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## Deliberative Negotiation

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### Introduction

In this normative analysis of negotiation, we have several objectives. First, we establish that the capacity to act is an integral part of the meaning of democracy. When legislatures deadlock because of their inability to negotiate, their inaction undermines key democratic values. Second, we make the simple point that a negotiation process is unlikely to be fully just unless it incorporates two elements often viewed as (normatively) essential to democracy: (1) inclusion on fair terms of the affected parties, and (2) the equal power of the negotiators. Negotiations rarely meet these criteria, of course, but they provide standards at which to aim. We note that although these standards are both intuitive and widely held, they also remain contested. Third, we distinguish the possible components that may appear in the legislative negotiating process. Between the two extremes of pure deliberation and pure bargaining, we specify three forms of what we call *deliberative negotiation*. We then explain why we believe the phenomenon of deliberative negotiation has been neglected, both empirically and normatively, and why it should receive more attention in politics. Finally, we undertake a normative investigation of three practices—long incumbencies, closed-door meetings, and side payments—that make political negotiation more effective, thereby enabling democracies to act. We specify the criteria we can use to judge when these practices are justifiable from a democratic perspective.

The normative theory of democratic negotiation and compromise is in its infancy. The theory of deliberative democracy has been evolving over the past thirty years, but it is not necessary to accept deliberative democratic theory to appreciate the value of deliberative negotiation. The case we advance here for the capacity for collective action as essential to democracy, for the deliberative negotiations that enable legitimate collective action, and for the institutional conditions that support deliberative negotiation is part of a first stage in a process of theory building.

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## Action

### Action as a Component of Democracy

The collective capacity to act is a crucial component of democracy. That capacity is surprisingly undervalued in both popular and academic democratic theory. When problems in the polity demand action and the legislature fails to act, the demand for action is displaced onto the executive, the administrative agencies, and the courts. The president, the agencies, and the courts are not, of course, undemocratic. They all have democratic justification in the sense that the citizens directly elect the executive, the agencies are duly appointed, and the citizens have constitutionally authorized their elected officials to appoint the members of judiciary. Yet the legislature—the official law-giving body—has a unique and central role in a democracy. In the United States, Congress alone has the authority to make and fund laws and the programs and policies that follow from them. Because Congress is composed of many representatives, elected from every part of the country, it also can come far closer than the executive to representing and communicating with the people in all of their plurality. When Congress is unable to act in the face of urgent collective problems, power flows to other parts of the political system, diminishing its democratic capacity and legitimacy.

Some failures of a legislature to act are democratically justified by a majority decision not to act, whether explicit or implicit. Other failures to act are democratically justified by deep divisions among the citizenry on what course of action to take, even when most agree that some action should be taken. The failures to act that most concern us arise when the members of the legislature could craft policies that would improve on the status quo, not infringe minority or individual rights, and be backed by a majority of the public—but the legislators still fail to agree and thus fail to act. These kinds of failures are not normatively neutral: they favor the status quo and disempower collective responses to both long-standing and emerging problems. Privileging the status quo is not the sole province of one side or another on the political spectrum; even partisans who want small government have to pass legislation to accomplish that goal.<sup>1</sup> When a majority of the citizenry favors an action that would not curtail individual rights, legislative paralysis begins to rob the legislature—and even the polity as a whole—of its legitimacy.

The capacity to act is built into the very meaning of democracy, or rule (*kratos*) of the people (*demos*). Whereas much normative political theory to date has explored what it might mean to say that the *people* rule, we focus on what it might mean to say that they *rule*—that is, they have the capacity to act and implement decisions.<sup>2</sup>

Sometimes both ordinary citizens and democratic theorists take for granted the action component of democracy and therefore neglect it because action per se is not distinctively democratic. Both ordinary citizens and democratic theorists also may forget to value action because we are habituated to focusing on the resistance to tyranny. Key features of our political system (e.g., the separation of powers) were designed to avoid the dangers of tyranny.

Many democratic practices, based on sound democratic ideals, impede democratic action. The establishment of minority rights, with strong and independent court systems to protect

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1 Gutmann and Thompson (2012, 32).

2 See Ober (2008, 7).

those rights, impedes democratic action. The checks and balances among separate branches of government, instituted to protect against the abuse of power, impede democratic action. Rules intended to promote deliberation, such as unlimited debate, impede democratic action. The practice of resistance in civil society, which both blocks tyranny and is one of the few sources of pressure for the inclusion of excluded or marginalized groups in the polity, also can impede democratic action. We value these practices and ideals for their inclusionary functions. Our goal, however, is to point out that inclusions are not sufficient to democracy: if collectivities lack the capacity to act, inclusions remain powerless. We stress that the capacity for action is *part* of democracy, insofar as a political system should empower collectivities to respond to their collective problems and aspirations. We therefore underscore the damage that political gridlock can do to a democracy's capacities to get things done—that is, the damage to democracy as collective self-rule. We want to redress the balance between resistance and action by drawing attention to the ways that institutions intended to empower resistance can undermine democratic capacities to solve collective problems.

### The Harms of Inaction

In contemplating these tradeoffs, we emphasize that the failure to come to agreement often harms inclusion, collective-will formation, efficiency, collective trust, and legitimacy.

First, a gridlocked system tends to defeat emerging claims. Failed negotiations freeze existing patterns of inclusion and exclusion into place, while failing to respond to social and economic change. Social change may occur, but the forces of change must do their work outside of the political system.<sup>3</sup>

Second, although the media, interest groups, and social movements help shape the perspectives and interests of the members of the polity through advocacy and discussion, and political parties, political campaigns, and candidates help shape these perspectives, interests, needs, and desires into agendas that are actionable, legislatures then do the detailed work of crafting policies that can attract a majority of the representatives' votes. If a democracy is working well, its institutions transform conflicts into potential agreements that at least a majority of participants could find substantively acceptable and most others could find procedurally acceptable and thus legitimate. Legislative gridlock fails to convert the wills of those who should be included in any decision into something that constitutionally could be considered a collective will and decision.

Failed agreements also entail efficiency costs, borne by members of the collectivity. Some forms of what we call deliberative negotiation often help participants discover efficient outcomes that capture more common interests, overlapping interests, and positive-sum solutions to problems than had previously appeared possible. Such agreements then can save the polity significant costs. Classic compromises also save on the ongoing costs of conflict, with overt war the limiting case.

Failed agreements often have costs in the reduction of mutual trust, which affects the possibilities for future agreements. Every failure to agree when agreement is possible tends to induce participants to withhold respect from their opponents and to demonize them. The failure to agree breeds a culture and mindset of animosity, which in turn makes future agreements less

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<sup>3</sup> Gutmann and Thompson (2012, 30-32).

likely (Gutmann and Thompson 2012, ch. 2). In contrast, successful agreements often produce positive ethical externalities: they generate the trust among opponents necessary for the next agreement.

These failures together take their toll on legitimacy. We distinguish between *normative legitimacy* and *empirical legitimacy*. Normative legitimacy exists when a process can be justified with well founded reasons. Empirical legitimacy exists when a process is actually accepted by most of the people in the relevant collectivity.

Deadlock undermines *normative* legitimacy when the practice emanating from institutions established to promote democratic ideals is no longer justifiable in terms of either those ideals themselves or a reasonable balance with other ideals, such as democratic action. We previously noted that legislative deadlock encourages migration of power away from the legislature. If the legislature is the most “democratic” of the branches—in view of its capacities to represent the pluralism of a collectivity and to enable two-way communication between constituents and representatives—then deadlock produces a less democratic process. Deadlock also produces undemocratic results. As political scientists have pointed out since the 1960s, a “nondecision” is as much a decision as any overt decisive act.<sup>4</sup> If a significant majority favors action and the opposition to that action is not based on individual or minority rights, then inaction is undemocratic. Inaction is particularly worrying when for external reasons a situation is already developing in one direction and inaction allows that “drift” to continue, or when strong majority preferences change in response to new circumstances but the existing political bodies do not change the relevant policies.<sup>5</sup> In the United States today, long-standing structural budget deficits, increasing inequality, and uneven investment in physical and human capital exemplify several kinds of drift. Internationally, the increasing extremes in climate exemplify drift. If the decisions to act in each case were deliberatively thought through and potential negotiated outcomes were contemplated and rejected, the resulting inaction would be democratically legitimate. However, when a polity’s institutions consistently block decisions that otherwise would have been made democratically and action taken, the result is democratically illegitimate.

Deadlock also undermines *empirical* legitimacy. A political system that cannot perform in the judgment of its people risks losing its legitimacy, which in turn can risk its stability. In the United States, trust in Congress is at an all-time low, in part because of the recent stalemate.<sup>6</sup> Although the system as a whole does not seem to be losing its legitimacy in the eyes of its people, its democratic core—Congress—is in such danger. In newer democracies, the incapacity to act democratically often provides a major reason for the return to authoritarian rule.<sup>7</sup> In the United States, the danger to democracy is more subtle but also quite real: as the core of the political system loses its legitimacy, those powers of collective action that remain migrate into less fully democratic parts of the system: executive agencies, the Federal Reserve, and the judicial system.

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4 Bachrach and Baratz (1963, 1964).

5 Gutmann and Thompson (2012, 30-34). On “drift,” see Burns (1963); Hacker and Pierson (2010); Mansbridge (2011). On “utility drift,” see Rae (1975, 1289); Shapiro (2003); Schwartzberg (2013).

6 For Gallup data on 9% approval of Congress in November 2013, see Newport (2013). By contrast, governors are much more popular, perhaps because they are more able to act (Cohen 2013).

7 Before World War II, critics attacked not only the Weimar Republic in particular but also democracy in general for the inability to act. Mussolini began his encyclopedia article on Fascism by writing, “Like all sound political conceptions, Fascism is action” as well as thought. In contrast to democracy, “Fascism was...born of the need of action, and was action.”

Democracy, in short, includes both “the people” and their “rule.” In a healthy democracy, people are able to provide collective goods for themselves and to respond collectively to emerging challenges, problems, and opportunities. A gridlocked legislative system damages democracy by undermining these capacities.

### *The Ideals of a Just Negotiation*<sup>8</sup>

In this chapter, we argue for negotiation as an important democratic tool through which citizens and their representatives make collective decisions that affect their lives. Before we discuss the normative qualities of what we call “deliberative negotiation,” we address the question of how negotiation processes might be assessed from the standpoint of justice—a question that is related but not identical to the question of democratic criteria. Although we do not offer an extended discussion of justice, we suggest that negotiation processes can be judged as more or less just in relation to two simple ideals: the ideal of including all affected parties and the ideal of equal power in the negotiation. Both ideals are related to the justice of the *process*, not the *outcomes*. And both ideals are closely related to and support democratic ideals of inclusion.<sup>9</sup> They are also “regulative ideals” that provide standards at which to aim, not criteria that if not met disallow the process.<sup>10</sup> We recognize that these ideas are contested. We discuss them here not to settle any of the contested questions but rather to put the issues on the table for further deliberation.<sup>11</sup> Our overall criterion for justice in negotiation is that in a meta-deliberation over the conditions of just negotiation, free and equal participants would be likely to adopt these understandings of the application of justice to the condition of negotiation.

#### **Including Affected Parties**

The simplest statement of the inclusion norm of a just negotiation is that all affected parties should be included in a negotiation. Democratic theorists have begun to discuss some of these issues under the rubric of “all affected interests.”<sup>12</sup> The question is highly contested and not sufficiently resolved for us to take a stand on it. We believe, however, that whatever complexities it entails, it remains highly intuitive that all parties affected by a negotiation should have a rightful claim to have their interests represented in the negotiation and that to the extent that those interests are not represented, the negotiation is to that degree less just. In practice, it is particularly important to attend to the interests of less powerful and marginalized groups whose interests might easily be ignored.

There are, of course, many practical difficulties in actually bringing to the literal table all those who might in any way be affected. Moreover, this formulation would seem to ignore

8 This section must be taken as a placeholder for a more thorough discussion that we hope to have in the future and that if we as a collective do not have, we hope that the larger community of normative theorists will.

9 Young (2000).

10 Kant ([1781]1998, 552); see also Rawls (1971) on most societies in practice being at best “nearly just.”

11 The question of the ideals of a just negotiation has not yet been much discussed. In the one treatment that we know, Albin reported being “struck by the dearth of any comparable research” (Albin 2001, 12). Yet even Albin’s treatment confines the normative philosophical discussion to the introductory chapter and defines the purpose of the book as investigating empirically how parties to negotiations perceive fairness in negotiation, how negotiators take into account such considerations, what effect the values have on the negotiation process, and how those values eventually influence the terms of international agreements. For Albin’s purposes, “the formulation of principles for the conduct of negotiations” falls “outside the scope” of that work (2001, 13). Other works that might take up the subject (e.g., Menkel-Meadow and Wheeler 2004) address only the question of ethics within the negotiation.

12 See Goodin (2007), Shapiro (2003), and Fung (2013). As Goodin (2007) noted, neither the principle of direct involvement nor the principle of affected interests provides determinate boundaries.

the special claims to be party to the negotiation of those who are members of the polities who will be legally bound rather than merely affected by the ensuing laws. It also ignores the special claims to be party to the negotiation of those who, as citizens, have contributed individually and whose family members and neighbors have contributed to bringing about the larger polity that undergirds the specific negotiation. For these reasons, among others, citizens of the United States may have a greater claim to be parties to a negotiation over the US laws on carbon emission than citizens in China, even beyond their claims on the grounds of being more directly affected. However, although these kinds of questions of degrees of concern and contribution remain to be worked out, it is likely that negotiations that exclude the interests of those affected will fall short of justice.

### Equal Power

The simplest statement of the equality norm of a just negotiation is that all parties to a negotiation should have equal power. One way of understanding power in the context of negotiation is to consider power in general as the preferences of one party causing or changing the probability of outcomes. Coercive power, which we consider in regard to negotiation, is then as the capacity of one party to cause or change the probability of outcomes for another party through the threat of sanction or the use of force. Threats of sanction would include the threat to leave the negotiation.<sup>13</sup> The bargaining component of negotiation includes not only threats of sanction but also promises of reward, which have a more positive normative status than threats of sanction but are also components of equal or unequal power. What might it mean to have equal power in a negotiation? When Habermas first approached the subject, he concluded that for a negotiation to be just in the absolute sense, “bargaining power should at least be disciplined by its equal distribution among the parties.”<sup>14</sup> He then modified this point to read that the procedures should “provide all interested parties with an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing.”<sup>15</sup> The problem is that equal bargaining resources, the equal exercise of power, the equal opportunity to exercise power, and the equal chance of prevailing are all different concepts and produce different outcomes.

Power also can be defined individually or as a matter of numbers of allies. An actor may individually have equal power with all other individuals (e.g., an equal vote), but if the rule is majority rule (unlikely in a negotiation) and the actor is in a minority—particularly a permanent minority—the “equal opportunity for pressure” will not translate into an equal or even a proportionate chance of “prevailing.” Neither will it even translate into outcomes in which all interests have equal consideration. An actor may have an equal veto with others in the group, as is characteristic of a negotiation that requires the agreement of all parties, but pay heavier costs if the agreement is not concluded. As Beitz (1989) pointed out, the procedures for producing political equality are multiple and indeterminate. Thus, what constitutes equal power, equal opportunity to exercise power, or the equal chance of prevailing often will be intrinsically contestable.

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13 For more on this definition, see Mansbridge et al. (2010, 80ff), drawing on Nagel (1975).

14 Habermas ([1992]1996, 165-166 see also 108-109).

15 Habermas ([1992]1996, 166-167).



In addition to these problems with what “equal power” might mean in a negotiation, it is the case that equal power is not the only ideal-regarding criterion appropriate to negotiation. For the pure deliberative moments, the ideal of “no power” may be more appropriate.<sup>16</sup> For some purposes, Aristotelian proportionality is most appropriate, that is, that parties should be treated in the same way only if they are, in fact, equal in the respects relevant to the negotiation. There may be arguments for giving greater weight to those more greatly affected or to those who have contributed more to the goods in question. Issues such as compensatory justice and need may well be relevant.<sup>17</sup>

Nonetheless, like the affected-interests principle, the equal-power principle captures the robust intuition that those who have rightful *claims* to inclusion should also have the *means* for inclusion. Despite the many difficulties of interpretation, we retain this simple criterion when assessing the justice of negotiation processes.

From the perspective of democratic theory, the question of justice in the process of negotiation is ultimately part of the question of the justice in democratic representation—or, more generally, what should count as a just democratic process.<sup>18</sup> Regarding outcomes, the question of whether the results of negotiation (either in legislation or a treaty) are just is a matter for the general theory of justice. Here, we intend to call attention only to the various and contestable ways that such questions can be addressed; we do not attempt to resolve the controversies about the meaning of inclusiveness and equality. Fortunately, it is not necessary to do so to make progress on the project of evaluating various types of negotiation. The aim is to find normatively acceptable forms of negotiation within a larger democratic process that is assumed to be reasonably just. To the extent that the larger process is unjust, the results of negotiations that it produces will usually be less just as well. And the results can be unjust even if the process is just. Within a relatively just democracy, individual negotiations may be considered less just to the extent that they are less inclusive and less equal if the departures from those ideals have not been deliberated and otherwise legitimized in that democracy. With this as background, we believe that to find effective forms of negotiation that are normatively acceptable in an ongoing democracy, it is more productive to operate at a less general level, employing criteria that refer specifically to the process of negotiation itself, such as those that balance confidentiality and transparency.

## *Deliberative Negotiation*

Congress seems to be losing its capacity for what we call “deliberative negotiation.” By *negotiation* in the political realm, we mean a practice in which individuals, usually acting in institutions on behalf of others, make and respond to claims, arguments, and proposals with the aim of reaching mutually acceptable binding agreements.<sup>19</sup> By *deliberative negotiation*, we mean negotiation based on processes of mutual justification, respect, and reciprocal fairness. Such negotiation includes elements of arguments on the merits made by advancing considerations that the other parties can accept; searching for zones of agreement and disagreement; and arguing about the terms of fair processes as well as outcomes, with a background of sufficient mutual respect for those

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16 See Mansbridge et al. (2010).

17 Albin (2001).

18 Young (2000, ch. 1).

19 Cf. Odell (2012, 27), and Odell and Tingley, Chapter 7 in this report.

arguments to have motivating force. Deliberative negotiation takes place in a context of relative openness and disclosure about interests, needs, and constraints.<sup>20</sup>

Much of what became known as “deliberative political theory” in the second half of the twentieth century began by distinguishing between “deliberation,” meaning a process of mutual justification, and “bargaining,” meaning a process in which individuals or groups say they will do or give something in exchange for something else, with each trying to give the least and get the most in the bargain.<sup>21</sup> Elster (1986) summed up this distinction when he distinguished between political “bargaining” and political “arguing” (or deliberation). He placed bargaining and the vote in the same nondeliberative (or anti-deliberative) category, identifying bargaining as “instrumental,” “private,” based in “the individual and secret vote,” and resulting in a “compromise between given, and irreducibly opposed, private interests.” On the other side of his dichotomy, he identified “arguing” with “rational agreement rather than compromise” and with “public debate with a view to the emergence of a consensus.”<sup>22</sup>

Since that time, many deliberative democratic theorists have argued that deliberation and voting are complementary rather than contradictory activities. They also have argued that the goal of deliberation is not only to reach unanimity but also to clarify and structure conflict.<sup>23</sup> We expand these points to cover negotiation, pointing out that in negotiation, arguing and bargaining not only frequently go together empirically but also are normatively compatible. In deliberative negotiation, the parties recognize conflicting interests but pursue mutual justification and respect and the search for fair terms of interaction and outcomes. They are relatively open and disclosing with one another. Instead of rational agreement on the substance of an issue, they may produce either a negotiated “integrative” agreement or a compromise, as described below. We suggest that in the political world the prevalence of the deliberative forms of negotiation has been insufficiently noticed.

Table 1 (next page) arrays five types of agreement-seeking procedures on a spectrum from pure deliberation to pure bargaining, with three types of deliberative negotiation in between.<sup>1</sup>

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20 See also Mansbridge (2009) and Mansbridge et al. (2010) on deliberative negotiations.

21 The definition of *bargaining* is drawn in part from the Merriam-Webster definition (see <http://www.merriam-webster.com/dictionary/bargain>). Three separate strands of early deliberative theory stressed this distinction: the Habermasian (Habermas [1981]1984, 1987), the civic republican (e.g., Sunstein 1988), and the Rawlsian (Cohen 1989).

22 Elster (1986, 103).

23 On the congruence between voting and deliberation, see, e.g., Thompson (2002), Mansbridge et al. (2010). On clarifying and structuring conflict, see, e.g., Goodin (2008), Mansbridge (2009), Knight and Johnson (2011), and List et al. (2013).



**Table 1: Types of agreement seeking procedures**

		Agreement seeking procedures				
		Pure deliberation	Deliberative negotiation			Pure bargaining
			I.	II.	III.	
			<i>Integrative</i>		<i>Distributive</i>	
Claims		<b>Common interests</b> , in which all gain, with identical or overlapping benefits, e.g. in greater understanding	<b>Full mutual advantage</b> , in which each party gains but with distinct benefits; no losses	<b>Partial mutual advantage</b> , in which each gains but with trades to add value	<b>Fair offer</b> , based on reasonableness, in which each gains, each loses; no mutual creation of value	<b>Strategic demands</b> , in which each aims at maximum; no mutual creation of value
Outcomes		<b>Informed consensus or clarified and structured conflict</b>	<b>Fully integrative agreement</b> , in which no party loses	<b>Partially integrative agreement</b> , in which parties have traded lower for higher values; at least one bears some loss	<b>Fair compromise</b> , in which each has sacrificed something of value	<b>Power-based compromise</b> , in which each loses something of value <i>or capitulation</i> , in which one side appropriates all the surplus

<sup>1</sup> We particularly thank Daniel Naurin for his work on this table.

Most actual political negotiations include interactions of several of these types; a few include all five types. Both this table and the analysis in this chapter apply to only agreement-seeking procedures when a problem is “tractable.” A problem may be tractable in two ways: either a “zone of possible agreement” among the parties already exists (i.e., there are various positions along a spectrum of possibilities on which the parties could agree that are better for all of them than the status quo), or other issues can be brought into the negotiation to create a package so that all could benefit compared to the status quo.<sup>24</sup> This table, therefore, does not cover all instances of negotiation. An exhaustive table covering all negotiations would include those in which there is no zone of possible agreement but in which the parties enter into negotiations because they have not discovered this fact or because they want to use the vehicle of negotiation itself (e.g., in buying time or demonstrating commitment to their constituents) to improve the facts on the ground from their perspective.

For purposes of this analysis, we use *negotiation* as an umbrella term to include all of the processes in this table, ranging from pure deliberation through the various forms of deliberative negotiation to pure bargaining. Deliberative elements in negotiations in practice may intertwine with the threats and promises characteristic of pure bargaining. Simply for ease of presentation, the first row in Table 5.1 depicts the expectations that parties have going into the process and the claims that they make. The second row depicts the outcomes that derive from the agreement.

The first column in Table 5.1 identifies *pure deliberation*—that is, deliberation aimed at both deep agreement and clarifying conflicts.<sup>25</sup> Deliberation can take place without any negotiation, particularly in circumstances of relatively common interests, when participants are trying to ascertain facts about the world or to forge or discover instances of a common good. More important for our discussion, however, moments of pure deliberation can occur within the larger interaction that legislators and analysts call a negotiation. In those moments, one or more of the parties—coming into the interaction with a willingness to be persuaded—may change their mind for reasons of principle or by simply seeing that new means better achieve their ultimate ends than the means they had originally promoted.

The next four columns of the table can be divided in two ways, and we use both. First, we adopt the standard distinction in the negotiation literature between *integrative* and *distributive* negotiations. In the integrative moments in negotiation, participants discover or create joint gains beyond those demarcated by the original zone of possible agreement. By contrast, in distributive moments, all joint gains have been captured and only zero-sum distributions remain. Thus, in Table 5.1, the second and third columns refer to the integrative moments and their corresponding integrative solutions, whereas the fourth and fifth columns refer to the distributive moments and their corresponding distributive solutions. In addition, however, we distinguish between forms of deliberative negotiation and both pure deliberation and pure bargaining. Deliberative negotiations, whether integrative or distributive, are characterized by mutual justification and respect and the search for fair terms of interaction and outcomes.

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<sup>24</sup> We use the status quo as our normative baseline rather than a party’s Best Alternative to a Negotiated Agreement, or BATNA—the traditional baseline in negotiation theory—because of the normative problems involved when one party changes the other’s best alternative to a position less desirable for the other party than the status quo.

<sup>25</sup> For definitions of deliberation, see, inter alia, Gutmann and Thompson (2004); Chambers (2003); Goodin (2008); Fishkin (2005); Stokes (1998); Przeworski (1998); Knight and Johnson (1994); Dryzek (2000); and Manin (2005).

In column two of Table 5.1, we introduce the concept of *fully integrative* solutions. Most negotiation theorists currently refer only to “integrative” negotiations and solutions. We deploy the distinction between “fully” and “partially” integrative because fully integrative solutions are rare, in both commercial and legislative negotiations.<sup>26</sup> Follett ([1925] 1944), who developed the concept of an integrative solution and coined the term in 1925, used as an example a small everyday negotiation in which she wanted the window in a Harvard library closed to avoid a draft but another patron wanted it opened to get more air in the room. Her solution, opening the window in the next room, gave both parties what they wanted.<sup>27</sup> Textbook examples of fully integrative solutions include a fight over an orange that was resolved by discovering that one party wants only the inside for its juice and the other only the rind for cooking, or a similar fight over a cake resolved by discovering that one wants only the cake part and the other only the frosting. With a fully integrative solution, the parties have no need to compromise; no party loses. Such a solution might be said to “dissolve” a conflict or show that a perceived conflict was only apparent. Any integrative solution, whether full or partial, is possible only when the parties have differing valuations of the different aspects of the good or goods about which they are negotiating. Such differing valuations usually appear in the course of relatively open conversations about underlying needs, interests, and constraints.

A high-stakes actual example of a solution that comes close to being fully integrative occurred in the 1979 settlement after the Egypt–Israel war, when Israel as the victor demanded land on the border from Egypt to protect its territory. The problem as originally defined involved two points on the same scale, a clear zero-sum conflict in which the more land Israel got, the more Egypt lost. However, Egypt most wanted to maintain its national pride and sovereignty, whereas Israel most wanted security. A demilitarized zone under Egyptian sovereignty gave each of the two parties most of what they wanted.<sup>28</sup> It was thus an almost fully integrative solution.

Column three of Table 5.1 identifies what we call *partially integrative* solutions. Such solutions in negotiation are far more common, achievable in many situations that present multiple issues. As in fully integrative solutions, these are possible only when the parties have differing valuations of the different aspects of the negotiation and can discover a way of exploiting those differing valuations for joint gain. Unlike fully integrative solutions, however, the conflict is not dissolved, and significant distributive (i.e., zero-sum) issues remain. The parties are able to achieve joint gains not by dissolving the conflict but rather by prioritizing their desires and trading on items that are low priority for one party and high priority for the other. Accomplishing these joint gains often will involve bringing in issues that were not originally on the table.

Chapter 4, on “Negotiation Myopia,” suggests the example from the commercial world of a seller of a service station and a potential buyer, whose reservation values are too far apart to make a deal good for both of them but who can add to the deal a job for the seller because the buyer in any case would need someone to fill that job. These kinds of instances, which we call “partially integrative,” are what the vast majority of writers on negotiation mean when they use the terms *integrative*, *joint gains*, *creating value*, and *expanding the pie*. They depend

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26 See Walton and McKersie (1965, 129) for the distinction between fully integrative (which they called “absolutely integrative”) and partially integrative solutions. For the rarity of fully integrative solutions, see Wetlaufer (1996).

27 Follett ([1925]1942).

28 Fisher, Ury, and Patton (1991, 41-42).

on seeing more than one facet to the negotiation or bringing in other issues on which to trade. Political negotiations are more complex than in this two-person commercial deal because the representatives in Congress who are chosen to negotiate with representatives of the other parties (or with representatives in the other house or with the president) over a policy must then come back and negotiate with members of their own party regarding the outcome, creating what we could consider a “two-level game.”<sup>29</sup> If the negotiators are successful in getting a majority in Congress, then the next level in what we label a “three-level game” emerges. At this point, the members of Congress must, in a sense, negotiate with their constituents to get agreement on the negotiated outcome. Their communications with their constituents are often constrained by the positions that they and their parties have taken for other purposes, such as campaigning. In this complex process, the simple points we take from the negotiation literature are that mutual gains may be discovered or created through negotiations; that these gains often build on taking the perspective of the others; and that those perspectives often can be obtained in the course of informal, friendly, repeated, and relatively open relationships.

Walton and McKersie (1965), who first introduced the distinction between integrative and distributive negotiation, made it clear that the problem-solving approach of integrative negotiation requires “trust and a supportive climate” so that participants will not anticipate threat and therefore behave defensively, which will then create defensive postures in others; will not try to “control information”; will be able to hear more accurately what others are saying; and will be able to experiment with attitudes and ideas, and test and retest perceptions and opinions.<sup>30</sup> They point out, therefore, that it is difficult for those involved in a negotiation to shift from an integrative stance to what we call “pure bargaining” and then back again. The difficulty arises

...from the contradictory nature of the tactical operations required for integrative bargaining and [pure bargaining]. The two processes differ in important respects: in terms of the amount of information the parties share with each other at every stage in arriving at decisions and in terms of the amount of consideration each gives to the information about the other’s problems. In the integrative process Party makes maximum use of voluntary, open, accurate discussion of any area which affects both groups.... Just the opposite is involved in [pure bargaining]. Party attempts to gain maximum information from Opponent but makes minimum disclosures himself....<sup>31</sup>

Columns four and five in Table 5.1 identify forms of “distributive” negotiation, which—in contrast to forms of integrative negotiation—do not provide the possibility of bringing other issues in and “expanding the pie.” In these two columns, whatever one party gains, the other loses. It is important to remember, however, that in this table, the term *zero-sum* refers only to the

29 We borrow the term two-level game from Putnam’s 1988 analysis of negotiation in international relations.

30 Walton and McKersie (1965, 141-143).

31 Walton and McKersie (1965, 166). In the quotation, where we inserted “[pure bargaining],” Walton and McKersie wrote “distributive bargaining.” Neither they nor subsequent negotiation theorists have conceptualized our third form of deliberative negotiation, the outcome of which we call “fair compromise” and distinguish from pure bargaining. In this form of deliberative negotiation, the outcomes within the zone of agreement are zero-sum and distributive but the goal is mutual sacrifice and a fair compromise—not each trying to achieve the maximum possible gains (Gutmann and Thompson 2012, 10). The “mindset and practices” that encourage this form of compromise “are often the same as those that offer the best chance of finding common ground and integrative agreements” (2012, 16). Repeated interactions in Congress can encourage this form of negotiation.

division of the surplus in a situation that is already positive-sum, such that the problem is already “tractable.” That is, Table 5.1 describes situations in which both parties (and those they represent) will be better off with a negotiated agreement than with the status quo. In the distributive cases, there is a zone of possible agreement, but within that zone, the parties’ losses and gains are zero-sum. To use another example from a two-party interaction in the commercial world, if a seller is willing to sell a house for anything more than \$500,000 and a buyer is willing to buy that house for anything less than \$600,000, the \$100,000 difference between the two is the zone of possible agreement. Any deal in this area will benefit both. Within that area, however, any amount that the seller gets, the buyer loses. If this is all that is or can be at stake, the negotiation is purely distributive because it is zero-sum regarding the “surplus” of \$100,000. However, the context is positive-sum for both parties because both benefit if the house is sold within that zone.

In the fourth column of Table 5.1, within the zone of possible agreement, the parties look for a “fair compromise.” They make claims that require their adversaries to give up something of value but offer concessions that involve sacrificing something of value themselves. The claims are “deliberative” in the sense that parties are relatively open with one another in their interactions, they do not take unfair advantage of their opponents, each party signals their understanding of fairness as part of their claims, and both parties come to an understanding about the fairness of the terms in ways that motivate and legitimize agreement. Gutmann and Thompson (2012) recommended in such interactions that parties adopt “mindsets of compromise” that include principled prudence and mutual respect, while avoiding the “principled tenacity” and mutual mistrust that make fairness in negotiations all but impossible.<sup>32</sup> These kinds of negotiations are possible and especially necessary in political institutions, such as in a legislature like the US Congress or in negotiating committees in the European Union (EU), in which the parties will have repeated interactions that would be disrupted by a series of outcomes that some of the parties considered unfair.<sup>33</sup> The outcome in this type of negotiation is typically a fair compromise. We define a *compromise* as an agreement in which all sides sacrifice something of value (i.e., make concessions) to improve on the status quo from the perspective of each.<sup>34</sup> We define a *fair compromise* as one that both (or all) sides in the negotiation perceive as fair.

The fifth column of Table 5.1 represents what we call “pure bargaining.” It too typically produces a compromise, although in some cases, when one of the parties or group of parties can take an intransigent stance through greater power or bluffing, one party gets the entire surplus within the zone of agreement and the other capitulates. In the case of pure bargaining, the negotiation and the negotiators’ claims lack deliberative elements. Rather than disclosing information to find ways of achieving joint gains, the negotiators will take advantage of any information asymmetries in the situation to reveal no more than what is strategically useful.

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32 Gutmann and Thompson (2012, 16-24).

33 Conceptions of fairness are notoriously open to self-serving bias (see Chapter 4 in this report). Yet when third parties also agree that a compromise is relatively fair, representatives can use this fact to convince their constituents that the compromise as a whole should be accepted. We note also that a compromise may fail to capture all possible joint gains because individuals who are concerned primarily with their ongoing relationship may compromise before pressing forward to see what further gains could be made. Representatives concerned only with their relationships with their colleagues might compromise too soon. In experiments that tested an approximation to the representative-constituent relationship, the greatest joint gain came from “representatives” who were both accountable to their “constituents” and had good relations with one another based on the expectation of future cooperation. Accountability alone tended to produce impasse; good relations alone tended to produce compromise without exploiting all the possibilities for joint gain (Pruitt 1983; see Chapter 4, note 16, in this report). In many real-world situations, it may be better (e.g., more efficient given transaction costs) to settle for a relatively quick and fair compromise than to press forward for joint gains.

34 Gutmann and Thompson (2012, 10-16); see also Van Parijs (2012).



They make what they perceive to be fair offers only when their opponent will reject anything else.<sup>35</sup> In addition to the outcomes being zero-sum within the zone of possible agreement, in this mode, the parties are merely trying to exercise power, exploit institutional advantages, and gain as much as possible at the expense of the other.

Successful legislative negotiation often incorporates over time many of the elements we identify. The negotiations in Congress about the Clean Air Act of 1990—especially as related to acid rain, which produced a policy widely viewed as highly successful—contained most of these elements, as discussed in the following section.<sup>36</sup>

### Clean Air Act of 1990

*Pure deliberation leading to informed consensus.* In the case of the Clean Air Act, much of the pure deliberation did not take place in Congress but rather in the scientific community. The work of scientists who had achieved a consensus on the causes of acid rain by the late 1980s provided the key backdrop to successful congressional negotiation. These scientific findings were disseminated both inside and outside of Congress via hearings and reports, and the consensus among scientists made possible common understandings across a range of policy makers in Congress and the executive branch. The shifting understanding produced by the scientific deliberation and the deliberative reception of those findings in Congress altered the politics of the issue and paved the way for new regulations. In Congress itself, certain members seem to have engaged in relatively pure deliberation.

*Toward an almost fully integrative solution.* One solution in the legislation was to mandate “technology forcing standards.” The idea was that advances in technology can make regulatory issues far less burdensome on affected interests. The catalytic converter was an example of this approach. In the case of the Clean Air Act, Congress mandated that industry develop technology to meet specific standards for reducing air pollution—technology that could make the goals of the legislation feasible at reasonable cost to industry. If the technology was not developed, the Environmental Protection Agency would be empowered to modify the standards. In other words, improved technology could make for solutions capable of transcending existing conflicts and reducing the extent to which interests were opposed to one another. The solution was not fully integrative because industry had to bear the burden of research on the appropriate technologies; however, the goal was to find a solution that would allow the reduction of pollution with a cost that was acceptable to the polluting industries.

*A partially integrative solution.* The legislation’s use of tradable emissions credits rather than mandates to bring pollution under control allowed for affected industries to “trade lower values for higher ones,” provided that they came in below the targets. This flexibility allowed industry to be creative in finding lower cost solutions to emissions controls. Jeffrey Burnam (2010), a political scientist present at these discussions, summed up that aspect of the negotiation as follows:

<sup>35</sup> The distinction we draw between fair offers and strategic demands in some respects tracks Rawls’s distinction between the reasonable and the rational (Rawls 2001, 6-7, 81, 191).

<sup>36</sup> We are grateful to Frances Lee, a member of the US working group of the Task Force and co-author of Chapter 3, “Making Deals in Congress,” in this report, not only for the suggestion of the Clean Air Act as an example but also for the thought and most of the wording in the following section.



As an observer and a participant in that process, I can testify that there was very little bargaining in the sense of “horse trading” in the Senate back room. The discussions there were based on efforts by key leaders to find mutually acceptable solutions that were right for them in accordance with [the] view that politicians have much to gain by seeking common ground and sharing credit for measures that are in their mutual interest to support.<sup>37</sup>

*Compromise.* The Clean Air Act provides many examples of compromise that aim at a rough concept of fairness. Burnam (2010) again reported:

Senator John Breaux of Louisiana (who was involved in negotiations over the toxic air emissions title) entered the negotiating room on Wednesday morning and asked: “What’s going on?” Senator Mitchell explained that there was a dispute between the two sides as to how many cities outside of California had to be out of compliance with the ozone attainment standard in the year 2000 in order to trigger the second stage of automobile tailpipe controls: “We say 10 and they say 12,” Mitchell told Breaux. “Well,” Senator Breaux replied, “there has to be a number between 10 and 12.”<sup>38</sup>

*Bargaining to win.* According to the account of Henry Waxman, a key player in the process, successful negotiation with John Dingell, an opponent of tougher regulation, became possible only after Waxman’s side had made a show of strength on a test vote in committee, forcing Dingell to realize that he could not prevail on the issue:

For more than a decade, Dingell and I had battled ferociously over the Clean Air Act, and we had often tried to get him to sit down and work out a deal. Dingell never budged, and so neither did I, each of us believing that we would prevail when matters came to a vote. Seeing that this was now unlikely to happen on the issue so important to him, Dingell did what any good congressman would do, and sat down to negotiate the best possible deal for his constituents. Two hours later, we had settled on the outline of an agreement.<sup>39</sup>

*Mixing the elements.* In 1986, then-Senator Timothy E. Wirth, Democrat from Colorado, and Senator John Heinz, Republican from Pennsylvania—who had been friends since attending the same preparatory school and playing on its basketball team together—realized while attending a meeting sponsored by the Environmental Defense Fund (EDF) that although the two of them “were both very interested in the environment...we weren’t paying enough attention to the economic side.” They “got some money from the Carnegie Corporation,” a private foundation, and hired a young Harvard economist, Rob Stavens, who had been the staff economist for the EDF, to work with other economists and business leaders to develop a plan for an economically sustainable approach to clean air (i.e., “Project 88”) aimed at the 1988 elections. The interest of the two representatives in the facts was purely deliberative; they wanted to understand the

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37 Burnam (2010, 318). It is possible that from the perspective of the industry, using the status quo as a benchmark, this was not a partially integrative solution because they might have gained more by staying at the status quo. From the perspective of the lesser normative standard of the best available alternative to a negotiated agreement, however, it probably was partially integrative. That is, with President George H. W. Bush, a Republican, pushing for clean air improvements, their alternative to a negotiated agreement might have been more draconian regulations.

38 Burnam (2010, 315-316).

39 Waxman (2009, 98).

situation better and worked together to do so. They believed that they already understood the conflicts between their constituencies' interests. As Wirth put it, "I was West, he was East. I was clean coal, he was dirty coal. I was new power plants, he was old plants."<sup>40</sup> They knew that fair compromise would be required, and they looked as well for integrative solutions. It would be difficult to disentangle the elements of deliberation, fully and partially integrative negotiation, and fair compromise in this mix. Power was in no way absent from the process, as suggested by the backgrounds of the protagonists, the importance of business interests, the role of private foundations and public interest advocacy groups, and the dominating frame of the 1988 election. At the same time, in the parts of the negotiation that these two conducted together, they seem to have come close to being "completely open with one another; [with] total honesty, full disclosure, no strategic posturing."<sup>41</sup> Their official relationships as legislative representatives mandated concern for the interests of their districts and for the good of the nation as a whole. In the negotiation taken overall, the representatives' roles were complex, changing subtly over time in response to the demand for different elements in the mix. Even "bargaining in the sense of 'horse trading'" entered the picture when, as noted previously, Dingell agreed to negotiate the best deal he could for his constituents once he realized that he would lose the vote.

As this example shows, interactions in negotiations may combine (1) purely deliberative elements (offering considerations that others might accept on their merits); (2) fully integrative elements (exploiting the different interests underneath the expressed demands or positions of each party to find a creative solution that gives each what that party really wants with no need for compromise on either side); (3) partially integrative elements (created by, e.g., expanding the number of issues considered and trying to conduct trades on issues to which one party gives a high priority and another a low priority); (4) compromises in instances of zero-sum conflict in which the parties intend to act fairly; and (5) pure bargaining in instances of zero-sum conflict in which the aim of each party is only to win.

### *The Neglect of Deliberative Negotiation*

Citizens, political scientists, and (increasingly) lawmakers in Congress are likely to mistake for pure bargaining the many dimensions of deliberative negotiation involved in successful agreements. These mistakes have been mirrored in political theory. In 1962, in his first major work, Habermas wrote scathingly of legislative action in the Weimar Republic that "[c]ompromise literally had to be haggled out, produced temporarily through pressure and counterpressure and supported only through the unstable equilibrium of power constellations between state apparatus and interest groups." Such "bargaining," he proclaimed, bore the mark of its "origins in the market."<sup>42</sup> In 1988, Sunstein wrote similarly from the civic-republican tradition that virtuous citizens "will attempt to design political institutions that promote discussion and debate among the citizenry; they will be hostile to systems that promote lawmaking as 'deals' or bargains among self-interested private groups."<sup>43</sup> In 1989, Cohen, writing from the Rawlsian tradition, argued that public "collective decision-making ought to be different from bargaining,

40 Jane Mansbridge interview with Timothy E. Wirth, April 22, 2013.

41 This is Raiffa's (1982) description of a "fully cooperative" negotiation, characteristic, for example, of "a happily married couple or some fortunate business partners."

42 Habermas ([1962]1989, 198).

43 Sunstein (1988, 1549); see also "[civic] republicans will be hostile to bargaining mechanisms in the political process and will instead seek to ensure agreement among political participants" (1988, 1554).

contracting, and other market-type interactions, both in its explicit attention to considerations of the common advantage and in the ways that that attention helps to form the aims of the participants.”<sup>44</sup>

Each of these early deliberative theorists, from three different traditions, positioned the normative goals of deliberation as antithetical to “bargaining.” As we have seen, in 1986 Elster, echoing much of the thought of his time, also positioned “arguing,” or deliberation, in sharp contrast to “bargaining.” Although Habermas ([1992] 1996) later changed his stance on bargaining, giving it more positive democratic status when the bargaining partners are equal, at the time those three theorists drew easily on a publicly accepted denigration of “bargaining.” They overlooked the democratic value of negotiation generally and deliberative negotiation in particular.

Pure bargaining has generated most of the strongly negative connotations attached to negotiation. Bargaining often includes threats, including the threat of exit, as a matter of course. The standard use in one-shot bargaining of “strategic misrepresentation”—particularly not revealing one’s reservation price—leads bargaining, or “haggling” as Habermas called it, to border on the unethical. Some market-oriented writers on negotiation underscore this interpretation. White (1980), among others, argued that negotiation is like a poker game: “To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”<sup>45</sup> A handbook on business negotiation suggests that “An individual who confuses private ethics with business morality does not make an effective negotiator. A negotiator must learn to...subordinate his own personal sense of ethics to the prime purpose of securing the best deal possible for the client.”<sup>46</sup> So too in legislatures: some legislators consider the use of parliamentary procedure to put one’s opponents at a disadvantage, or to call a vote when one’s opponents are absent, no more than savvy playing within the rules.

None of these practices that are characteristic of pure bargaining—threat, strategic misrepresentation, and the strategic use of asymmetric information—meets the normative criteria for *deliberative* negotiation that the negotiation be based on mutual justification and respect and the search for fair terms of interaction and outcomes, all of which assume a reasonable degree of openness and disclosure among the parties.<sup>47</sup> A commitment to these practices also tends to overlook the practical value of deliberative negotiations. Repeated interactions, for example, undermine the usefulness of purely strategic bargaining by making it less likely that others will engage in future negotiations with those who have deceived them. Such practices, therefore, are often inefficient. Ulbert and Risse’s (2005) cases confirm “the crucial

44 Cohen (1989, 17).

45 White (1980, 928). See also Carr (1968, 145), allowing “cunning deception” and “concealment.”

46 Beckmann (1977), quoted in Lax and Sebenius (1986, 146).

47 Such practices in the “pure-bargaining” phases of a negotiation might be considered democratically legitimate on the grounds that all players have agreed, explicitly or tacitly, to specific forms of “role-morality” that are restricted to the rules of a specific “game.” Applbaum (1998, 123) argued to the contrary that if the “rules of the game” are invoked to justify a role-morality that permits what would otherwise be morally prohibited, the game in question must meet certain stringent criteria, including that the rules must be “necessary for the continued success and stability of the game as a mutually advantageous cooperative venture...[that] provides all its players positive expected benefits” and “distributes benefits and burdens justly to its players” while imposing “no unjust externalities on those who are not players”. In legislative negotiation, strategic misrepresentation in negotiation is unlikely to help create a mutually advantageous cooperative venture. The best argument for allowing “sharp dealing” in legislative negotiation is that because it is not possible to monitor intent or private knowledge, it may be better to accept openly, as part of the game, the behaviors that cannot be monitored, so that ethical individuals, adopting a role-morality suitable to this specific arena, may have an even playing field with the unethical. When repeated interactions, as is typical in legislatures, make such monitoring easier, there is no normative justification for strategic misrepresentation.

role” in repeated interactions of the “credibility and truthfulness of speakers.”<sup>48</sup> Particularly to play the role of “knowledge broker,” a position that grants significant influence in a negotiation, the speaker “must be perceived as honest and impartial.” Personal reputation or representing an organization with a long history of dedication to a cause perceived to be in the common good can also anchor a speaker’s credibility. The incentive structures created by repeated interaction reduce the likelihood of most instances of manipulation, deceit, and even the strategic use of asymmetric information.

It is worth underscoring that we are not equating “private” or “market” transactions with any of the categories in Table 5.1. Market transactions can include all of these categories, as can legislative negotiations. Many early normative analyses drew a dichotomy between “deliberation” and “bargaining” that equated “bargaining” (or what we call “pure bargaining”) with the “market.” The negotiation literature in business and law may have reinforced this equation. The equation originally took root because the purest bargains typically are one-shot interactions among parties who need not be concerned with any of the deliberative virtues, and such interactions are likely to take place more in the market than in a legislature with repeated interactions. Market transactions also typically do not involve attentiveness to broad, public, or common goods but instead only to the goods internal to the transaction. Nevertheless, even in the market realm, many transactions may have deliberative elements—if only because both parties may have an interest in obtaining better purchase on a particular factual situation. Repeated market transactions also usually carry elements of reputation, trust, and fairness, often backed by the regulative norms and institutions that underwrite markets. For our purposes, the worst effect of this equation is to “tar” legislative negotiation, which frequently takes the form of deliberative negotiation, with the one-shot bargaining brush. The implicit or explicit condemnation of negotiation and compromise deflects attention from the importance for democratic action of deliberative negotiation.

Negotiation also classically entails opprobrium because in the market and also in the legislature, it is often based in self-interest or, more commonly, the self-interests of constituents. Equally important, negotiations are seen as deriving from conflicting interests that undermine or even corrupt the common good. Self-interest has recently been rehabilitated as an important input to democratic processes.<sup>49</sup> Moreover, although sometimes negotiations that end in compromise do reflect failures to find common interests, thereby representing a second-best outcome, such failure can occur only when common interests exist and could be found. In all other cases, including most of the difficult cases in politics, participants will not get everything they want from the political process. A negotiated compromise may be second best but good enough. Because conflicting interests are an ineradicable part of political life in a pluralistic society, negotiation and compromise are essential features of political systems that maximize democratic goods.<sup>50</sup>

The concept of compromise attracts condemnation for another reason. In most of the world, the term *compromise* carries the connotation that one who compromises is “unprincipled” and thus morally suspect, as in the French phrase, “to put in compromise” (*mettre en*

48 Ulbert and Risse (2005, 359).

49 Mansbridge et al. (2010).

50 See, e.g., Gutmann and Thompson (2012, ch. 2).

*compromis*).<sup>51</sup> This connotation of compromising one's principles in turn derives in part from the assumption that certain goods—moral principles in particular—should never be bargained or compromised. Although this judgment is sometimes right, the general and familiar point made by Schumpeter ([1942] 1962) and others that ideals and ideological interests cannot be compromised is wrong. Gutmann and Thompson (1996) pointed out that compromises can be wrought in which each party respects the other's deepest moral values, and that successful compromises can include mutual principled gains even when parties hold opposing principles.<sup>52</sup>

Some of the most important legislative compromises are unattractive not only because they involve sacrificing principle but also because they combine conflicting principles. In the United States, the Comprehensive Immigration Act of 2007, a compromise that had strong bipartisan support but ultimately failed, illustrates the disorderly nature of classic compromises. It combined a form of amnesty (which in the view of conservatives violated a principle of retributive justice) and a form of discrimination against illegal immigrants (which in the view of liberals violated distributive justice). Senator Arlen Specter, Republican of Pennsylvania, who spoke passionately in favor of the compromise, acknowledged the problem: “[T]his amendment was characterized by the Senator from New Mexico as the politics of compromise. Well, that might sound bad, but that happens to be the reality of what goes on in the Senate all the time. It goes on in all political bodies... [T]here is nothing inappropriate about the politics of compromise. That means we sacrifice the better for the good.”<sup>53</sup>

On the issue of abortion, for example—an issue long thought to be resistant to compromise—proponents on each side can make concessions that respect both the claim that even an embryo has elements of human life and the claim that bringing an unwanted child into the world is a tragedy. Opponents have found that they can agree about the desirability of reducing unwanted pregnancies, particularly among teenagers. In cases such as these, talking together helps parties not only to investigate their own commitments and convey them to others but also to test whether they might discover possible agreements on some commitments and make concessions on others, such that they could craft solutions that might partially integrate what seemed to be absolutely irreconcilable differences. Ideological as well as material oppositions sometimes are fully incompatible. However, it takes argument (or deliberation) and often the attempt at negotiation to find this out.

## *Negotiation-Facilitating Institutions and Practices*

If deadlock undermines democracy and deliberative negotiation supports it, why don't we have more deliberative negotiation? Deliberative negotiation is resisted not only because its distinctive values are misunderstood but also because some of the practices that make it possible can actually conflict with democratic norms. Although there are many kinds of reforms that would enhance conditions favorable to deliberative negotiations—nonpartisan primaries or

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51 Fumurescu (2013) compared the relatively neutral or even positive use of the word in Great Britain and the United States to the usually pejorative use of the term in French, which often occurs in the phrase “mettre en compromis.” The difference from France may arise from the normative and practical grounding in contracts of the British “nation of shopkeepers” and the American “commercial republic.”

52 Gutmann and Thompson (1996, 2012, 73-85). For a somewhat different position also arguing for the possibility of compromise on principle, see Richardson (2002).

53 Congressional Record 153 (June 6, 2007), S7099. For a discussion, see Gutmann and Thompson (2012, 92-98).



independent electoral district commissions, for example—we focus on three practices that are effective and can conflict with democratic norms: the repeated interaction promoted by long incumbencies, closed-door negotiations, and provision of side payments for the constituency of a specific member of Congress. All facilitate deliberative negotiation, but all have significant normative tradeoffs. In the following discussion, we suggest circumstances in which the costs in these tradeoffs are reduced or even become nonexistent.

One general circumstance likely to minimize the tradeoffs between democratic norms and the three negotiation-supporting institutions discussed here is that of a relatively uncorrupt polity, in the sense of both illegal corruption and more pervasive institutional corruption, such as that caused by massive inequalities in campaign funding.<sup>54</sup> The more corrupt the polity, the higher are the costs of the “cozy” relationships created by repeated interaction and the opportunities for self-dealing (or privileged-constituency dealing) afforded by closed-door sessions and the provision of side payments. Relatively uncorrupt polities allow political representatives to engage more freely in deliberative negotiations for the public good.

A major challenge confronting all efforts to facilitate legislative negotiation is the rise of the permanent campaign.<sup>55</sup> Campaigns are zero-sum contests, not occasions for negotiation, even less for deliberative negotiation. Elections are not intended to produce win-win solutions. The attitudes and practices of campaigns are not conducive to the negotiation necessary for governing. As campaigning increasingly intrudes into governing, negotiations become increasingly difficult. Representatives have their minds set on winning the next election more than on reaching constructive agreements. The practices we discuss here, if properly structured, can help representatives stay focused on governing. Long-term relationships, closed-door deliberations, and side payments that smooth collegial cooperation can be seen as ways of enabling legislators to concentrate their minds on governing. We focus on these three only as examples of facilitating mechanisms that raise normative questions, hoping that the examples will spur further research into the institutional and normative frameworks conducive to deliberative negotiation.

### Repeated Interaction

Many negotiation theorists, as well as many active and former elected representatives, stress the importance of long-term repeated interactions, in which opposing parties can get to know one another personally, particularly in contexts separate from those involving the issues on which they are opposed. Such relationships are especially important in legislative bodies. As Gutmann and Thompson (2012) wrote:

When adversaries know each other well, they are far more likely to recognize whether the other side’s refusal to compromise on a principle is a negotiating tactic or a real political constraint. They are less likely to act as players in the classic bargaining game who hold out for their maximum individual payoff, producing an outcome that makes both sides worse off. In longer-term relationships, legislators have a better sense of their colleagues’ intentions, their trustworthiness, and the

54 See Thompson (1995) and Lessig (2012) for institutional corruption.

55 Gutmann and Thompson explicitly connect the permanent campaign to the difficulty of negotiating compromises (2012, 3-5, 160-167). On the permanent campaign, see also Ornstein and Mann (2000) and King (1997).



political constraints they are facing—and their colleagues know that they do. They are repeat players. That enables all to make more confident judgments about when to compromise and when not to.<sup>56</sup>

When repeated interactions involve working together on a common problem, they are particularly likely to increase the mutual respect and understanding that support deliberative negotiation.<sup>57</sup>

The solution of repeated interaction among representatives implicitly endorses long incumbencies. Yet long incumbencies often involve relatively uncontested elections, and the democratic accountability of representatives to their constituents is often thought to require genuinely contested elections. Empirical indexes of democracy often count relatively uncontested elections as a clear indicator of lack of democracy. The normative tension between the benefits of long incumbencies and the benefits of contest reflects to some degree the tension between action (deriving from negotiation) and resistance (deriving from suspicion of long incumbencies and the potentially corrupt or “shirking” motives of representatives). An increasingly disillusioned public in the United States increasingly demands term limits, short incumbencies, and a tight tether to public opinion. These demands are often (although not always) bad for negotiation.

We ask, then, what types of circumstances support repeated interactions in ways that are consistent with democratic norms? We are especially concerned with the norm of control of representatives by those who elect them, a key mechanism through which inclusions become effective in representative democracies. Although a full theory of these circumstances is beyond the scope of this chapter, we believe that long incumbencies are more or less acceptable to the degree that the constituency is relatively informed and not manipulated, has potential alternatives to the incumbent, and has the capacity to act on alternatives. To operationalize this concept empirically, we might ask questions such as the following:

- Does the representative, by and large, promote policies and a broad political direction that the majority of constituents approve?
- Do most constituents say they are relatively satisfied with their representative?
- Is the minority of constituents deeply unsatisfied with the representative?
- Are the existing media system, interest-group system, and party system (through either an opposing party or internal-party dynamics) healthy, able to present alternative policies, and able to publicize departures from citizen preferences or interests?
- Are the citizens active in other forms of politics and therefore able to inform themselves easily and take action skillfully if their current representative no longer seems appropriate?

Although it may not be easy to ascertain the answers, we must ask these kinds of questions before we treat high rates of incumbency as *prima facie* evidence of democratic failure. The resulting judgment is a matter of degree. However, the underlying concept is not complicated: these are the types of indicators that suggest that constituents can have enough

56 Gutmann and Thompson (2012, 170; see also 177-179, 200-209).

57 See Sherif et al. (1961) on the null effects of contact alone in undermining prejudice and mutual animosity, in contrast to the dramatic effects on opposing groups of working together on a problem that will benefit both sides.

warranted trust in their representatives to allow them to form long-standing relationships with other representatives, without thereby breaking or somehow betraying their representative relationships with constituents. Representatives should be able to use long-term relationships to support deliberative negotiations on behalf of their constituents.

### Closed-Door Interactions

Deliberative negotiation does not thrive, it seems, in highly public settings. Political representatives and negotiation scholars agree that relatively private interactions behind closed doors provide the moments, sheltered from publicity—particularly the constant monitoring and oversight of intensely interested and well-organized interest groups or a sensation-seeking press—in which opposing parties can share their perspectives freely and come to understand the perspectives of others.<sup>58</sup> As Ulbert and Risse (2005) noted:

[P]rivate in *camera* settings...such as the “confession talks” during European Council summits allow actors to explore potential compromises, to seek out the justifiability of their interests, and the like. These settings allow for arguing and persuasion, because negotiators do not have to stick to their fixed preferences behind closed doors and are allowed to “think out loud” about possible negotiating solutions.<sup>59</sup>

Sheltering negotiations from publicity so they may be more productive has a long-standing history. At the Federal Convention to design the new US Constitution, the sessions were closed and secret. As James Madison said later, he did not believe that the delegates could have come to agreement on the constitution if the proceedings had not been behind closed doors. In his analysis, “Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument.”<sup>60</sup>

Madison was right on being “open to the force of argument.” After comparing the interactions in the US Federal Convention, which met behind closed doors, and the French *Assemblée Constituante*, which met in public, Elster concluded: “Many of the debates at the Federal Convention were indeed of high quality: remarkably free from cant and remarkably grounded in rational argument. By contrast, the discussions in the public *Assemblée Constituante* were heavily tainted by rhetoric, demagoguery, and overbidding.”<sup>61</sup>

Today, the positive effects of closed-door interactions are just as clear. In the United States, after the 1976 Government in the Sunshine Act opened committee meetings to the public, several senators interviewed on the larger subject of the growing “individualism” in the Senate blamed

58 See Gutmann and Thompson (1996, 115-116), arguing that deliberative secrecy is a “justifiable way of encouraging better discussion and fuller consideration of legislation...Legislators remain freer to change their minds about a Bill in response to continuing discussions.” See also Chambers (2009) for the most extensive treatment of the issue to date.

59 Ulbert and Risse (2005, 40). See also Lewis (1998) and Wallace (2002).

60 Madison reported in an interview with Jared Sparks (1830), cited in *United States Constitutional Convention* (1937, 478), quoted in Elster (2000, 386). See also Stasavage (2004, 688).

61 Elster (1995, 251, 244). Elster’s comments raised in shorthand a number of issues that we do not discuss here. We quote his conclusion only to note his attribution of several positive attributes to the closed-door format and several negative attributes to the open-door format.

opening the committees to the public for part of the loss of their capacity to negotiate and their former spirit of “political self-sacrifice”:

Most senators seem to agree that [the recent changes in the rules] have made negotiation and political self-sacrifice infinitely more difficult. Open meetings are singled out most often. ... “There was an enormous give and take,” Pearson [former Senator James B. Pearson, Republican from Kansas] says of the old closed-door committee system. “People could change their minds—as a result of hard bargaining and deliberation. But nobody wants to admit in public that he was wrong.”<sup>62</sup>

In their studies of the transcripts of parliamentary deliberation in Switzerland, Steiner and colleagues (2004) found that indications of one representative’s listening to the others were far more frequent in in-camera proceedings in the Swiss parliament than in proceedings that were open to the public.<sup>63</sup> In a study that compared publicly available and private lobbying letters to governmental regulatory bodies, Naurin (2007) found more “self-regarding” justifications in the letters available to the public, presumably because those letters might be seen by those whom the letter-writers were representing. The paid consultants (i.e., lobbyists) that he interviewed echoed this point, saying that a public audience encourages posturing through adopting uncompromising positions and playing to one’s own constituents. As one consultant stated:

The leaders of these types of organizations [business and public interest groups] have a fairly difficult task. On the one hand, they have to keep their own comrades happy and 50 percent of their own group, maybe more, demand blood....If the [head] of the organization is up for re-election six weeks later, his tone...may be [even] sharper.<sup>64</sup>

In studies of negotiations in the EU, Ulbert and Risse (2005) identified many instances in which negotiators had agreed on controversial passages in papers drafted behind closed doors because in that context, they were able to go beyond their instructions to explore possibilities for compromise.<sup>65</sup> As early as 1965, on the basis of many years of labor negotiations, the path-breaking negotiation specialists Walton and McKersie concluded:

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62 Ehrenhalt (1982, 2177-2178).

63 Steiner et al. (2004).

64 Naurin (2007a, 222). In the same study, Naurin showed that when impartiality norms are relatively strong and the degree of corruption is relatively low, there need be no tradeoff between secrecy and deals that are capable of withstanding public scrutiny. Through the interviews with consultants and the discovery of private letters that later became publicly available, he found that business lobbyists acting under closed-door conditions in their relationships with the European Commission had realized “that in order to promote their interests they have to argue carefully with reference to public interests and ideals rather than bargain from self-interest” and that “the industry lobbyists studied here sounded better, with respect to self-interest, behind closed doors than in public” due to constituency pressure toward a self-interested stance in public settings (Naurin 2007b, 9, 8).

65 Ulbert and Risse (2005, 358). The Council of Ministers of the EU explicitly made this point in its rejoinder to the Court of First Instance when The Guardian newspaper demanded access to their minutes:

The Council normally works through a process of negotiation and compromise, in the course of which its members freely express their national preoccupations and positions. If agreement is to be reached, they will frequently be called upon to move from those positions, perhaps to the extent of abandoning their national instructions on a particular point or points. This process, *vital to the adoption of Community legislation*, would be compromised if delegations were constantly mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to these documents, independently of a positive Council decision (Council of the European Union 1994, cited in Stasavage [2004, 690-691]; emphasis in original).

[The parties] will not engage in problem-solving behavior unless the activity is relatively safe. Both Party and Opponent need to be assured that if they freely and openly acknowledge their problems, if they willingly explore any solution proposed, and if they candidly discuss their own preferences, this information will not somehow be used against them. [...] The use of transcripts or a stenographer may inhibit exploratory and tentative discussions. Large galleries and disclosure to outside persons have the same effect.<sup>66</sup>

By now, the empirical evidence on the deliberative benefits of closed-door interactions seems incontrovertible.<sup>67</sup>

The problem is that closed-door, nontransparent interactions come with serious democratic hazards. We discuss three: the general normative presumption for transparency, deriving perhaps from a “right to know”; the problems that closed doors pose for accountability; and the practical problems that closed doors pose for trust in society. We then suggest several criteria for judging when nonpublic, closed-door meetings may be consistent with democratic norms.

The general presumption in favor of transparency in democracies stems from the fundamental role of a citizen in “ruling.” To make good collective decisions, the citizen must be informed. Citizens therefore may have a “right to know” all of the available information that could inform their decision.<sup>68</sup> Yet the question remains open as to which kinds of knowledge are necessary to support citizens’ rights and powers to judge their representatives and their decisions.<sup>69</sup> We distinguish between *transparency in process*, or public access to the details of actual interactions, and *transparency in rationale*, or public access to the reasons for the outcome.<sup>70</sup> If the rationale is genuine, in many cases it is all that citizens need to know to be informed, allowing the process itself to remain behind closed doors. The practical problem is that the rationale may not be genuine and often the only way that citizens can find out is to have access to the process.

The problems that closed doors pose for accountability track those posed by the right to know. Traditionally, the concept of accountability meant “giving an account”—that is, giving the reasons for one’s actions. In a principal–agent relationship, in which a principal has contracted with or has otherwise relied on an agent to act in the principal’s interest, the agent should be able to give an account of any seeming deviation from those interests. More recently, accountability

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66 Walton and McKersie (1965, 159), quoted in Naurin (2007a, 211). Adopting the concept of an “integrative” solution from Follett, Walton and McKersie first created the distinction between “integrative” and “distributive” negotiation that we (along with many others) use herein.

67 See, e.g., Groseclose and McCarty’s (2001, 114) conclusion from their data: “Although there may be benefits to ‘sunshine laws’ and other measures to make negotiations open, our results show that they may actually harm efficiency.” See also Jacobsson and Vifell (2003): “the more closed the forum, the more openness in the discussion,” cited in Stasavage (2004, 694); Chekel (2001) on deliberative persuasion being more likely in “less politicized and more insulated in-camera settings,” cited *ibid*; and Stasavage (2004, 673) for evidence that public posturing “can provoke a breakdown in bargaining that has a negative impact for all concerned.” See also Morgenthau (1950, 431), who commented, “It takes only common sense derived from daily experience to realize that it is impossible to negotiate in public on anything in which parties other than the negotiators are interested,” cited in Peters (2013, 57). See Pedrini et al. (2013) for an in-depth study of a closed-door session in the Swiss legislature demonstrating that in this context, compared to more public sessions, political actors were engaged in high-quality reasoning and creative problem-solving activities geared toward deep agreement and minority-favoring outcomes. See Chambers (2004, 392) for a list of situations, such as juries, in which closed doors enhance the capacity for good deliberation.

68 See also Stiglitz (1999) and Florini (2007). The recent right-to-information campaign in India had the slogan, “The right to know is the right to live,” Singh (2007), referenced from Peters (2013).

69 See Thompson (1999), especially the section on “How much should the veil be lifted?”

70 For the distinction, see Mansbridge et al. (2010); see also Gutmann and Thompson (2012, 59–60).

has come to mean the combination of monitoring and sanctioning, and monitoring requires transparency for the events monitored. In representative democratic government, far more transparency in process is expected today than at the US founding, when delegates at the Federal Convention debated whether to require that roll-call votes be made public. In the early years of the republic, closed-door sessions of Congress were frequent.<sup>71</sup> Stasavage (2004, 671) reported that “There is clear evidence from the United States and the UK that demands for transparency appeared during periods of heightened fears that representatives were biased. In strong contrast, during periods where fears of bias were less present, the public was more accepting of closed-door sessions.”

The most serious source of bias is the undue influence of powerful groups, combined with the fear that any concessions to such groups will be obscured in the rationale later made public. The instrumental use of transparency in process to identify and subsequently prevent such influence must depend on the degree to which special interests have undue influence and the degree to which transparency in process would reveal it. The considerable influence, for example, of financial interests in the United States today often takes the form of persuading key actors that the health of the economy depends on continuing support for or deregulation of such interests. Transparency in process would reveal those actors making those arguments; however, under the circumstances we specify, so would transparency in rationale.

The most normatively troubling set of issues and policy negotiations that benefit from secrecy are those that are deeply controversial, divisive, or generally involve some difficult and perhaps unpopular tradeoffs. For example, the conflicts played out in the Council of the EU, which still operates more like a forum for international negotiation than a legislature in a democratic polity, usually concern national interests at the sector level rather than general political ideas.<sup>72</sup> The link between the negotiators in the Council and their constituents is based on geography and nationality more than political ideology. Open debates in the Council would not demonstrate conflict between, for example, liberals and conservatives, but rather between Germans and Greeks or between Poles and Italians. An important reason why the Council has refrained from having these open debates is the fear that such debates, conducted in terms of “we” and “they,” would be divisive and would reduce rather than increase the legitimacy of the EU in the view of Europeans. Ulbert and Risse (2005) thus suggested that for public discussions to have the greatest constructive influence, some degree of impartiality among the public is necessary. When these conditions do not hold, as when nationalism prevails, they believe there is a good argument for negotiations to be held behind closed doors. If the EU Council were to become more like a legislature over time, and were both members and citizens to come to think of themselves at least in part as representing or as citizens of the whole union, they argue, negotiations could become more public.<sup>73</sup>

The problem with respect to democratic norms is that citizens want not only their interests to be represented but also their voices and, to some degree, their selves. If they are in fact

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71 For the debates in the convention on public access to the representatives' votes, see Madison Debates, August 10, 1787, [http://avalon.law.yale.edu/18th\\_century/debates\\_810.asp](http://avalon.law.yale.edu/18th_century/debates_810.asp), retrieved November 15, 2013. We thank Gregory Koger for this reference. All of the assemblies in the US states in the colonial period met in secret, and not until 1794 did the Senate vote to open its debates to the public. In 1689, 1738, and 1771, the House of Commons debated whether to drop its long-standing ban on publishing its proceedings (Stasavage 2004, 685-686).

72 Thomson (2011).

73 Ulbert and Risse (2005, 359).

nationalistic or hold positions on issues that are more extreme than those of the median voter, they want those perspectives represented. The most politically active want their perspectives not only represented but also fought for *within the process itself*. Transparency in process allows these kinds of citizens to monitor their representatives to prevent them from compromising their principles. Transparency in rationale is not sufficient to this end. Transparency in rationale also usually will not meet the desire to have one's voice reflected in the process unless that rationale also presents the strongest or most strongly expressed arguments on all sides. In these circumstances, regardless of the normative good or bad of holding extreme positions, closed-door processes have the normative cost of undermining citizens' powers to monitor the process or hear their voices expressed in arguments.

In addition to the democratic goods of the right to know and accountability, transparency in process has recently been advanced as a means to shore up citizen trust in government. Yet transparency may not have this effect. Several studies find no effects of transparency on trust and procedure acceptance.<sup>74</sup> In one recent study, transparency in process did not produce increments of legitimacy significantly greater than transparency in rationale. The authors conclude that “a relatively modest reform focusing on transparency in rationale—such as a reason-giving requirement—may contribute to similar degrees of added legitimacy as more far-reaching transparency in process measures. Decision makers may improve the legitimacy of the procedure by simply outlining carefully afterward the reasons for the decisions taken behind closed doors.”<sup>75</sup>

Given the normative problems posed by the right to know and accountability, we suggest here four circumstances under which the closed-door sessions that facilitate deliberative negotiation are more likely to be democratically acceptable.

First, it would be best if citizens themselves have the opportunity to deliberate about and agree to negotiation privacy. Such a “second-order” or “meta” agreement would then legitimize negotiating behind closed doors.<sup>76</sup> This condition usually can be met in the case of decisions about military operations and some other decisions affecting national security or the market (e.g., the deliberations of the US Federal Reserve) but is difficult to meet in the case of ordinary legislation. The more controversial the law, the more many citizens want to know about the process that produced it. When citizens do not understand the reasons for closed-door sessions and when the natural tendency is to want all available information, the requirement of citizen agreement is difficult to meet. In a democracy, to the extent that a majority of citizens opposes nontransparent processes, they are to that degree illegitimate.

Some proxies for actual agreement can support decisions by representatives to institute closed-door negotiations. If there has been public debate on the question, transparency in rationale may serve as a proxy for citizen agreement. In the presence of an active and informed media and active opposition parties, tacit consent in the form of acquiescence to existing nontransparent institutions might be taken as agreement. Retrospective ratification of the results

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74 See Grimmelikhuijsen (2012), De Fine Licht (2011), and De Fine Licht et al. (2013). See also Bauhr and Grimes (2013) for a correlational study.

75 De Fine Licht et al. (2013), citation omitted.

76 For “second-order publicity,” see Gutmann and Thompson (1996, 105) and Thompson (1999); for “meta-transparency,” see Neumann and Simma (2013). Both terms refer to making transparent the reasons for and scope of any intransparency.



also might be considered a form of agreement to the process.<sup>77</sup>

Yet tacit and retrospective forms of agreement have their normative problems, particularly within low-trust, highly polarized contexts. One possible solution might be to have the records of confidential meetings made public at a later date. This solution may work well for institutions such as the US Federal Reserve (“the Fed”), where access to the pros and cons of possible decisions as they were being made would cause, if made public, considerable market instability. As in the establishment of privacy in national-security matters, this reason for privacy is unrelated to the quality of deliberation.<sup>78</sup> Because the public has an interest in long-term accountability and post facto transparency, in August 2012—under pressure for greater publicity—the Fed began publishing unaudited quarterly reports. Also in response to a 2011 lawsuit, the Fed now must disclose the names of firms that it bailed out during the financial crisis.

Situations in which publicity harms the quality of deliberation have a different structure: negotiators need to worry about unguarded, expressive, informal speaking and trial proposals that later might be taken in the strategic contexts of public debate as betrayals of principle or selling-out constituents. Because public records last indefinitely, negotiators may need commitments that delays in ex post transparency *in process* (as opposed to *rationale*) will last at least the life of their political career. Otherwise, negotiators are likely to treat even closed-door negotiations as if they were open-door, knowing that anything they say subsequently may be used against them.

Second, closed-door negotiations have the fewest normative problems when constituents have reason to trust their representatives. In a political system that suffers from widespread public cynicism—itself in part the result of unjustified nontransparency in (for example) campaign financing—individual representatives will have to work especially hard to gain the trust of constituents. Some representatives, however, are in fact trustworthy. Their constituents can believe with warrant that their representative is “like” them or can have other reasons, such as reputation, for believing that their representative will act in their interests, even behind closed doors.<sup>79</sup> As with long incumbencies, this warranted trust is the best normative argument for allowing closed-door negotiations. In this case, as with so many others, a society constructed around high levels of trustworthiness and the resulting high degree of social trust can be far more efficient, as well as more normatively attractive, than societies in which trust is less warranted.<sup>80</sup>

A third condition that can help to reconcile closed-door negotiations with democratic norms will be that the relevant interests are represented fairly in the negotiation. The exclusion of the interests of affected parties from consideration, if not representation, is *prima facie* evidence of an illegitimate process. Moreover, as Chambers (2004) stated, “On fundamental questions that affect the broad public, the more secret and closed is the debate, the more important it is that all

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77 See Gutmann and Thompson (1996, 115-117) on ratification as “a form of retrospective accountability for the process as well as for the results,” responding to their own conclusion that secrecy is “not justified merely if it promotes deliberation on the merits of public policy; citizens and their accountable representatives must also be able to deliberate about whether it does so.” Chambers (2004) argued that mere ratification does not involve citizens meaningfully enough in the deliberation to count as justification for a closed-door process.

78 See Peters (2013) for the distinction between the “intrinsic” reason for privacy that relates to the quality of deliberation and other reasons, such as those for secrecy in the Fed and military security.

79 See Fearon (1999), Besley (2006), and Mansbridge (2009) on the “selection model” of representation.

80 Warren (1999).

possible points of view are represented.”<sup>81</sup>

The fourth and final but also crucial condition is that the negotiators make public after the negotiation the larger rationale for the outcome. It often should be sufficient for the democratic norms of inclusion and acceptable agreement that the rationales for proposals or agreements are public and transparent, rather than that every aspect of the process leading to agreement be transparent.<sup>82</sup> Issues may emerge from affected publics, be negotiated behind closed doors by representatives, and the resulting agreements presented to these same publics for deliberation and ratification without every move, concession, and tradeoff of a hard-fought negotiation having to be made public. However, the questions of why this agreement is a good deal, why this solution is the right one, and what the overall public justification is for the result should be publicly argued so that constituents may discuss that rationale and possibly engage in retrospective criticism and sanctions.<sup>83</sup> The rationale does not, in fact, have to reproduce the actual set of reasons that motivated the negotiators, but it should express the best and most reasonable reasons for (and against) the agreement that produces the legislation. The rationales conveyed to the citizens after the negotiation therefore must convey enough information for the public to initiate or continue informed and even passionate discussion of the issues on the basis of the most relevant evidence. Ideally, representatives should provide reasons for their actions in a two-way process, engaging with constituents or their interest-group representatives in a discussion of why they agreed to a deal or a proposed deal. Because in practice two-way communication with constituents is highly time-consuming, the publicity given an issue by public debates among elected representatives or interest groups often may have to suffice.<sup>84</sup>

To summarize, we believe that there are two types of circumstances that reconcile closed-door negotiations with democratic norms, as follows:

- Citizens have the opportunity to deliberate about the rationales for closed-door negotiations.
- When citizens have, with warrant, high trust in their representatives, they consequently have reason to trust them to negotiate behind closed doors.

In addition, to be consistent with democratic norms, closed-door negotiations should meet the following two conditions:

- The interests of those affected (or potentially affected) should be effectively represented in the negotiation.
- Negotiators must be transparent in their rationales for a decision, providing enough information and reasoning that citizens can engage in informed debate and judgment.

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81 Chambers (2004, 397).

82 Kant's own test was that "all actions affecting the rights of other human beings are wrong if their *maxim* is not compatible with their being made public" ([1795]1970, 130; emphasis added).

83 See Lindstedt and Naurin 2010 on the importance of the information that could inform citizen deliberation "actually reaching and being received by the public."

84 See Naurin (2013) for the distinction between "transparency" (i.e., making information available) and "publicity" (i.e., making the public aware of the information). In the best conditions, a "two-step" process (Lazarsfeld et al. 1944, 151ff), in which public sources make information available and more informed individuals publicize the relevant parts, would bring relevant information in understandable form to the public.

## Side Payments

Negotiation theorists often give the name “logrolling” to the trades made via side payments in partially integrative negotiation.<sup>85</sup> The name, taken from legislative negotiation, has an appropriately negative normative connotation in common parlance, although not in the negotiation literature or even in some political science. Logrolling refers in the first instance to vote trading, in which one legislator promises another to vote for that one’s project if the other legislator votes for the first one’s project. Members can trade either costly projects or costly tax reductions. Much logrolling involves “pork-barrel” projects that benefit primarily a particular legislator’s constituents or a portion of them. This kind of trading would not be necessary if either project could get a majority on its own. Each component of the logroll typically will benefit only a relatively small group, at the expense of the taxpayers as a whole. In such cases, the normative problem is that the benefits go to only some members of the population (i.e., “intense benefits”) but are paid by all (i.e., “diffuse costs”).<sup>86</sup> The outcome is inefficient and, arguably, against the general good. As Pennock wrote in 1970, logrolling regarding pork-barrel projects “tends to result in overspending and it is discriminatory.”<sup>87</sup> The problem from the perspective of democratic norms is that those affected—the broader public—are excluded from the decision making. It is likely that legislators calculate that they could not justify logrolls to the majority of those affected by them. On average, it is unlikely that matters requiring logrolling will be in the public interest, at least in the first instance.

Not all trading is logrolling in this sense. Trades may reflect differing intensities of preference on an issue, which provide opportunities for normatively unobjectionable trades in which low values are traded for high values, enabling partially integrative solutions that represent improvements on the status quo for all interested parties. However, even when the trading involves logrolling over pork-barrel items, the question as to whether trading is on balance good or bad often depends on the kinds of items and the kinds of trades. In one kind of case, a local project may be in the common good—the expansion of an airport that serves as a national transportation hub, for example—but collective-action problems prevent members from voting for them. That is, no representative outside that district may be willing to commit his or her constituents to pay the costs of a project that would benefit them only in a diffuse or indirect way, especially if it appears that they can free-ride on costs borne by other jurisdictions. In another kind of case, the institutional structure of a polity creates veto points that, to be surmounted to achieve democratic action, require side payments to those critically located at the veto points. In such cases, even though each side payment lacks a democratic justification, together they may be necessary to achieve broader goods. In this more difficult case, we need to judge which levels of rent-seeking required by the institutional design of checks and balances must be collectively borne to achieve a greater good. In a third kind of case—the “classic” logroll—side payments are reciprocal, returning comparable goods to constituencies. In equally difficult cases, we must balance the harms of expending public funds on projects that would not be voted by a majority without the logroll against the goods of enhancing mutual cooperation in ways that the health of the polity as a whole may require. Such judgments will be contingent on the circumstances.

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85 “Logrolling is the act of making mutually beneficial trade-offs between the resources under consideration” (Thompson and Hrebec 1996, 398).

86 Gutmann and Thompson (2012, 15-16).

87 Pennock (1970, 714).

Although there is much to be said against side payments normatively—logrolling legislators simply may be well-positioned rent-seekers for their constituents, for example—every textbook on negotiation recommends expanding the issue area in negotiation to include side payments of various sorts. Only through such an expansion can parties whose reservation stances otherwise do not create a zone of possible agreement find packages that will benefit everyone. The opposition to side payments arises primarily because they come at a cost to the taxpayer without the scrutiny—legislative or judicial—necessary to ascertain that they are in fact justified as part of agreements that improve on the status quo.<sup>88</sup> There is also the problem that the side payments sometimes end up rendering a policy incoherent or ineffective with respect to its originally conceived purpose. This is because the cost of the side payments spreads resources too thinly or the requirements of the side payments gut the logic of the policy or remove its teeth. Examples include features of the US federal tax code and the banning of government price negotiation in the Medicare drug benefit.

We need more work on the norms of side payments; however, at present, we can say tentatively that side payments are more or less acceptable under the following circumstances:

- The side payments should be transparent.
- The side payments should survive cost-benefit scrutiny on the allocation itself; that is, there must be an overall benefit to the collectivity served as measured against the cost of providing that benefit.
- The rationale of the benefit provided by the side payment should be justifiable to those affected (e.g., taxpayers) who were not involved in the trade. That is, there should be transparency in rationale.
- The side payments must be needed to negotiate an agreement.
- The side payments must be elements of a fair compromise or partially integrative solution.

## Conclusion

Democracy is, first and foremost, about the rule of the people. The American political system, however, was designed, first and foremost, to avoid tyranny, largely through the institutional device of separated powers. In consequence, the system empowers multiple actors to prevent collective action even when most of the people prefer a collective act and most would benefit. To the extent that the American political system empowers the people to rule through its most representative branch, Congress, it does so because the people's elected representatives *negotiate* across their many potential veto points with the aim of reaching agreement. To succeed in this goal, they must negotiate in ways that enable them to mutually discover common interests, overlapping interests, convergent interests, and fair agreements. That is, they need to engage in *deliberative negotiation*.

Our goal in this chapter is to develop the concept of deliberative negotiation, mindful not only of the harms of deadlock to democracy but also of the great extent to which the American political system depends on this class of agreement-seeking procedures to produce democratic results. We clarify the concept with this context in mind. We also seek to identify features of institutions that support deliberative negotiation. We focus on three of these—repeated

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88 Cf. the British system of members' Private Bills.

interactions, closed-door interactions, and side payments —largely because they raise important normative issues in a democracy. We hope our analysis complements the chapters contributed by the other working groups of the Task Force on Negotiating Agreement in Politics, and that together they inspire a new generation of research, public discussion, and innovation on negotiating agreement in politics.

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