls see Mansbridge 2010. For an interesting analysis of the contrast between these two models of representation under the rubrics “responsive” and “indicative” see P. Pettit, “Representation, responsive and indicative” *Constellations*, 17 (2010), 426–34.

motivated, exogenous reasons to do what their constituents want. As Miller and Stokes put it, they choose representatives who “so share their views that in following their own convictions they do their constituent’s will.”<sup>20</sup>

Let’s examine the mirror claim in detail. As just mentioned, the argument based on the mirror claim is that we should confer decisional status on minipublics because their participants are *like us* (or at least more like us than political elites, judges, interests groups or other political actors). There are several claims involved in this argument. Participants in minipublics are *like us* in the sense that they are ordinary citizens and thus in contrast to politicians, lobbyists, and other political actors they are unlikely to have hidden agendas or conflicts of interest in their deliberations about the public interest. We can trust them as our representatives in the sense that we don’t need to monitor them or threaten them with sanctions because they are independently motivated to figure out what’s best for the polity. But, in line with the selection model of representation, participants in minipublics are claimed to be *like us* in a *stronger* sense, namely, in the sense that they share our interests, values, policy objectives, etc.<sup>21</sup> This is why we are supposed to trust them not only in the sense that we don’t need to threaten them with sanctions to keep them accountable, but in the stronger sense that we can assume that their recommendations coincide with what we would have thought if we had participated. For that reason, we should trust them in the strong sense of endorsing their recommendations as our own (e.g. when voting on referenda).<sup>22</sup>

Now, whereas the first mirror claim seems plausible, the second seems problematic. Given how much ethical and political disagreement there is among citizens in pluralistic societies the stronger mirror claim can hardly be true of a genuinely representative sample of the population. The more that diverse evaluative perspectives (concerning need interpretations, value orientations, comprehensive views, etc.) are included in the sample, as they should be, the less sense it makes for non-participant citizens to assume that their interests, values, and political objectives will invariably

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<sup>20</sup> Miller and Stokes 1963, as quoted by Mansbridge 2009, 371.

<sup>21</sup> As Mansbridge 2009 indicates concerning the alignment of objectives between agent and principal according to the selection model, “the alignment of objectives can take place not only on the high ground of similar understandings of what is best for the nation as a whole but also on what is best for particular individuals or communities such as farmers, miners, or inner city residents.” (p. 380)

<sup>22</sup> For a defense of such trust-based uses of minipublics see MacKenzie and Warren 2012.

coincide with those of the majority of the sample regardless of the issue. Non-participants cannot assume that the conclusions reached by the minipublic reflect what *they would have thought if they had participated*. For, in principle, the opposite is equally possible. After all, the participants in the minority have reviewed the same information and deliberated as much as the others while reaching the opposite conclusion. Even if citizens can trust that all participants were genuinely interested in figuring out what is best for the polity, they know that in pluralistic democracies there is ongoing contestation over a variety of social, moral, ethical, religious, economic views and values, which bears significantly on political questions and policy objectives.

The selection model of representation seems plausible at a smaller scale. Citizens can trust some political party, civil society organization or individuals who share their interests, values and policy objectives. But for that same reason it would not make sense for them to also trust those political parties, organizations and individuals that defend the contrary views, values, and policy objectives, whichever those may be. If I trust Oxfam's recommendations on poverty relief I cannot also trust the opposite recommendations of, say, the Chamber of Commerce. If I trust Planned Parenthood's recommendations on women's reproductive health I cannot also trust the opposite recommendations of, say, the Pro-life Action League. Since I cannot simultaneously trust the conflicting views, values and policy objectives of all these different actors, I cannot trust the recommendations of the majority of the sample without first knowing whether *they have taken the side in the political spectrum that I would have taken if I had participated*.

Of course, if the materials and deliberations are made public citizens can always find out whether this is the case. But once they do, they will no longer be trusting the minipublic. They will be trusting themselves. More importantly, many of them will find out that the majority of the sample is *not like them*, since they actually oppose their views, values and policy objectives on the issue in question. At this point the line of argument based on the mirror claim predictably collapses. For the fact that the random sample is a microcosm of *the people taken collectively* means that for contested issues there will be a majority defending one view and a minority defending the opposite view, and therefore it cannot be true of *all the people taken individually* that the majority of the sample is *like them*. But if they aren't, in which sense are they their representatives? If the

majority of the sample is neither like them nor accountable to them what is the justification for those citizens to trust them? It seems that the argument is not that citizens should trust the majority of the sample because they are *like them*, but because they are *like the majority of the people*.<sup>23</sup> But are they? At this point it becomes clear why this line of argument cannot get the filter claim for free. In fact, the filter claim undermines the mirror claim. Let's see why.

*Should the Counterfactual or the Actual People Rule? Beware of Usurpers*

One of the main attractions behind the proposal of conferring decisional status on minipublics is precisely that their considered opinions are often different (and presumably better) than the raw opinions of the actual people. If they weren't, there would be not much point in conducting Deliberative Polls instead of regular polls. As Fishkin indicates, "the thoughtful and informed views created in the experiment [of Deliberative Polling, CL] *are not widely shared* because the bulk of the public is still, in all likelihood, disengaged and inattentive precisely because it is subject to all of the limitations... that routinely apply to the opinions of citizens in the large-scale nation-state. Deliberative Polling overcomes those conditions, at least for a time, for a microcosm, but *leaves the rest of the population largely untouched*."<sup>24</sup> This is precisely the problem. The *disconnect* between the views of the minipublic and those of the actual people induced by the effective intervention of the deliberative filter undermines the mirror claim at the postdeliberative stage. As Parkinson points out, by becoming better informed and having reasoned about the issues in question participants in the minipublic have become more like experts on those issues than ordinary citizens.<sup>25</sup>

Before the deliberative experience the mirror claim could plausibly be granted. Assuming the selection process was successfully conducted, it seems trivially true to

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<sup>23</sup> I cannot think of any interpretation of the selection model of representation, according to which it would be plausible to claim that citizens should trust the considered opinion of a majority of random others. I analyze the difficulties of this claim in Lafont 2015, 54-57. But whether or not this view of representation could be considered plausible, the problem in our context is that the modified mirror claim on which it is based is false.

<sup>24</sup> Fishkin 2009, 28; my italics.

<sup>25</sup> See Parkinson 2006, 82.

claim that participants in the minipublic were *like the people* in the sense that the views of the random sample would accurately reflect the views of the population as a whole. This is why regular polls can be used to (more or less reliably) track the views of the people despite the fact that only a handful of randomly selected citizens are actually interviewed. However, once the deliberative filter is added, which is the very purpose of organizing deliberative minipublics, the views of participants undergo significant, at times drastic transformations. But, precisely for that reason, it would be a clear case of usurpation to claim that the voice of the minipublics' participants is the voice of the people at the postdeliberative stage, especially in those cases when they are on record as *dissenting from the actual people*. The populist temptation to speak for the people is common among political actors of all kinds, but the dissimilarity between them and the actual people helps to undermine such claims. By contrast, the similarity between minipublics's participants and the people at the initial stage makes their dissimilarity at the *empowered stage* harder to spot. As such, they could become the ultimate usurpers!<sup>26</sup>

Deliberative democrats simply cannot have it both ways. If the voice of the minipublics deserves a special hearing it is precisely because it is *not* the voice of the actual people. But if it is not, proposals to confer decisional status on them cannot be justified on grounds of democratic representativeness. Democracies are stuck with the people they have, so political improvements can count as democratic only if they take the people along, instead of trying to bypass them by appeal to some favored proxy. Political innovations can count as democratic only if they aim to transform the interests, views and policy objectives of the actual people, so that the people can continue to identify with the policies to which they are subject and endorse them as their own, instead of being simply coerced into compliance. This is what the democratic ideal of self-rule requires. But before I analyze possible democratic contributions of minipublics in that participatory sense, let me add some argumentative support to the participatory case against empowered minipublics with the help of an example.

*The shortcut to better outcomes is the long road*

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<sup>26</sup> See note 31 below.

In “Depoliticizing Democracy” Pettit discusses an interesting example in support of one of his proposals for institutionalizing minipublics.<sup>27</sup> We are asked to imagine a polity in which a relatively mild sentencing regime is working quite well so that imprisonment is not often imposed. But, it could happen that some convicted offender who received a light sentence (e.g. community service) commits some horrific crime that would not have happened if the offender had been put in prison. In that context, politicians looking for reelection can take advantage of the passions of the citizenry and ask for tougher sentencing in order to make their political opponents look weak and not sufficiently concerned, even if tougher sentencing would not serve the common good at all (it might increase instead of diminish the crime rate, be too expensive, etc.) Pettit explains: “We can easily see why such a politician or a party, particularly one out of government, can have political advantage to make from denouncing the existing, relatively lenient pattern of sentencing, calling for heavier sentences, even perhaps for capital punishment. They can activate a politics of passion in which they appear as the only individual or the only group really concerned about the sort of horrible crime in question. They can call into existence what Montesquieu called a tyranny of the avengers, letting loose a rule of kneejerk emotional politics that works systematically against the common good. How might this sort of affront to deliberative democracy be rectified? Once again, the only hope would seem to lie in depolitization. It would require parliament to appoint a commission representative of relevant bodies of expertise and opinion, as well as of the people as a whole, to oversee criminal sentencing.”<sup>28</sup>

In the example, Pettit assumes that access to information about the adverse consequences of higher sentencing would move participants in the minipublic to reject manipulative proposals of politicians whereas non-participants would be easily manipulated to embrace higher sentences, even to endorse capital punishment. This is why he proposes the shortcut of minipublics as the best solution to the problem. Instead of taking the long road of providing the information to the citizenry so that they eventually make up their minds on whether to oppose higher sentences, he proposes to

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<sup>27</sup> See Pettit 2006, 54-55. Pettit’s proposal leaves open whether to confer decisional status on minipublics or to leave the ultimate control over them to parliament. Either way, the innovation would bypass the citizenry, which is my focus here.

<sup>28</sup> Ibid.

institutionalize a minipublic as part of a commission in charge of overseeing criminal sentencing. It seems to me that the example is plausible only if one assumes that there is no such thing as *settled* political views in a polity. Whereas it is easy to see how the example would work in a country like, say, the US, where the death penalty is not a settled issue, it is hard to imagine that it would work in a European country. To the extent that rejection of the death penalty is a settled political view for an overwhelming majority of European citizens it seems that no amount of political manipulation exercised upon an allegedly inattentive citizenry would succeed in bringing it back.<sup>29</sup> If we compare these two hypothetical cases, it seems to me that, contrary to Pettit's conclusion, informing the citizenry about the political issue in question so that it becomes settled is the only way a polity can successfully shield itself from political manipulation. By contrast, taking the shortcut of informing the members of a minipublic while bypassing the citizenry as a whole would only delay the settling of the issue and thereby leave an open flank for political manipulation, backlash, resentment, and so on.

Now, in order to take this participatory perspective for evaluating proposals to institutionalize minipublics seriously we have to enlarge the scope of analysis in both the temporal and spatial dimensions. We need to adopt a *diachronic* perspective in order to evaluate their potential effects, not just at the particular moment in which a policy decision is made but over time as well. And we need to adopt a *holistic* perspective that takes into account the effects of using minipublics in the deliberative system as a whole.<sup>30</sup> However, since the participatory perspective is citizen-centered, not system-centered, the potential effects in the *ongoing* public debate among the citizenry are of special normative significance to the analysis.<sup>31</sup>

## II. The Democratic Case for Political Uses of Minipublics

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<sup>29</sup> Since nothing turns on the specific example of a settled political issue, those with doubts about how settled the death penalty is in European countries can substitute it with any other example they consider settled (e.g. burning at the stake).

<sup>30</sup> For an overview of different versions of the deliberative system approach see Mansbridge et al. 2016.

<sup>31</sup> For an analysis of the differences between a system-centered and a citizen-centered interpretation of the deliberative systems approach see Owen and Smith 2015.

As we have seen, the mirror claim is an essential element in democratic defenses of proposals to institutionalize minipublics. However, in order to avoid the problematic ambiguities we analyzed in the previous section, it is important to avoid identifying minipublic participants with “the people.”<sup>32</sup> Speaking of “the people” in the singular is always problematic, but particularly in pluralistic democracies. The collectivist use of the expression suggests a kind of homogeneity among the citizenry that neither exists nor is desirable in democratic societies committed to the maintenance of free institutions. Minipublics are no exception. Their members tend to disagree in their considered opinions. Thus, even at their best, what the outcomes of minipublics reflect is not the considered opinion of the people, but *the considered opinion of the majority of the people*. This is particularly clear in the case of Deliberative Polls. Since participants are under no pressure to come to an agreement on some collective opinion or recommendation, deliberative polling always reflects the percentage of the majority and of the minority opinion on the political issue in question. But even if one recognizes that minipublics’ outcomes only reflect the considered opinion of the majority of the people it is still easy to see what is so special about them. They reflect what the majority of the citizenry would think if they were informed and had the opportunity to form a considered opinion on the political issue in question.

If we adopt a participatory perspective, what possible use could this information have for the citizenry? There are two aspects of this information that are democratically significant, namely, that these are “considered judgments” and not just raw preferences or uninformed opinions, and that they are the considered judgments of “the majority of the population.” But before I analyze these features of minipublics, let me mention that in order to be of any use to the citizenry, citizens would need to be familiarized with the minipublics’ workings, so that they would understand the political significance of the type of information they reveal. Different types of deliberative minipublics have different characteristics, but for simplicity of exposition I will take Deliberative Polls as paradigm example. My analysis of possible functions that minipublics could perform in the

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<sup>32</sup> This tendency is particularly visible in Leib’s proposal for a popular branch of government modeled on minipublics, where the voice and will of “a group of stratified random samples of laymen” (Leib 2004, 72) is routinely identified with the voice and will of “the people” (see e.g. Leib 2004, 66).

political system does not assume that citizens would need to know all the details about the workings of different types of minipublics, but it does assume that citizens would have become sufficiently familiar with them as to be aware of at least the following features:

- The techniques of stratified random sampling help ensure *inclusion* and *diversity* (especially inclusion, i.e. presence and voice, of marginalized social groups). This gives a higher level of *representativeness* to minipublics than almost any other political forum where the presence and voice of powerful social groups tends to predominate.
- The random selection of participants among ordinary citizens prevents co-option by politicians or capture by organized interest groups. It helps ensure the political *independence* and *impartiality* of participants and increases the chances that their deliberations are *oriented towards the public interest*.
- The provision of *information* helps secure balanced briefing materials as well as the inclusion of all relevant social perspectives. The presence of trained moderators facilitates mutual deliberation, helps weigh the pros and cons of different proposals, and prevents collective deliberation from being hijacked. This allows participants to reach *considered judgments* on the political issues in question.

This special combination of features justifies the claim that the conclusions of minipublics reflect the considered judgments of the majority of the population. Now, citizens do not need to believe that the considered judgments of the majority are always right in order to appreciate the political significance of the majority opinion in democratic societies. For any political issue that can be legitimately decided by majority rule, the opinion of the decisional majority determines the policies to which all citizens are subject. Since majority opinion and actual policies are supposed to be *aligned*, the stakes could not be higher in political struggles for shaping what counts as the majority opinion in a political community. It is in the context of this struggle that the information provided by minipublics acquires its political significance.

The alignment or misalignment between majority opinion, public policies and minipublics' recommendations offers a way of organizing the potential political uses of the latter so that their benefits or drawbacks can be better assessed. I distinguish the following four general categories under which the many potential uses of minipublics can be subsumed: contestatory, vigilant, anticipatory, and empowered uses of minipublics. My brief analysis, however, does not aim to cover the innumerable applications of minipublics currently under discussion in the vast empirical literature on applied deliberative democracy or to answer empirical questions of institutional design for each type of minipublic use.<sup>33</sup> My aims are more modest. I analyze some possible political uses of minipublics from the perspective of a participatory conception of deliberative democracy in order to identify the specific democratic values that could be served in each case, while offering a few examples of how the relevant political actors could best engage them in each case.

#### *Contestatory uses of minipublics*

One reason to insert minipublics into the political process is the expectation that the majority opinion reached after deliberation by the minipublic will *differ* from the majority opinion of the population on the political issue at hand. Discussions of this type of mismatch tend to focus on the difference in the deliberative *quality* of the outcome. However, in my view, the fact that the difference concerns the *majority opinion* has even greater significance. To the extent that the political decisions in question are supposed to be made by majority rule, showing that considered majority opinion differs from current majority opinion gives minorities a powerful tool to challenge consolidated majorities *in their own terrain*, so to speak. It is one thing for a minority to simply claim that they are right and the majority is wrong. It is quite another to provide some independent evidence indicating that the majority of a representative sample of the population came to endorse their view after having been properly informed. The fact that the minority view became a

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<sup>33</sup> For good overviews of empirical applications of minipublics see e.g. Grönlund, Bächtiger and Setälä 2014; G. Smith, *Democratic Innovations. Designing Institutions for Citizen Participation* (Cambridge: Cambridge University Press, 2009), 72-110. For a comparative empirical analysis of the potential impacts of minipublics in different kinds of states see Dryzek and Niemayer 2010, 155-76.

majority view under these circumstances can be a powerful political tool. In the context of a political struggle on the contested political issue in question, the independent evidence provided by minipublics could help minorities challenge consolidated majorities and hold them to account. The use of minipublics for political and legal contestation can thereby serve the important function of protecting the democratic value of “non-tyranny”—to use Fishkin’s expression.<sup>34</sup>

As mentioned above, a distinctive and valuable feature of minipublics is the better ability to secure effective inclusion of marginalized voices and social perspectives. By virtue of achieving higher statistical representativeness minipublics offer a mirror of the people that is unmatched by any other available mirror that allows the citizenry to see itself. The mirrors offered by other institutions in the political system (from the judiciary to the legislature, the media, the public sphere, etc.) tend to be highly exclusionary and therefore reflect back a quite distorted image of the people. Even in democratic societies it is hard to ensure effective inclusion in public political debate or even voting, given the factual disenfranchisement of marginalized groups and the difficulties of providing a proper hearing to their interests and views.<sup>35</sup> Even if new venues for citizen participation are created, self-selection, which tends to favor the wealthy and educated, can worsen rather than improve the underrepresentation of the powerless and marginalized.<sup>36</sup> Thus even democratic political systems lack venues for finding out what would happen if the general public or the powerful groups that define the majority culture could actually listen to the needs, views, and arguments of minorities and marginalized groups.

Assuming the general public is aware of the unique features of the venue that minipublics provide, minipublics could be used by organized social groups in their political struggles to contest the views of consolidated majorities on specific political issues. The more the minipublics’ opinions differ from actual majority opinion the more this should signal to the public the need to examine the available information and the relevant perspectives so as to scrutinize their soundness and their potential need for revision. This could lead to more nuanced positions on polarizing issues or it could

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<sup>34</sup> See Fishkin 2009, 60-64.

<sup>35</sup> See I. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

<sup>36</sup> See J. Mansbridge, *Beyond Adversary Democracy* (Chicago: Chicago University Press, 1980).

prompt a general reconsideration of popular but unjust views held by consolidated majorities. However, this is not to suggest that the public should take the evidence provided by the minipublics' opinions as decisive or authoritative. The function of minipublics should not be to shut down political debate, but, to the contrary, to reignite and facilitate the *ongoing* public debate on contested political issues.<sup>37</sup> Minipublics can enrich those wider debates by enhancing the voices of silenced or marginalized groups and perspectives in the public sphere. Precisely because the recommendations of the minipublic *differ* from actual public opinion, the distinction signals the need to *transform* public opinion accordingly. This means that political actors must address the minipublics' recommendations to *both officials and the public* with the aim of shaping ongoing political debate in the public sphere.

Minipublics could be inserted in the political process not only for the purposes of political but also legal contestation. Of the many possibilities here, let me mention two. Civil society groups could include the recommendations of minipublics when filing *amicus curia* briefs to the Supreme Court as independent evidence for challenging the assumption that raw public opinion actually reflects views “deeply rooted in the country’s history and traditions.”<sup>38</sup> The evidence in question should not be taken as authoritatively settling the issue. Still, the special features of minipublics (their independence, impartiality, representativeness, etc.) confer on their recommendations a status of independent evidence that no other evidence that parties may provide from like-minded sources (groups, organizations, etc.) can match. If minipublics are working as intended, outside parties can do nothing to influence the outcome.

Stronger forms of institutionalization could also be beneficial. For example, it could become standard practice that in cases involving suspect classifications of groups with a history of discrimination, which trigger a higher level of scrutiny, some form of minipublic is routinely convened to provide the Supreme Court with additional information on what the considered majority opinion of the country at a given time may

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<sup>37</sup> For a defense of this claim in the context of an interesting analysis of different uses of minipublics see N. Curato and M. Böker, “Linking Mini-publics to the deliberative system: a research agenda,” *Policy Sciences*, DOI 10.1007/s11077-015-9238-5.

<sup>38</sup> I am using here the formulation of the “deep roots test” that the US Supreme Court uses as its substantive due process standard. For a critical analysis of that standard see J. C. Toro, “The Charade of Tradition-Based Substantive Due Process” *New York University Journal of Law & Liberty* 4/2 (2009), 172-208.

be. Again, there is no need to claim that this information should be authoritative about the right way to interpret constitutional rights. The considered opinion of the majority may still be unduly hostile towards protecting the rights of unpopular minorities. But the information may nonetheless be valuable as an indication of how far the considered judgment of the majority is moving in a particular direction.<sup>39</sup> Precisely because minipublics would not have decisional status, the political contestation that is likely to surround the interpretation of their opinions by different political groups would not be detrimental, especially if it manages to spark a broader debate in the public sphere as well, which important Supreme Court cases tend to do.

### *Vigilant uses of minipublics*

The analysis of contestatory uses of minipublics was based on cases when the minipublics' recommendations *differ* from the actual majority opinion on some political issue. The driving idea was that the more minipublics' recommendations differ from actual public opinion the more this should signal to the public the need to *scrutinize public opinion*, i.e. to reexamine the available information and reconsider the soundness of the views and arguments supported by the majority culture on the issue in question. But perhaps even more significant are cases when the minipublic' recommendations coincide with the majority opinion but *differ* from existing policy. This mismatch should signal to the public the need to *scrutinize the political system*. The more minipublics' recommendations are aligned with public opinion but differ from the actually enacted policies the more this signals to the public that the political system is not properly responsive to their views, interests and policy objectives. The evidence provided by minipublics could draw additional support from the general public to social and political

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<sup>39</sup> The level of empowerment of minipublics in this context could be increased. For example, it could be required that the Supreme Court takes up their recommendations in the legal reasoning justifying its decisions and offers an explicit, reasoned justification whenever it rules against them. I mention this intermediate possibility not as a proposal I endorse, but simply to indicate that political empowerment comes in degrees, so for any possible use of minipublics the level of empowerment can range from the weakest option of conferring upon them a merely non-binding and advisory role to the strongest possible option of conferring upon them the binding power to make final decisions unchecked by the citizenry or by any other political institution. Opposing the strongest form of empowerment, as I do, does not require endorsing the weakest form as the only legitimate option.

groups mobilized against whichever forces are impeding the proper flow of influence between the process of opinion and will formation in which citizens participate and the enacted policies. By enhancing the responsiveness of the political system to the interests, views and policy objectives of the citizenry, such critical or vigilant uses of minipublics would serve the important political function of enhancing *democratic control*. Whereas the contestatory uses would strengthen *political equality* in the *horizontal* dimension (i.e. between socially powerful citizens and less powerful or marginalized citizens), the vigilant uses of minipublics would strengthen *political equality* in the *vertical* dimension (i.e. between ordinary citizens and political officials).

One could also use minipublics to enhance the agenda-setting power of ordinary citizens, giving them more effective influence in the selection of policy objectives to which the political system must respond. Citizens could be regularly polled to rank important political issues that need to be tackled but have not been tackled and minipublics could then be convened to make recommendations concerning the top ranked issues. This process would provide public visibility to the issues in question. This would be particularly helpful concerning political issues that elected officials may see as intractable or not worth confronting.<sup>40</sup> Because officials have little incentive to tackle such issues, they are therefore likely to remain forever unresolved, even if the overwhelming majority of citizens agree on what the right political solution would be. Think of the policy proposals for enforcing background checks on gun sales in the US, which are supported by 86% of the population, but cannot make it through the legislature.

Situations of political gridlock or the capture of political institutions by powerful interest groups provide one of the key motivations behind proposals to confer decisional status on minipublics, so that they can get done what the legislature (perhaps even the judiciary) is demonstrably unable to do with respect to some political issues. As Leib argues in the context of his proposal to create a popular branch of government modeled on minipublics, empowered minipublics could make an essential contribution in

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<sup>40</sup> The latter include political issues where elected officials have a clear conflict of interest, e.g. choosing among electoral systems or drawing electoral boundaries. Regarding these kinds of questions, vigilant uses of minipublics would strengthen popular oversight of public officials especially if they were empowered to require public officials to appear before them to testify. See Goodin and Dryzek 2006, 235-36; Dryzek and Niemeyer 2010, 169; J. Ferenjohn, "Conclusion: the Citizens' assembly model" in M. Warren and H. Pearse, eds, *Designing Deliberative Democracy* (Cambridge: Cambridge University Press, 2008), 192-213.

situations when citizens are frustrated by the legislature's unwillingness to take action or when legislatures find themselves unable to reach a reasonable compromise.<sup>41</sup> Minipublics without decisional status would seem to make no contribution at all. If the citizenry already overwhelmingly endorses some political solution already, organizing a minipublic is likely only to reinforce the opinion the citizenry already holds, and thus would seem to fulfill no function at all.

However, the fact that the minipublic offers a *considered* majority opinion can be extremely powerful to the citizenry. It can effectively counteract arguments to the effect that the majority's support for some popular policy is due to the citizenry's lack of information or familiarity with the complexity of the problems involved; or that it is due to irresponsible wishful thinking that fails to take into account the potential consequences, legal constraints, or any other relevant dimensions that only experts (but not ordinary citizens) can fully grasp. Popularity for self-defeating policy objectives is not unheard of, as when citizens favor both expanding public services and lowering taxes at the same time. When this is the case, following the political will of the majority could be extremely harmful. In such public political debates, the contribution of a minipublic could be invaluable to the citizenry. For it would force the political system to provide the needed information so that participants in the minipublic could engage in an independent examination of the soundness of the arguments in question. Whatever the minipublics' conclusions may be, the public availability of these arguments would be a great improvement over the status quo. Indeed, for ordinary citizens it would be a win-win situation. If the arguments were right, they would have independent evidence that might lead them to change their political opinions accordingly instead of having to blindly trust the bare assertions of potentially self-interested parties. If the arguments were wrong, this would strengthen the ability of ordinary citizens to pressure the relevant political actors into action by removing their demonstrably unsupported excuses for inaction.

#### *Anticipatory uses of minipublics*

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<sup>41</sup> See Leib 2004, 62.

So far I have considered two different forms of misalignment between majority opinion, public policies, and minipublics' opinions. But another form of misalignment can be even more worrisome from a democratic perspective. These are situations when the public has no opinion at all about the political issues in question. This type of *disconnect* does not have to be problematic. For low stakes issues that are technical in nature or serve merely an administrative purpose, there may be no need at all for citizens even to form an opinion on the policies in question. But it is worrisome when the public does not know anything about policies or legal developments that can negatively impact their wellbeing or their fundamental rights.

Such public ignorance can have various roots. The policies in question may concern technological innovations with *unpredictable consequences* so the public does not know what may be at stake. Think of new gene editing technologies such as CRISPR, which may permanently alter the human genome.<sup>42</sup> Or the public may not know because the political decisions in question are *migrating beyond national borders*. International trade agreements are a paradigmatic example. Although they can have a tremendous impact on the domestic economy of a country and its ability to protect the fundamental rights of its citizens, they are negotiated beyond national borders, often by the executive branch of government, without strong oversight by the legislature, under the unilateral influence of powerful lobbies, and surrounded by secrecy. In the absence of public political debate and proper media coverage most citizens do not even know that they should know about the political decisions in question, given what is at stake. Disguised as remote foreign relations matters, transnational agreements are not perceived by the citizenry as having domestic policy implications that may have severely harmful consequences but which will be much harder to reverse, given the number of countries involved. Transnational negotiations lack the *visibility* in the domestic public sphere needed to generate a political debate in which citizens could either endorse or reject such policies.<sup>43</sup>

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<sup>42</sup> See e.g. J. Perker, CRISPR/CAS Faces the Bioethics Spotlight. *BioTechniques*, 58/5 (2015), 223-27.

<sup>43</sup> Visibility should not be confused with transparency. Even when the information in question is publically available, this may still be useless to the citizenry if its importance is not visible in the public sphere so that it can generate public awareness and political debate. On the crucial difference between transparency and visibility and the special importance of the latter see S. Rummens, "Staging Deliberation: The Role of

Under current conditions of globalization, inserting minipublics into transnational political processes could have, in my opinion, the highest democratizing impact.<sup>44</sup> From a participatory perspective, the function of minipublics would not be to directly *shape* the policies in question, but instead to enhance the *visibility* of what is at stake so as to enable public debate among citizens. Their primary role would not be to recommend some policies over others, but rather to acquire sufficient information so as to be able to *identify*, among the various policies under consideration, those whose potential impact on citizens' well-being, fundamental rights and interests is so high that the public needs to know about them in order to collectively determine in public debate which priorities, interests and values should guide the political decisions in question. By *anticipating* what citizens would think if they knew more about what is at stake in political decisions that, for a variety of reasons, fall under the radar of the public sphere, and by providing public *visibility* to those decisions where the stakes are so high that the citizenry should not remain ignorant, minipublics would fulfill the crucial political function of enhancing democratic control.<sup>45</sup> Instead of becoming another shortcut for bypassing the citizenry, minipublics could be deployed against many of the existing shortcuts in order to force the political system to take the long road of properly involving the citizenry.

### *Empowered uses of minipublics*

This is a complex issue that I cannot properly answer here. But to avoid possible misunderstandings let me clarify that I do not take my argument to lead to the conclusion

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Representative Institutions in the Deliberative Democratic Process” *The Journal of Political Philosophy*, 20/1 (2012), 29-41.

<sup>44</sup>Many different institutional ways could accomplish these ends. One would require legislative standing committees overseeing major transnational agreements to convene some form of minipublic in advance of important binding decisions. Their empowerment could vary from merely indicating whether or not public debate is needed to setting the agenda on the specific issues in need of public debate (e.g. identifying specific environmental or ethical concerns, establishing proper priorities in light of significant tradeoffs, etc.)

<sup>45</sup> I take the idea of anticipatory uses of minipublics from MacKenzie and Warren 2012. However, my participatory interpretation of this use differs from theirs in that I do not consider it to be a trust-based use. Rather than the public simply entrusting minipublics with the task of reaching a considered public opinion on the political issues in question so that these opinions may then be communicated to executive agencies or other public officials, from a participatory perspective, the function is instead to *identify* the issues about which the public needs to collectively form a considered public opinion, and *communicate* this information to both public officials and the citizenry.

that all uses of empowered minipublics would necessarily be democratically suspect or illegitimate. Empowering minipublics in connection with or in the form of an institution like Ackerman and Fishkin's Deliberation Day could be highly desirable from a participatory perspective.<sup>46</sup> I also do not rule out the possibility of legitimate uses of empowered minipublics that may not be *directly* tied to referenda or some other form of citizen ratification. Here is the reason. Empowered minipublics could be inserted in the political process to share power with other political institutions that, for good reasons, are not themselves tied to direct forms of citizen ratification (e.g. the judiciary). In such a case, although the inclusion of empowered minipublics may not increase the democratic quality of the political system as a whole, it may not decrease it either.<sup>47</sup> If that were the case, and *if their use were recommended on other grounds*, then for all I have argued here, there may be no reason to oppose their use.

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<sup>46</sup> See B. Ackerman and James S. Fishkin, *Deliberation Day* (New Haven, CT: Yale University Press, 2004). However, this is not to say that all such uses would always be desirable, since other considerations may speak against them. For example, Christopher Zurn proposes to empower minipublics for certifying popular amendment proposals and to require deliberation days for ratification or rejection by the citizenry (see Zurn 2007, 336 and 2015). This type of proposal may have impeccable participatory credentials, but it may raise concerns regarding political stability because it offers no criteria to limit what can and cannot be up for amendment. For a criticism along these lines see Fishkin 2014, 506.

<sup>47</sup> I am thinking here of proposals for empowering minipublics in the context of constitutional review (see e.g. Gohsh, Spector, Zurn). I have serious doubts that any of the proposals currently under discussion meet these criteria, but it cannot be ruled out a priori that some modified proposal could meet them.